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28th April 2021

Subject: Appeal FAC 226/2020 regarding licence CN84609

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 CN84609 for 300 metres of forest road at Dergvone, Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 2nd April 2020.

Hearing

An oral hearing of appeal FAC 226/2020, of which all parties were notified was held by the FAC on 14th April 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Mary Coogan, Ms. Orla Fahy, Mr. Martin Regan,

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 set aside and remit the decision to the Minister regarding licence CN84609.

The licence pertains to 300 metres of forest road works to serve 4.88 ha of forest at Dergvone, Co. Leitrim. The soil type underlying the project area is described in the DAFM Appropriate Assessment documentation as being predominantly podzolic in nature, the slope as predominantly flat to moderate

(<15%), and the project area is said not to adjoin or contain an aquatic zone(s). The vegetation type(s) within the project area is described as comprising forest. The nearest waterbody is the Owennayle_010 which has been assigned a moderate status in the 2013-18 assessment period. The specification for the forest road, which is to be constructed through excavation was provided with the application.

The DAFM undertook a screening of the proposal for Appropriate Assessment (AA) and found that there were six European sites, each of which is recorded in the AA screening documentation contained in the Inspectors Certification on file. The screening process examined:

- Arroo Mountain SAC 001403 – site was screened out due to;
 - The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection.
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.
- Boleybrack Mountain SAC 002032– site was screened out due to;
 - The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection.
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.
- Corratirrim SAC 000979– site was screened out due to;
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.
- Cuilcagh - Anierin Uplands SAC 000584– site was screened out due to;
 - The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection.
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.
- Lough Gill SAC 001976– site was screened out due to;
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.
- Lough Melvin SAC 000428– site was screened out due to;
 - The absence of any aquatic zone within or adjoining the project area.
 - The absence of any significant relevant watercourse(s) within or adjoining the project area.

The application notes on file indicate that the processing of the licence application was subject to an audit (as part of a DAFM 2% audit of Inspector certifications) which set out that;

'with regard to the AA Screening - Arroo Mountain SAC 001403, Boleybrack Mountain SAC 002032, Cuilcagh - Anierin Uplands SAC 000584, Lough Gill SAC 001976, Lough Melvin SAC 000428 - reasons for screening out should also include not within or adjoining the SAC/SPA, existing habitat not suitable for qualifying interests/species of conservation interest and the nature of the Qualifying interest. Corratirrim SAC 000979 can be screened out due to distance and the nature of the Qualifying interest. In-combination assessment shows that the application is in a rural area with little development apart from forestry - in the vicinity there were no planning applications, a windfarm was refused by An Bord Planeala with limited afforestation and some felling predominantly Coillte'.

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 Leitrim County Council who responded raising no specific objection while making suggestions with regard to conditions that should be attached to the licence if approved and made commentary in relation to the amendments to Section 4 of the Planning & Development Regulations 2013 as it relates, inter-alia, to forest road works. The licence was approved on 2nd April 2020.

There is one appeal against the decision. The grounds of the appeal contend:

1. A breach of Article 4(3) of the EIA Directive 2014/52/EU through failure to consider criteria set out in Annex III as part of a case-by-case examination for screening for EIA, and that the cumulative impact of forestry activity is not sufficiently considered.
2. A breach of Article 4(4) of the EIA Directive 2014/52/EU through failure to submit details of the whole project on the basis that a forest road is not a project in its own right it is a part of a wider project to harvest trees.
3. That the AA Screening determination is technically and legally flawed and should be referred back to the national competent authority for re-screening, specifically that being downstream of a Natura site does not mean that there is a subsequent lack of hydrological connection.
4. That there has been inadequate consideration of the objectives of the WFD River Basin Management Plan, that a nearby waterbody (Owennayle_010) has a poor status and is "At risk" and there has been inadequate consultation with relevant state bodies.

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, submitting later their satisfaction with the biomap received, and that the project was both desk and field assessed. At oral hearing the applicant's representative described the context of the application, its broad content, set out that the project is not crossed / nor is it adjacent to a watercourse and that the project area was relatively flat. In response to query at oral hearing a DAFM representative confirmed that notwithstanding the observations included in the notes in relation to the findings of the audit with regard the Appropriate

Assessment screening carried out, that DAFM considered the screening conclusions reached and the reasons for same to be sound and that this audit predated the issuing of the licence. In response to a query at the oral hearing the applicant's representative confirmed that the road was to be constructed in an area where there was an average peat depth of around 400mm, that this was taken into account in the specification for construction as submitted with the application and that it formed part of the analysis in determining a construction by excavation method.

The FAC, in the first instance, considered the Appropriate Assessment screening and related reports undertaken by the DAFM. The grounds of appeal submit that the AA Screening determination is technically and legally flawed and should be referred back to the national competent authority for re-screening, specifically that being downstream of a Natura site does not mean that there is a subsequent lack of hydrological connection. The FAC finds that the screening of the proposal for Appropriate Assessment established that there were six European sites (Arroo Mountain SAC 001403, Boleybrack Mountain SAC 002032, Corratirrim SAC 000979, Cuilcagh - Anierin Uplands SAC 000584, Lough Gill SAC 001976, and Lough Melvin SAC 000428) within 15km of the proposed road works. All six sites were screened out and reasons for the screening conclusion reached for each site are provided on the file. The FAC noted the content of the notes on file that set out the commentary arising from the 2% audit as they relate to Appropriate Assessment and that the DAFM representative (and audit author) in a contribution to the oral hearing asserted that the screening conclusions reached in relation to Appropriate Assessment were sound. The FAC examined publicly available information from the NPWS and EPA and identified the same six European sites (Arroo Mountain SAC 001403, Boleybrack Mountain SAC 002032, Corratirrim SAC 000979, Cuilcagh - Anierin Uplands SAC 000584, Lough Gill SAC 001976, and Lough Melvin SAC 000428) within 15km of the proposed road works. 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 considered that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The FAC considered that the procedures adopted by the DAFM in its Appropriate Assessment of the proposal are acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error was made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions reached.

The FAC considered the contention in the grounds of appeal that there has been inadequate consideration of the objectives of the WFD River Basin Management Plan, that a nearby waterbody (Owennayle_010) has a poor status and is "At risk" and that there has been inadequate consultation with relevant state bodies. The Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways related to the proposal. The FAC finds that the contributions made at the oral hearing by both the applicant's and the DAFM's representatives assert that the project area for the proposed road works is not crossed by nor is it adjacent to a watercourse. An examination of online aerial imagery and maps by the FAC did not identify the existence of a watercourse on or adjacent to the project area for the proposed road works. In relation to the contention in the grounds of appeal that a

nearby waterbody (Owennayle_010) has a poor status and is "At risk" the FAC finds, having consulted information from the EPA which is available to the public, that the project is located c. 250m from the Owennayle_010 waterbody at its closest point and that the WFD status assigned to the said waterbody for the assessment period 2013-18 is moderate. Based on the information available to it and having regard to the scale, nature, location of the project and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality nor is it satisfied that the DAFM erred in its processing of the licence application as it relates to this ground of appeal.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds of appeal, the FAC, having examined the records on file (including the *Assessment to Determine EIA Requirement* as included in the Inspectors Certification) finds a confirmation that the description and characteristics of the proposed road works have been examined for the purposes of EIA requirement, that the questions regarding Cumulative effect and extent of the project have been completed for questions numbers 2 – 9 based on a spatial run of 7th January 2020, that the answer to question 10 regarding local levels of forestry related traffic in this section is recorded as 'N/A', that the questions in relation to water are completed, that the answers to questions 15 and 16 regarding soil, terrain and slope are recorded as 'N/A', and that the remaining questions in the Assessment to Determine requirement for EIA are completed. At oral hearing the DAFM representative asserted that they did not have sufficient information available to them at the time of the site visit to enable either a 'yes' or 'no' answer to be provided to questions 10, 15 and 16 in the Assessment to Determine the need for EIA. 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 decision under appeal relates to a licence for a forest road works of 300m, and so is sub threshold for mandatory EIA as set in Irish Regulations. The FAC finds that while 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, there was a failure to record a definitive answer to questions 10, 15 and 16 and, further, that the written and oral submissions to the FAC did not provide sufficient certainty that these issues were given due consideration in the assessment process. The FAC concluded that this represented a serious error in the Assessment to Determine requirement for EIA of the proposed road works.

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 satisfied that a serious error or series of errors was made in making the decision regarding licence CN84609 and is setting aside and remitting

the decision to the Minister to carry out and record a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive, before a new decision is made.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee