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30th April 2021

Subject: Appeal FAC424/2020 & FAC543/2020 regarding licence CN86110

Dear [REDACTED]

I refer to the appeals 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

A licence for 610 metres of forest road works at Byrnesgrove, Co. Kilkenny was issued by the Minister for Agriculture, Food and the Marine on 7th July 2020

Hearing

A hearing of appeal FAC424/2020 & FAC543/2020 was held by the FAC on 21st April 2021. In attendance: FAC Members: Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr. Seamus Neely, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms. Mary Coogan, Mr. Robert Windle

Applicant Representatives: [REDACTED]

Appellant FAC424/2020: [REDACTED]

Appellant FAC543/2020: [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 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 CN86110.

The licence decision pertains to 610 metres of forest road works at, Byrnesgrove, Co. Kilkenny. The soil type is mineral and the land lies at an elevation of 260 – 280 metres. The Application included a project description, environmental considerations, road specification details, a management plan, and a number of maps. The record describes the area as predominantly brown earths in nature. The slope is predominantly flat to moderate (<15%). The project area does not adjoin or contain an aquatic zone(s). The vegetation type(s) within the project area comprise coniferous forest. No new entrance or material

widening of an entrance to a public road is proposed. One submission from a member of the public was made. The road is submitted to serve an area of 24.42ha. The application was referred to Kilkenny County Council and no response was recorded. The proposal was desk and field assessed. The DAFM undertook and recorded a screening for Appropriate Assessment and identified four European sites within 15km; Cullahill Mountain SAC 000831, Lisbigney Bog SAC 000869, River Barrow And River Nore SAC 002162, River Nore SPA 004233. Other plans and projects considered in combination with the proposal was also recorded. It was concluded that the proposal should not proceed to Appropriate Assessment. The record also includes a consideration of the proposal across a range of criteria and a conclusion was reached that the proposal was not required to under an EIA process. A licence was approved on 7th July 2020.

There are two appeals against the granting of the licence. The grounds of FAC424/2020 submit that the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive. The grounds question the total distance of roads in this cumulative area and submit that the Directive is in metres and not percentage. The grounds submit that "If the development which is within 15km of a Natura 2000 site it has been screened in". Reference is made to CJEU Case C-323/17 in relation to measures intended to avoid or reduce the harmful effects of the plan or project on European sites. The grounds submit details of information which is considered necessary to be included in the assessments.

The grounds of FAC543/2020 contend, inter alia, that there has been a breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU (The FAC understands this to refer to Directive 2011/92/EU as amended by Directive 2014/52/EU) in that a number of criteria required under the Annex III are not taken into account and that the whole project has not been identified or assessed. It is further submitted that the EIA Determination is inadequately reasoned and that the project and CN86354 are essentially part of the same project and the application represents project splitting in terms of the EIA Directive. It is submitted that the stage 1 Appropriate Assessment is not legally valid. It is submitted 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. It is submitted that the licence conditions do not provide a system of protection for wild birds under the Birds Directive or animal species listed in IV(a) of the Habitats Directive.

In a statement to the FAC, the DAFM submitted that decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria in standards and procedures have been adhered to in making a decision on the application. It is further submitted that the relevant AA procedure was applied in approving the licence and that the screening information and an in-combination assessment can be found on file. It is submitted that using the current AA procedure in conjunction with the Habitat & Foraging guidance tables all Natura 2000 sites have been screened out as outlined on file and that an Appropriate Assessment and an Appropriate Assessment Determination were also carried out. The statement sets out that this application alone or in-combination with other forest and non-forest plans/projects in the area will not have a significant impact on the qualifying interests of the Natura 2000 sites screened.

It is further submitted that there are two projects adjoining each other CN86110 and CN86354 and that the two projects have different owners, hence the need for two separate applications for Grant Aided Forest Road. There is no likelihood that this project either alone or in-combination with other plans and projects -will have an effect on a European site and that the project length along with the adjoining project combined make 845m of forest road work, which is below the 2000m meter threshold for an EIA.

An oral hearing of the appeals was held, of which all parties were notified, and attended by representatives of the DAFM and the Applicant and the Appellant of FAC543/2020. The DAFM described the processing of the application and the issuing of the licence and restated their written submissions. They corrected the statement in that no Appropriate Assessment was undertaken in this case. The DAFM submitted that errors appeared on the Certification form in relation to questions 4, 16, 22 and 37. They submitted that townland boundaries have no specific legal protections but that good practice does provide some protections through, for example, reducing clearance from 15m to 5.5m at these points. The Appellant submitted that the Application should have proceeded to Appropriate Assessment and that the separate applications made for CN86110 and CN86354 constituted project splitting in relation to Environmental Impact Assessment. The Appellant also submitted that the project area contains an aquatic zone and that there is a lack of certainty regarding water leaving the site and that the area drains to an SAC and that a watercourse is present some 40 metres from the end of the road and queried the specification of culverts. The Appellant queried the in-combination undertaken and the extent of forest road and felling licences in the area and that cumulatively forest roads exceeded 2,000 metres. They queried what impacts would arise on the townland boundary, that they were not familiar with this particular site but that such boundaries have cultural and historical value, and when the works would be undertaken and that there were no details of emissions. The Applicant's Representative submitted that there is existing access to the public road through a farmyard and that there are multiple owners of the forests in the area. It was submitted that the road would be unbounded with no use of concrete and that there was no risk to water quality or European sites from the project. They submitted that an aquatic zone lies to the south of the edge of the road but that a sufficient buffer was in place in relation to the watercourse. They submitted that in making the application mistakes were made in relation to questions 3.2 and 4.2 as recorded on the Certification. They submitted that culverts are employed generally in all roads to avoid localised surface water but that these would not connect to external water features. They submitted that their standard procedures minimise impacts on townland boundaries by reducing clearance to 5.5m and avoiding spoil being left adjacent to the boundaries.

The FAC considered in the first instance the grounds that relate to Environmental Impact Assessment (EIA) Directive and related matters. The FAC considered that 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 610 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 or landscape preservation. The proposed road would ultimately connect to a minor public road and it is submitted that an existing entrance is in place through an existing farmyard.

The road would be situated in the Nore_SC_080 subcatchment of the Nore Catchment. A stream flows to the south of the end of the forest road and forms part of the CLOGHNAGH_010 waterbody which has a Good status (2013-2018) and Not At Risk regarding the objectives of the Water Framework Directive based on data provided by the EPA. 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 and that there is no convincing evidence that the DAFM have erred regarding the requirements of the Water Framework Directive. The EIA considerations of the DAFM also document a consideration of this issue.

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. The proposed forest road is not situated within any European site and is not directly connected with or necessary to the management of the site. 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 considered the range and type of plans and projects considered in-combination with the proposed road and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same four sites within 15km of the proposal. The River Barrow And River Nore SAC 002162 is situated 4km at its nearest point to the proposed road. The conservation objectives of this SAC relates to a number of terrestrial and aquatic species as documented. This includes the Freshwater Pearl Mussel (FPM) which is highly sensitive to water quality. The proposal does not lie within a FPM catchment while the portion of the Nore catchment to the west and upstream of the proposal has been so designated. There are no aquatic features to be crossed and the closest stream lies to the south. While the Appellant submitted that this was 40 metres away, the FAC in reviewing the submitted mapping found this to be c.50 metres in distance which would be in keeping with the COFORD Forest Road Manual and DAFM Forestry and Water Quality Guidelines. This stream flows southerly to join the Dinin which joins the Nore, and enters the boundary of the SAC after some 5km. The proposal, as described, would involve the construction of an unbounded, forest road through a commercially managed forest on free draining mineral soil. The land is described as flat to moderately sloped and map contours of the land would suggest this is correct. Considering the nature, scale and location of the proposal, the FAC does not consider that there is any evidence that the proposal would generate sediment of any significant amount or that this sediment would reach the waterbody to the south or that this would reach the SAC

some 5km downstream. There is no evidence that the terrestrial qualifying interests are present on the site to be impacted by the development. Based on the evidence before it and having regard to the record of the decision the FAC is not satisfied that the DAFM erred in not proceeding to Appropriate Assessment in relation to this SAC. Lisbigney Bog SAC 000869 lies some 6km to the north in a separate subcatchment and its qualifying interests are a terrestrial habitat and species not documented as being on the proposal area. Cullahill Mountain SAC 000831 lies c.13.5km to the east of the proposal and there is no pathway of effects from the proposal to the SAC. The River Nore SPA 004233 lies 4km to the east at its closest point and there is no pathway of effects to the SPA and its qualifying interest, the Kingfisher (*Alcedo atthis*). The DAFM maintained a record of the screening decision, listing each European site and its qualifying interests, their considerations and the reasons and screening conclusion. Having regard to the record of the decision, the grounds of appeal and submissions at the oral hearing the FAC does not consider that there is any evidence that the DAFM Appropriate Assessment screening contains serious or significant errors. The EIA considerations of the DAFM also record that no Natural Heritage Area or other designated site would be impacted by the proposal.

The DAFM had completed each section of its EIA determination and the responses appeared to the FAC to be largely in keeping with the facts of the matter. While not raised in the grounds, the FAC questioned the DAFM in relation to a number of responses provided. The DAFM submitted that the road was appropriately designed and in keeping with an appropriate network and density of roads and the protection of the environment. They also submitted that the application had been referred to the County Council but that no reply had been provided and that submissions from the public had formed part of their considerations and that the record contains the related correspondence. The Applicant described the design process and decision making regarding the Engineering inputs and the requirement of the landowners. The FAC concluded that the incorrect answers being recorded on the Certification did represent an error but that, having regard to the proposal and the record of the decision, that they were not of a serious or significant nature such that the decision should be impacted. The record contains contradictory responses to questions 3.2 and 4.2 between the Applicant and the DAFM in relation to the distance to designated areas and archaeological monuments. The FAC considered that these issues could be readily verified using publicly available information and the DAFM had provided the correct responses. The FAC considered that the criteria considered, in addition, to the screening and other parts of the record, were appropriate in this case and that the reasons are recorded and display sufficient reason for the conclusion reached that the proposal should not be subject to the EIA process.

In relation to CN86354, this road adjoins CN86110 at its northern edge and runs to the farmyard to the south. It was submitted that these lands have different owners and that the roads would largely service different areas and that they were therefore submitted separately. The FAC considered this to be a reasonable explanation. Both roads are marked and identified on the application for CN86110 and the DAFM was clearly informed of the plans at the application stage. Combined, the roads would still fall significantly below the threshold for the mandatory submission of an EIA report and the DAFM documented CN86354 in its record of considerations of other plans and projects. The FAC concluded that there was no evidence of project-splitting or an attempt to avoid any form of regulation in applying for the road as specified. While not submitted in the grounds of appeal, the Appellant also queried

possible impacts on the townland boundary. This boundary lies between Byrnesgrove and Ballymartin can be seen on the northern edge of the proposed forest on the submitted Biomap. The FAC considered the responses provided by the DAFM and the Applicant regarding the status of townland boundaries and the practices in place and found them to be satisfactory.

The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached and did not consider that any convincing evidence was provided to it that proposal would be likely to have a significant effect on the environment.

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 is not satisfied that an error was made in making the decision.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received at the oral hearing. The FAC is not satisfied that a serious or significant error or series of errors were 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 CN86110 in accordance with Section 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 Vincent Upton.

Vincent Upton/On Behalf of the Forestry Appeals Committee