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22<sup>nd</sup> December 2021

**Subject:** Appeal FAC 112/2021 relating to Licence CN75820

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 14A (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.

#### **Decision**

Having regard to the evidence before it, including the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence CN75820.

#### **Licence**

The licence is for the construction of a forest road 985 metres in length in the townland of Curraghlahan, Co. Limerick. Licence CN75820 was submitted to the DAFM on the 9<sup>th</sup> of August 2016. On the 27<sup>th</sup> of May 2021 the DAFM issued a notice of Refusal of Application for a Forest Road Licence for the reason that:

*"The appropriate assessment found that the project could have an adverse impact upon the integrity of natura sites. The mitigation measures appear not to be fully achievable given the location of the proposed road. This is a sensitive site due to the river, flood plain and steep sided ravine. The proposed road is not compliant with the Forest and water quality guidelines relating to the section on 'roads' and the Forest Harvesting and the environment guidelines relating to 'roads.' This refusal is to ensure good forestry practice, the protection of the environment, health and public safety."*

The proposed forest road was subject to Appropriate Assessment including a Natura Impact Statement (with revisions) and an Ecological Impact Assessment (EclA) submitted by the applicant. A considerable amount of discussion took place between the applicant and the DAFM and the site was inspected jointly on the 4<sup>th</sup> of January 2018 and 7<sup>th</sup> September 2018 and on a number of additional occasions by the DAFM Inspectorate.

#### **Hearing**

The appeal was considered at the sitting of the FAC held on the 6<sup>th</sup> of December 2021. The FAC Members present were Mr. Myles Mac Donncadha (Deputy Chairperson), Mr Derek Daly and Mr. Iain Douglas. At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM. Following examination and

assessment of documentation on the file before it, the FAC decided an oral hearing was not warranted in this instance.

## Background

The proposal consists of a forest road 985 metres in length to serve an area of 39.4 Ha. which requires the construction of a river crossing. The licence application was referred to the NPWS on 19/08/2016 which replied on 03/10/2016; to Limerick County Council on 19/08/2016 which did not reply; to IFI on 26/09/2016 which did not reply, further requests was sent to the IFI on 08/12/2016 and 24/03/2017 and a reply was received on 24/04/2017 and a further report was received 08/11/2017.

The initial (1<sup>st</sup>) Inspector's Certification Report (undated) screened out the need for Appropriate Assessment (AA) on the ground that *"The zone of influence centred on this application does not overlap with any Natura site. Therefore, due to spatial separation, this project is screened out for the purpose of Appropriate Assessment."* However, following the Inspector's AA Screening Form of 09/06/2017 and referral to the DAFM ecology section a Natura Impact Statement (NIS) and an Ecological Impact Assessment (EclA) were requested from the applicant on 22<sup>nd</sup> June 2017. These were submitted 16/08/2017.

Following review of the NIS and EclA a request for a revised NIS was issued on 25/03/2019. This was received on 23/05/2019.

The NIS Screening identified eleven Natura Sites within 15 Km of the site and concluded that two sites, Slievefelim to Silvermines Mountains SPA (Site code: 004165) and the Lower River Shannon SAC (002165) should proceed to AA Stage 2. The Stage 2 NIS concluded that *"The proposed development, by itself or in combination with other plans and projects, in the light of the best scientific knowledge in the field, will not, in view of the site's conservation objectives, adversely affect the integrity of any European Sites."*

The final Inspector's Certification Report (with a spatial run dated 27<sup>th</sup> May 2021) describes the soil type underlying the project area as being predominantly brown podzolic in nature, with a predominantly flat to moderate (<15%) slope and that the project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprises of mixed forest, native woodland and a deep ravine is present on the route.

The final Inspector's Certification Report which contains the final recommendation on the project notes that there are eleven Natura 2000 sites located within 15Km of the proposed forest road and records an AA screening decision to screen out all the sites, including the two sites subject of the applicant's NIS. The reasons given for screening out Slievefelim to Silvermines Mountains SPA (Site code: 004165) and the Lower River Shannon SAC (002165) is *"Other Factors"* in both cases, this is taken to mean the fact that they were subject to AA by the DAFM ecologist and that the term *"Other Factors"* was a response to allow completion of the certification form by the Inspector.

The final Inspector's Certification Report is accompanied by an in-combination assessment carried out by the DAFM dated 30<sup>th</sup> April 2021 that concludes that *"Individually the project does not represent a source, or if so, no has no pathway exists for an effect on any of the Natura sites listed in the AA screening conclusions for individual Natura sites table."* Consequently, the DAFM deems that there is no potential for the project to contribute to any effects, when considered in-combination with other plans and projects."



The Inspector's Certification Report also contains an assessment of the environmental factors relating to the proposed forest road to determine whether the proposed forest road requires an Environmental Impact Assessment Report (EIAR) and concludes that it is not necessary to subject the proposed forest road to EIA.

### **Appeal**

There was one appeal against the decision to refuse the licence, the appellant in this case is the applicant. The grounds of appeal are summarised as follows:

1. The applicant had a legitimate expectation that the application would be approved.
2. No consideration was given to the EIA/NIS or method statement prepared to address concerns of the Forest Service.
3. The rejection letter is subjective.
4. The Appropriate Assessment Determination contains quotes from relevant bodies that indicate they had no major concerns with the proposal.
5. The competent authority has signed off on the project.
6. The application and documentation were prepared by experienced, professional experts.
7. The project is upgrading an existing path.
8. The decision was not proportional compared to the impact of the proposed road on the habitat.
9. There were significant delays in dealing with the licence.
10. Proper procedures were not followed.
11. Did the request for information on the application by a third party influence the decision?
12. There is no other alternative route.
13. Common Sense should be applied the application has taken 5 years to process, the trees are probably passed the thinning stage and may never be harvested.

### **Hearing**

#### ***DAFM Statement of Fact provided to the FAC***

At the hearing the FAC had before a SoF provided by the DAFM dated 14<sup>th</sup> of October 2021 which confirms the administrative details of licence application CN75820; that indicates that a both a desk and field inspection were carried out on the proposed forest road and that the DAFM was satisfied that all criteria in its standards and procedures had been adhered to in making the decision on this licence application. The SoF included a statement from the District Forestry Inspector outlining his involvement with the file and a written response to the grounds of appeal dated the 12<sup>th</sup> of September 2021 supported by a report on the grounds of appeal carried out by the DAFM ecologist and dated 16<sup>th</sup> July 2021.

#### ***Consideration by FAC.***

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the Forest Service, and other on-line services. Aerial photography and mapping, including that submitted with the application show that the eastern section of the forestry that the forest road is to serve is divided by the main channel of the Glashacloonaraveela river, a tributary of that river running through the western area of the forest and a second tributary running along part of the western and southern boundaries of the forest. EPA mapping shows the soil underlying the site as Surface-water and Groundwater Gleys.

### ***Appropriate Assessment (AA).***

The FAC has confirmed that the forest road is located entirely within the Slievefelim to Silvermines Mountains SPA (Site code: 004165) Natura 2000 site and is not required for the management of that Natura 2000 site.

The FAC noted the NIS (including the revisions and method statement for the works) concludes that the proposed development, by itself or in combination with other plans and projects, would not adversely affect the integrity of any European Site.

The FAC noted the DAFM Appropriate Assessment Screening Determination (AASD) dated 16<sup>th</sup> April 2021 by the DAFM ecology consultant and the DAFM ecologist which “screened in” the same two sites as the applicant’s screening.

The FAC noted that the DAFM Appropriate Assessment Report (AAR) dated 18<sup>th</sup> April 2021 which concluded that, notwithstanding the measures outline in the NIS and site-specific mitigation measures identified by the DAFM, the proposed forest road could have an adverse effect on the integrity of one or more European Sites, in view of their conservation objectives.

The FAC noted that the DAFM determined, based on objective information, that reasonable scientific doubt remained as to the possibility for adverse effect(s) on the integrity of one or more European site in its Appropriate Assessment Determination (AAD) dated 19<sup>th</sup> April 2021.

### ***Environmental Impact Assessment (EIA).***

The FAC noted that the DAFM recorded a consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale, and location of the proposal.

The proposed forest road is located in the Slieve Felim Landscape Character Area in Limerick County Development Plan 2010-2016 in which forestry is not identified as being an issue.

### ***Water Framework Directive (WFD).***

EPA mapping shows the site lying within the 25D Lower Shannon WFD Catchment. The relevant sub catchment is the Bilboa\_SC\_010 within which forestry (Clear felling) is identified as a pressure. EPA mapping shows the river waterbody Glashacloonaraveela\_010 as the waterbody crossing the site. The WFD Assessment of this river waterbody is that its status is Good in the period 2013-2018 and is Not at Risk. The underlying Ground Water body is Slieve Phelim IE\_SH\_G\_213 which is Not at Risk.

### ***FAC Considerations.***

In addressing the grounds of appeal, the FAC considered the following.

#### **Legitimate expectation that the application would be approved.**

The FAC noted the extensive consultations, correspondence, discussions and site inspections, both jointly and severally in the processing of this licence and it appears that both parties have gone to extraordinary lengths to solve the engineering problems of constructing this forest road. In this



instance the DAFM, in fulfilling its their statutory obligations to carry out AA, determined that there was insufficient information to support the contention that the engineering solutions for the proposed forest road would not have adverse effects on the integrity of the Natura 2000 Site(s) listed, and sensitive ecological receptors.

With regard to licence (Ref No. GFL 19463) for the thinning of trees the FAC notes the licence for a forest road is a separate licence which must be determined on its own merits, independently of any thinning or felling licence. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.

No consideration was given to the EIA/NIS or method statement prepared to address concerns of the Forest Service.

The FAC noted that in its AAD the DAFM listed the documents to which it had referred to in carrying out that AAD and refers specifically to "an initial NIS" and a "current NIS" and that in Section 4 of the AAD all bullet points which are the basis for determination refer to the NIS supporting EclA. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.

The rejection letter is subjective.

The FAC noted that the precautionary principle underpins AA and that case law has determined that any AA must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The AAD prepared by the DAFM clearly states that, notwithstanding the NIS, EclA (including the construction methodology), reasonable scientific doubt remains as to the possibility for adverse effect(s) on the integrity of any European site. The FAC is satisfied that the wording of the decision on the licence properly reflects the inability to reach a definitive position on the impacts given the information submitted by the applicant.

The Appropriate Assessment Determination contains quotes from relevant bodies that indicate they had no major concerns with the proposal and the Competent Authority has signed off.

The FAC noted that the competent authority responsible for implementing Appropriate Assessment with respect to regulated forestry activities is the Minister for Agriculture, Food & the Marine and while the Minister may consult other statutory agencies and consider their views, the final decision is that of the Minister. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.

The application and documentation were prepared by experienced, professional experts.

The FAC noted that no comment was made during the processing of the licence about the experience and standing of the appellant's professional advisers and that the Minister's decision is founded on the uncertainty of impacts during the construction, operation and decommissioning of the forest road on the two Natura 2000 Site(s) listed, and the sensitive ecological receptors within the zone of influence of the forest road.

The project is upgrading an existing path.

The historical maps show a track and a ford as a river crossing. The FAC noted that the site was inspected and, that the ecologist's opinion was that there was a substantial level of vegetation on the track suggesting that it had not been in regular use for decades and that as the site lies within a Natura 2000 or is connected to a Natura site the Minister was required to carry out an Appropriate Assessment of potential impacts of the likely significant effects of the activity/project on European sites, under Article 6(3) of the Habitats Directive. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.



The decision was not proportional compared to the impact of the proposed road on the habitat.

In this ground of appeal the FAC noted the appellant's calculations regarding the percentage of the habitat area lost to the road, the range and nature of the mitigation measures proposed by the appellant in the NIS, EclA and the construction methodology and the view expressed by the DAFM in the AAD that the mitigation measures are "*vast and generic*". The FAC acknowledges that small projects can have a disproportionate ecological impact and given that the AAD has determined there is insufficient information to prove conclusively that the engineering solutions for the proposed forest road would not have adverse effects on the integrity of the Natura 2000 Site(s) listed, and sensitive ecological receptors the FAC is not satisfied that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

There were significant delays in dealing with the licence.

The FAC was established under the Agriculture Appeals Act 2001, as amended, with a function to hear and determine appeals against decisions of the Minister for Agriculture, Food and the Marine, this ground of appeal relates to operational matters within the DAFM and therefore does not fall within the remit of the FAC to determine.

Proper procedures were not followed.

The FAC noted a report dated 3<sup>rd</sup> October 2016 in which the NPWS indicated that the Forest Service should ensure that the careful management of any potential water quality impacts of the proposed forest road on the SAC (Lower River Shannon SAC). Under Article 9 of the Forestry Regulations 2017 the Minister is required consult with any consultation body that the Minister believes may have an opinion on the proposed forestry development. The Minister decided that the IFI, as a body that is concerned with the conservation, protection, management, and improvement of inland fisheries may have an opinion on the proposed forestry development, including any amendments to same. The FAC noted that, in law, any decision must be taken in accordance with the regulations in force at the time of the decision being made not when the application is made, if different. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.

Did the request for information on the application by a third party influence the decision?

The FAC noted that there was no third-party submission on the licence application.

There is no other alternative route.

The FAC noted that two alternative routes were examined in the NIS but rejected, therefore DAFM could only assess the forest road as proposed. The FAC noted that the list of alternative routes examined was not exhaustive. The FAC also noted that the appellant has a current licence application for a forest road CN89015 serving the eastern part of the site. The FAC therefore considered that the DAFM had not erred in its processing of the application as it relates to this ground of appeal.

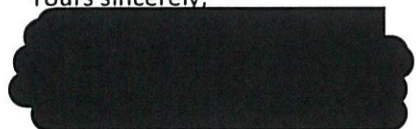
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## Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the DAFM Statements of Fact. The FAC is satisfied that no serious or significant error or 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 to refuse licence CN75820 in accordance with Section 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that to refuse the proposed development would be consistent with Government policy, the Habitats Directive, good forestry practice, the protection of the environment, health and public safety.

Yours sincerely,

A large black rectangular redaction box covering the signature of Iain Douglas.

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

