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19<sup>th</sup> January 2021

**Subject:** Appeal FAC 431/2020 regarding licence CN86264

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 CN86264 for a forest road of 400m at Meenachullalan, Co. Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 10<sup>th</sup> of July 2020.

#### **Hearing**

An oral hearing of appeal FAC431/2020 was held by the FAC on 13<sup>th</sup> January 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

Appellant: Not present

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Martin Regan, Ms. Mary Coogan

#### **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 affirm the decision of the Minister regarding licence CN86264.

The licence pertains to the construction of a forest road a forest road of 400m at Meenachullalan, Co. Donegal. The site area to be serviced by the road is 14.12ha and the age of the plantation is 48 years. A new entrance to the public road is not required and the site elevation varies from 120 to 135m.

The application was referred to Donegal County Council and Inland Fisheries Ireland (IFI) on the 20<sup>th</sup> of April 2020. Responses were received on the 8<sup>th</sup> of May 2020 and the 27<sup>th</sup> of April, respectively. The response from IFI refers to the need for the operation to adhere to standard forestry guidelines and practices. The reply from the local authority observes that there are no current or historical applications in the vicinity of the proposed road.

The application was desk and field inspected by a DAFM District Forestry Inspector. The Inspector's Certification records the area as being of blanket bog with a moderate (<15%) slope which does adjoin an aquatic zone. As part of a screening for Appropriate Assessment, the Certification records that the project site does not overlap any European sites, but that it is within 15km of 10 European Natura Sites. These are: The Donegal Bay SPA [4151], the Inishdiff SPA [4115], the Lough Nillan Bog (Carrickatlieve) SAC [0165], the Lough Nillan Bog SPA [4110], the Sheskinmore Lough SPA [4090], the Slieve League SAC [0189], the Slieve Tooey/Tormore Island/Loughros Beg Bay SAC [0190], the St. Johns Point SAC [0191], the West Donegal Coast SPA [4150], and the West Ardara/Mass Road SAC [0197]. For each SAC and SPA, the Qualifying Interests are noted. In all cases (including SPAs) the sites are recorded as being screened out because of the project area being within a separate waterbody catchment to that containing the Natura site, with no upstream connection and the subsequent lack of any hydrological connection. All sites are also screened out by reason of there being no possibility of in-combination effects following an in-combination assessment. The application was approved on 10<sup>th</sup> of July 2020.

There is one appeal against the decision. In summary, the grounds are:

- a. The test for Appropriate Assessment Screening Irish and EU law is: it is, merely necessary to determine that there may be such an effect, and that if a development is within 15km of a Natura 2000 Site it has to be screened in.
- b. The appellant refers to the CJEU judgement in case C-323/17, People Over Wind and Peter Sweetman v Coillte Teoranta, and that in relation to Article 6(3) of the Habitats Directive (92/43/EEC), specifically that:
  - i. it is not appropriate, at screening stage to take account of the measures intended to avoid or reduce the harmful effects of the plan or project;
  - ii. and that an assessment carried out under Article 6(3) of the Directive must not have lacunae and contain complete, precise, and definitive finding and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.
- c. That a map showing the SACs and SPAs and the site of the proposed development should be attached.
- d. That it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha, and that it is necessary to give the total km of the forest road in the area and show that no roads which are not included in the application will be needed to carry out the development, including thinning and clearfell.
- e. The appellant refers to the Opinion of Advocate General Kokott (30 April 2020) [Friends of the Irish Environment Limited v An Bord Pleanála] in relation to the obligations of the FAC.



In a statement to the FAC, the DAFM submitted that the proposal was desk and field assessed in line with DAFM procedures. The statement notes that the application was submitted on the 14<sup>th</sup> of April 2020, and that the application was advertised on the 20<sup>th</sup> of April 2020. A single submission is noted as having been received on the 30<sup>th</sup> of April 2020. The referrals to IFI and Donegal County Council are noted consistent with the dates observed by the FAC examination of the file above. Two referrals to a forestry inspector are noted, as are the certification dates which occurred on the 26<sup>th</sup> of June 2020 and the 8<sup>th</sup> of July 2020. The statement notes the decision as having been made on the 10<sup>th</sup> of July 2020 and it being advertised on that date.

An oral hearing was held which was attended by representatives of the DAFM and the Applicant. The DAFM outlined their processing of the licence including the appropriate assessment screening undertaken for SPAs and SACs including consideration of hydrological distance and physical distance. The desk and field assessments were described. It was submitted that the response of IFI was considered and reflected in the licence conditions. The Applicant's representatives described the application and confirmed the description of the proposal. The applicant observed that the pre-approval submission included an indication that a bridge was required, and that this was their preferred approach to the required water-crossing at this site as it meant that the water course would not be interfered with. The applicant stated that its own process for such works entails prior consultation with IFI, in line with the requirements of relevant Forestry and Water Guidelines, relevant COFORD guidelines, and the Code of Best Forest practice as referenced in the licence.

In considering the grounds of appeal, the FAC in the first instance considered the grounds relating to the Habitats and Birds Directives. The FAC noted that the Inspector's certification included a screening for Appropriate Assessment, which identified all Natura sites within a 15km radius of the project site and considered the Qualifying Interests and Special Conservation Interests in each case. Site names and site codes were provided in each case which enabled the FAC to verify the details provided using publicly available website services such as those provided by the Environmental Protection Agency and the National Parks and Wildlife Service. This identified the same 10 Natura sites. While the Inspector's Certification did not include physical separation as a reason for screening out the SPAs, the FAC observe that the nearest SPA is the West Donegal Coast SPA at ca. 9.7Km distance and accept that this was considered as part of the screening process. No hydrological connection to any SAC could be observed.

The FAC is satisfied based on the above that the screening for Appropriate Assessment carried out was complete, with sufficient information provided to verify this. The FAC is further satisfied that the licence conditions stated are representative of good forestry practice and do not represent mitigation measures in relation to potential impacts on Natura sites.

In relation to the ground of appeal that it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha, the FAC had regard for the fact that this is a requirement of the EIA Directive, and considered the DAFM record in this light. 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. The proposal is considerably sub-threshold for the mandatory submission of an EIA report. 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 as described is for a road of 400m, which is an extension of a forest road of ca. 120m, to give a total of 510m. The application itself is not for afforestation. Having regard to the record of the decision and the submitted grounds and the nature, scale, and location of the proposal the FAC is not satisfied that the proposal would not result in a likelihood of significant effects on the environment or that the DAFM erred in the decision regarding EIA.

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 CN86264 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,



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John Evans On Behalf of the Forestry Appeals Committee