



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

26th February 2021

Subject: Appeals FAC 742/2020 & 771/2020 in relation to licence CN86462

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence CN86462 for forest road of 355 meters(m) at Derryreag, Co. Kerry was granted by the DAFM on 11th September 2020.

Hearing

An oral hearing of appeals FAC 742/2020 & 771/2020, of which all parties were notified, was held by the FAC on 3rd February 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant (FAC 742/2020):	Not present
Appellant (FAC 771/2020):	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Eugene Curran & Ms. Mary Coogan
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister to grant this licence CN86462.

The licence pertains to 355m of forest road at Derryreag, Co. Kerry to serve 18.99 hectares of forestry. A pre-approval submission report together with a photo of the site notice, maps and the specifications of the road were included with the application and construction is to be by Embankment 'Build on Top';

and outlines a carriage width of 3.4m. The site elevation was submitted as 100 to 200m and the soil type as peat.

The proposal was desk assessed by DAFM and referred to Kerry County Council, however no response is on file. DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found seven European sites within 15km of the proposal and there was no reason to extend this radius in this case. The sites were considered in turn with their qualifying interests listed and the reasons for screening each site out provided. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The DAFM also 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 licence issued on 11th September 2020 with standard conditions attached.

The decision to grant the Licence is subject to two appeals. The grounds of the first appeal (742/2020) broadly are;

- a. That no legal Screening for Appropriate Assessment has taken place.
- b. That the accumulation of forest roads in this forest exceeds 2km, and therefore an Environmental Impact Assessment is required.
- c. *"Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives".*

The above is not permitted in a screening.

The grounds of the second appeal (771/2020) broadly are;

- i. Breach of article 4 (3) of the EIA Directive 2014/52/EU through failure to consider all relevant selection criteria set out in Annex III of the directive.
- ii. Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project.
- iii. Breach of Article 4(5) of the EIA Directive 2014/52/EU through similar grounds to (b) above.
- iv. 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.
- v. That the determination of the Inspector is inadequately reasoned in terms of the requirement for an EIA. There is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which contains errors) or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application.
- vi. That the project is in a referral zone for the NPWS but the NPWS was not consulted.
- vii. The Stage 1 Appropriate Assessment Determination is not legally valid as it has failed to apply the correct test to a Natura 2000 site that is within the catchment of an SAC with aquatic qualifying interests.
 - o There is a significant degree of discrepancy between the site description and the conclusions drawn.
- viii. That the application and its associated operations take inadequate consideration of the River Basin Management Plan for Ireland 2018-21.

- In the absence of adequate consultation and assessment of the cumulative impact of this project with other existing forestry and non-forestry projects and land uses, approved and proposed, in the same catchment the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured.
- ix. That there is insufficient detail and clarity in the in Combination information to enable a definitive position to be reached on the cumulative effect of this project with other plans and projects.
- x. That the licence conditions do not provide a system of protection for animal species listed in Annex IV(a) of the Habitats Directive.
- xi. 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 Article 5 of the Birds Directive.

In a statement to the FAC, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, and provided responses to the grounds of appeal with regard to EIA including noting that this forest road application is considerably under the EIA threshold, and with regard to Appropriate Assessment(AA) that the AA procedure relevant at the time was applied, that Natura 2000 sites were assessed within 15 km radius and each of them were screened out.

At the oral hearing, DAFM opened by summarising their approach to processing the application and issuing the licence. The appellant contextualised his grounds of appeal and made more specific references to some of the grounds. He suggested an error in the application with regard to site elevation, asserting that no assessment was conducted of potential emissions as required by the EIA Directive, that screening for AA should cover both the road project and the clearfelling project it is planned to serve, referred to the proximity of the site to the Killarney National Park, Macgillycuddys Reeks And Caragh River Catchment SAC and that an AA should have been triggered, that the site notice was positioned in Co. Cork, and raised some discrepancies between some entries, challenging others, in the DAFM documentation. The applicant provided information on the site, clarifying that the site elevation is 320 – 330m and that the site is relatively level, that no watercourse is to be crossed and that there is no hydrological connection from the proposal area to a waterbody, giving reasons for their contention that there was no risk of water leaving the site and providing some detail on the proposed operations. They submitted that the road would serve all management purposes in the area and that the existing forest road network was long established. The DAFM in responses acknowledged some errors in the recording of information but expressed their satisfaction that they considered all factors appropriately and that the road would not cross or adjoin any watercourse and were content with their conclusions.

In addressing the grounds of appeal, the FAC considered, in the first instance, as to the completeness of the assessment to determine for EIA requirements, and the grounds as elaborated at the oral hearing that followed from those contentions. 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. 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 felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for a forest road of 355m, so is significantly sub threshold for mandatory EIA as set in Irish Regulations. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The purpose of the forest road is submitted to be for all management activities in a commercial forest that was 43 years old at the time of application. The road would be constructed through the managed forest. The area lies outside of any conservation area and the DAFM completed a screening for Appropriate Assessment and determined that no significant effects would occur on any SAC or SPA. The FAC is not satisfied that a serious or significant error or a series of errors was made in relation to the EIA considerations and concurs with the conclusion.

In addressing the Appropriate Assessment grounds of appeal, the FAC considered, under Article 6(3) of the Habitats Directive, any 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 projects, having regard to the conservation objectives of that designated site. The DAFM, in this case, undertook their own Stage 1 screening, and found seven European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Blackwater River (Cork/Waterford) SAC 002170, Kilgarvan Ice House SAC 000364, Killarney National Park, Macgillycuddys Reeks And Caragh River Catchment SAC 000365, Mullaghanish Bog SAC 001890, Mullaghanish to Musheramore Mountains SPA 004162, Old Domestic Building, Curraglass Wood SAC 002041 and St. Gobnets Wood SAC 000106. The FAC consulted publicly available information from the NPWS and EPA and identified the same seven sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and they concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. The closest site is 000365 which lies c.1.6km to the north and covers an extensive area. There is only one SPA within 15km which is 004162 which lies 6.3km to the east at its closest point and the proposal would occur in a mature coniferous forest which would not be considered suitable habitat for the associated special conservation interest of the SPA. Other European sites are at a considerable distance from the proposed road.

The FAC considered the specific ground submitted that the Stage 1 Appropriate Assessment Determination is not legally valid in light of the applicant's further articulation on this at the oral hearing. The DAFM in screening out the Killarney National Park, Macgillicuddy Reeks and Caragh River Catchment SAC for AA gave their reason as "The absence of any aquatic zone within or adjoining the project area". The biomap shows no aquatic zone adjoining the proposed road or the area to be served by it, it does though show a watercourse beyond this area to the west. The applicant at oral hearing supported this evidence and added that this watercourse is c. 400m to the west from the proposed road. The FAC consulted EPA maps and observed that this watercourse to the west flows north to join the Killarney National Park, Macgillicuddy Reeks and Caragh River Catchment SAC. This SAC contains aquatic qualifying interests including the Freshwater Pearl Mussel (FPM), however the site itself is not found to be within or proximate to a FPM catchment. The site is within 3km of the Killarney National Park, Macgillicuddy Reeks and Caragh River Catchment SAC and with regard to the written ground of no consultation with the NPWS, the DAFM at oral hearing submitted that the requirement to refer the proposal to the NPWS for comment is discretionary. Given they determined the proposal was not hydrologically connected to this SAC, the DAFM stated that they decided to not refer the proposal to them in this case. The proposal area is in the Flesk (Kerry)_010 sub catchment which includes the Killarney National Park, Macgillicuddy Reeks and Caragh River Catchment SAC and the aforementioned watercourse to the west of the proposal area is part of Flesk (Kerry)_030 river waterbody, which has a high status WFD 2013-2018. Submissions on the description of the site were given at the oral hearing, where the DAFM agreed the soil type was peat but contended that as the site is relatively level that there is ample area for water from the road to percolate safely. On this basis and that having regard to the proposal as well, the DAFM stated that they did not foresee a threat to water quality. Submissions on the absence or otherwise of adequate consultation and assessment of the cumulative impact of this project with other existing forestry and non-forestry projects and land uses, along with some of the detail and clarity in the in combination assessment and conclusions reached, were also given at the oral hearing. The DAFM in their assessment to determine EIA requirement, in the section focusing on the cumulative effect, included the approximate % forest cover in the underlying waterbody (or waterbodies) and within 5km, both currently and five years previous. These current figures at the time of assessment were found to be 7.31% and 39.43% respectively and the DAFM concluded that based on the extent of the forest cover and the forest road network that the cumulative effect of this proposal was not likely to have a significant impact. The DAFM in their in combination assessment recorded a consideration of other plans and projects, including forestry and non-forestry projects, and in their in combination statement outlined that the % forest cover in the River Sub Basin River Flesk (Kerry)_030 was approximately 37% and that at 355m the project is considered medium in scale and determined that the project when considered with or plans and projects would not give rise to the possibility of an effect on the Natura sites listed. The DAFM at oral hearing reiterated that they were comfortable with the concentration of forest cover and forest roads in the area. The FAC considers that while there was some variation in the % forest cover captured in the DAFM documentation, that the extent of forest cover and forest roads was considered adequately by DAFM when conducting their assessments, and notes the non forestry projects captured in the DAFM's assessment too. The FAC having considered all of this, consider the procedures adopted by the DAFM in their assessments are acceptable and based on the information available to it, the FAC is not satisfied that a serious or significant error or series of

errors was made in the making of the decision regarding AA, water quality and cumulative impact and concurs with the conclusions provided.

In relation to the submitted grounds of appeal that the licence conditions do not provide a system of protection for animal species listed in Annex IV(a) of the Habitats Directive and for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. The FAC note 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 noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In relation to the contention that the site notice was positioned on the public road in Co. Cork rather than Co. Kerry. The applicant at oral hearing submitted that the exit from the proposed road to the public road is to the north east of the site via a long established forest road. This exit is found to be in Co. Kerry. The FAC finds that the site notice was positioned south of this location further along the N22, as indicated on the site notice location map submitted with the application. The DAFM submitted that they didn't physically see the site notice but reviewed the material submitted. The applicant's property contains a network of forest roads and two entrances along the N22 are evident from the mapping and aerial imagery of the area. The submitted biomap marks the forest road to the south of the proposed road as an existing forest road. The FAC is satisfied that the site notice was erected at an entrance to the land to which the application relates and that the notice was visible and legible to persons using the public road.

In considering the appeal the FAC had regard to the record of the decision, 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 in deciding to affirm the decision, 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 James Conway.

James Conway, On Behalf of the Forestry Appeals Committee