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27<sup>th</sup> July 2021

**Subject:** Appeal FAC 738/2020 & 784/2020 in relation to licence CN86090

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 (as amended), has now completed an examination of the facts and evidence provided by the parties to the appeal.

#### Background

Licence CN86090 for forest road of 100 meters(m) at Ballard, Co. Wicklow was granted by the DAFM on 11<sup>th</sup> September 2020.

#### Hearing

An oral hearing of appeals FAC 738/2020 & 784/2020, of which all parties were notified, was held by the FAC on 26<sup>th</sup> May 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant (FAC 738/2020):	[REDACTED]
Appellant (FAC 784/2020):	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Robert Windle & 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 appeals, and submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister to grant this licence CN86090.

The licence pertains to 100m of forest road at Ballard, Co. Wicklow to serve 11.92 hectares of forestry. A pre approval submission report, photographs of the site notice, maps, the specifications of the road, method statement and a temporary bridge diagram and photograph were found on the DAFM file as part of the application process. Construction is to be by excavation.

The proposal area is in the Avoca-Varty WFD Catchment (ref 10), Avonbeg\_SC\_010 and Avonbeg\_040 River Sub Basin. The Avonbeg\_040 river waterbody has a Good WFD status for the assessment period 2013-18. The biomap shows that the area to be served is crossed by the Avonbeg\_040 and the proposed road is in close proximity to it. A Method Statement on file indicates the installation of a temporary water crossing, which IFI refer to in their submission.

The proposal was desk and field assessed by DAFM and referred to Wicklow County Council and Inland Fisheries Ireland (IFI). Wicklow County Council responding noting the 100m road adjacent to Avonbeg\_040 which is at Good status and stating no objections subject to measures to protect waters and Good status. IFI responded observing that the lands were in the catchment of the Avonbeg, a salmonid system supporting populations of Atlantic salmon, sea trout and brown trout. It highlighted that in addition to the construction of the road this scheme involves the construction of a temporary bridge across the river. It indicated that it had discussions with the applicant on the design and construction of the bridge and have agreed a Method Statement for the planned construction. It listed a number of items that approval should ensure, such as, all works be carried out in adherence to Environmental Requirements for Afforestation 2016 and The Code for Best Forest Practice.

The DAFM's Inspection Certification document described the site details as this project comprises 100 metres of forest road works, the predominant soil type underlining the project area is predominantly brown earths in nature, the slope is predominantly flat to moderate (<15%), the project area is crossed by / adjoins an aquatic zone(s) and the vegetation type(s) within the project area comprise WD3.

The DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found five European sites within 15km of the proposal and that 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 out each site are 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 11<sup>th</sup> September 2020 subject to conditions, including the following;

- *Please give the Forest Service District Inspector (Robert.Windle@agriculture.gov.ie) two weeks commencement notice prior to forest road works commencing,*
- *Strictly adhere to all conditions set by Inland Fisheries Ireland,*
- *Adhere to forestry & landscape guidelines.*

The decision to grant the licence is subject to two appeals. The grounds of appeal 738/2020 broadly are:

- That no legal Appropriate Assessment screening has taken place
- That the accumulation of forest roads in this forest exceeds 2km, and that therefore and Environmental Impact Assessment is required.



- That the statement *“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 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”* is not permitted in a screening.

The grounds of appeal 784/2020 broadly are;

- A breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/52/EU. It is submitted that the Directive requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account. It is further submitted that a number of criteria set out in Annex III do not form part of the standard FS screening assessment, and that a Member State exceeds the limits of its discretion under Article 2(1) and 4(2) of the EIA Directive in circumstances where it does not take into account all relevant selection criteria listed in the Annex.
- A breach of Article 4 (4) of the EIA Directive 2014/52/EU by reason that the Directive requires a developer to submit details of the whole project. It is submitted that the application for this licence does not represent the whole as a Forest Road is not a whole project but is part of a larger scheduled programme of works which needs to be assessed in an integrated and coherent manner in respect of the potential of the programme to have a cumulative significant environmental impact.
- A breach of Article 4 (5) of the EIA Directive 2014/52/EU for similar reasons to the above.
- That the Determination of the Inspector in terms of the Requirement for an EPA is inadequately reasoned as there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries 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.
- That the proposed design and construction of the forest road does not take into account soil, terrain and slope in a way that mitigates against any environmental damage.
- That an adequate EIA screening has not been conducted as there is insufficient (no) evidence of consideration of the potential impact on protected species and habitats - notably Otter, and that the NPWS was not consulted.
- That the location of the forest road will not permit extraction of timber in conformance with the (Interim) Standards for Felling & Reforestation.
- That there is insufficient information included with the application to permit the inspector to make a definitive response to all IFORIS checkbox queries and hence make a conclusive determination as to whether an EIA is required.
- 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 and that the project documentation contains contradictory statistics.
- That this 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 by reason that in the absence of adequate consultation the achievement of the objectives set for the underlining waterbody or waterbodies under the

River Basin Management Plan for Ireland cannot be assured as in the absence of an adequate assessment of the cumulative impact of this project with other forestry activities approved or planned in the same catchment the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured.

- That the licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence.
- That this licence should contain a condition that plans and works must be inspected by FS prior to, during and post works to ensure compliance with all environmental conditions and mitigations.
- That licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.
- That the licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

In statements to the FAC, the DAFM submitted that the decision was issued in accordance with DAFM procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act. The statement in relation to FAC 738/2020 submitted the process followed with regard to Appropriate Assessment and considerations relating to the EIA Directive. The statement for FAC 784/2020 provided a response to each of the grounds including that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered within the current procedures; that it complied with these requirements by assessing the information submitted by the applicant and which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account the results of the preliminary verifications or assessments of the effects on the environment carried out under Birds and Habitats Directives and the Water Framework Directive; that the proposal has been assessed on its own merits and all the documentation provided, the meters of road applied for is reasonable to ensure the timber can be extracted in the most practical and efficient manner; the local authority in their response had no objection, subject to measures to protect water and the good status; IFI also had a number of conditions and these were added as conditions on this licence; a field inspection was undertaken by the certify inspector on the 28/08/2020 and the location of the forest road does permit extraction of timber in conformance with the (Interim) Standards for Felling & Reforestation.

At the oral hearing, the DAFM opened by summarising their approach to processing the application and issuing the licence. The appellant in attendance contextualised his grounds and made more specific references to some of the grounds, querying the absence of an Annex 3 form and the answer to Q.16 on the Assessment to Determine EIA Requirement, the proximity of the timber loading area to a relevant



watercourse and how it meets the Interim Standards for Felling and Reforestation, that native vegetation exists in and around the proposed road area and that the NPWS should have been consulted as there will be an impact on wildlife. The applicant submitted that the site was planted in 1977, that a premade bridge is to be used to cross the watercourse, the structure being 9m wide, and that clean rock boulders will be used to create a level area at each side of the river and to ensure the required full 15m is spanned. The applicant also submitted that there is no scrub along the riverbed, that full consultation took place with IFI and DAFM, that the temporary bridge will only be in place for the minimum period required, and that hot logging will take place, that as timber comes across the bridge that it will go from the forwarder to the lorry, that the lorry will travel to another forest in close proximity where it will be handled again, therefore double handled, and then hauled onwards to its destination. The DAFM submitted that the answer recorded to Q.16 was a mistake, that it should have been 'yes' and that details regarding the proposed road and mitigation against effects was outlined in the Method Statement, that a 50m minimum distance between the proposed road and watercourse is recommended but that there was consultation with IFI and the County Council on the application and they didn't object to it proceeding, that DAFM discussed hot logging of the timber with the applicant and that the road is to be constructed through the summer as advised by IFI when water levels are low. The applicant further submitted that the footprint of the road was not changed in the revised biomap, that an area that has been crossed in the past is going to be used as the location for the bridge and that they took the licence condition with regard to IFI to mean to follow the details in the Method Statement and were supplied with the IFI response as supplementary information. The DAFM further submitted that stacking of timber was a concern when initially reviewing the application, but that the applicant had subsequently provided an acceptable proposal that the forwarder machine will not leave the road when loading the lorry, that the design of the road allows for reversing etc now. The appellant further submitted there was no reference to hot logging in any of the application details, queried if the site to be used for stacking has been assessed, referred to % forest cover figures for the Avonbeg\_040 river sub basin in the documentation and that there are concerns for more than just aquatic species. The applicant's representative stated that the double handle site is less than 3km away, that discussions with IFI would have included hot logging and that part of the design of the road is in order to have a safe working space for the forwarder and lorry.

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. 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. 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 of 100m, 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, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. In its consideration of soil, terrain, slope, the DAFM recorded an answer 'no' to question 16; *"Do the proposed design and construction of the forest road take into account soil, terrain and slope in a way that mitigates against any environmental damage"* in the Assessment for EIA Requirement, but at the oral hearing submitted that this was a mistake and that the answer should be 'yes'. The grounds of appeal included that there is insufficient (no) evidence of consideration of the potential impact on protected species and habitats - notably otter, and that the NPWS was not consulted. The DAFM's consideration of designated areas and non designated areas recorded 'no' answers to the forest road being within a SAC, SPA, National Park, NHA, pNHA or Nature Reserve, or within a 0.5km or 3km buffer zone, upstream of, and hydrologically connected to, a SAC, SPA, National Park, NHA, pNHA or Nature Reserve and 'no' to the application to a Forest Service Ecologist. The FAC find the based on the evidence before it, the proposal is for 100 metres of forest road construction to facilitate the management of commercial forest for timber production and outside of any area designated for conservation. The nearest European site to the proposal area is Vale of Clara (Rathdrum Wood) SAC at a distance of c. 3.3km. The next nearest European site is the Wicklow Mountains SAC at a distance of c. 7.2km. The otter is a qualifying interest of the Wicklow Mountains SAC but not of any other European site within 15km of the proposal area. The Wicklow Mountains SAC is hydrologically connected to the proposed works via the Avonbeg\_040 river waterbody which is to be crossed by the installation of a temporary bridge under the proposal. The proposal area is downstream of the Wicklow Mountains SAC and the Avonbeg\_040 flows south eastwards to join the Avoca river and it continues in a relatively similar direction to enter the sea at Arklow. The proposal was referred to IFI and Wicklow County Council; with both referral bodies providing a response. The proposal area was not in a NPWS referral zone as per the Forestry Standards Manual, November 2015. The specifications for the road, a method statement detailing the installation of a temporary water crossing along with a diagram of the proposed temporary bridge and a photograph of a previous installation were found on file as part of the application. The DAFM also field inspected the site and corresponded with the applicant on some of the specifics of the proposal. The FAC having considered all of the evidence before it, 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 make a determination as to whether an EIA is required and the FAC is not satisfied that a serious or significant error or a series of errors was made by the DAFM in relation to their EIA consideration 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 and projects, having regard to the conservation objectives of that designated site. The DAFM, in this case, undertook a Stage 1 screening, and found five 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 Buckroney-Brittis Dunes And Fen SAC 000729, Deputys Pass Nature Reserve SAC 000717, Vale of Clara (Rathdrum Wood) SAC 000733, Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040. The FAC consulted



publicly available information from the NPWS and EPA and identified the same five sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reason for their screening conclusions for each site as the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, on the week of 9<sup>th</sup> September 2020 in a stand-alone document, and they concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on any Natura site. Regarding the text identified in FAC738/2020 and submitted to not be permitted in a screening, the FAC does not consider that this text should be included in the document but neither does it consider that there is any significance to its inclusion or that it would impact on the overall procedure and conclusion reached. The percentage forest cover figure for the River Sub Basin Avonbeg\_040 was given as approximately 23% in the in-combination statement, this was higher than the 20.16% forest cover current figure in the underlying waterbody (or waterbodies) recorded in the Assessment to Determine EIA Requirement and which was recorded as being fractionally lower five years previous. The project though is for 100 meters of forest road, and the forest cover percentage will not be particularly impacted under this licence, as it is not for afforestation or deforestation. The FAC considered that the DAFM had sufficient information available to it, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions reached.

Regarding the contention in the grounds of appeal that the location of the forest road will not permit extraction of timber in conformance with the (Interim) Standards for Felling & Reforestation, the FAC noted inter alia, that the Standards include, locate timber landing bays at least 50m from the nearest aquatic zone. The proposed road will be within 50m of an aquatic zone and the proposed works include the installation of a temporary bridge crossing over an aquatic zone, river waterbody. The biomaps provided outline the area to be served with only a very small plot of this overall area adjoining the public road and that the proposed road is to be located in this small, square shaped plot, bisecting it, and that the substantial area to be served is across the aquatic zone, a river waterbody, which extends left and right after crossing the river and in a straight/northerly direction. The DAFM field inspected the proposal and evidence of consultation between the applicant, the DAFM and IFI with regard to this application is on file and of agreement on a Method Statement for the planned construction of the bridge. The DAFM and the applicant at oral hearing submitted that timber will not be stacked on the area served by the proposed road, but that timber will be loaded directly off the forwarding loader onto a lorry for transporting to a site for double handling. Wicklow County Council and IFI in their referral responses raised no objections to the proposals subject to measures, conditions. The licence conditions include giving the Forest Service District Inspector two weeks commencement notice prior to forest road works commencing, strictly adhering to all conditions set by IFI, and adhering to forestry & landscape guidelines. In addition, a separate licence for felling will have to be sought and granted to allow for the extraction of timber from the area to be served by the proposed road. The FAC considered the submission at Oral Hearing that the second bio-map submitted was intended to illustrate that the

forwarder machine will not leave the road, and is satisfied that the location and design of the road is to be as described in the Method Statement and that this Method Statement encapsulates a resolution of the concerns of IFI. However, the FAC is of the opinion that the submission of a second biomap introduces ambiguity as to the location of the road to be constructed and that this represents an error in the processing of the licence. The FAC therefore is varying the licence issued to include explicit reference to the Method Statement as a condition.

The FAC considered the contention in the grounds of appeal that in granting the licence the DAFM had taken inadequate consideration of the objectives of the WFD River Basin Management Plan. In doing so, the FAC reviewed EPA maps and data and find the proposal area is in the Avoca-Varty WFD Catchment (10), Avonbeg\_010 and Avonbeg\_040 River Sub Basin. The Avonbeg\_040 river waterbody which has a Good WFD status (2013-2018 monitoring cycle) crosses the area to be served by the proposed road and a temporary bridge is to be installed over the waterbody also. The DAFM referred the proposal to Wicklow County Council and IFI, to which both responded, and the DAFM included as a condition on the licence to strictly adhere to all conditions set by IFI. The Method Statement on file outlines the scope and methods of work regarding the installation of the temporary bridge and this included that, works will take place during summer months when water flow is at a minimum. The DAFM and the applicant at the oral hearing submitted that timber will not be stacked on the area served by the proposed road, that timber will be transported off site for double handling, that the forwarding machine will not leave the proposed road when loading the lorry, that the design of the road allows for reversing etc on it now. In summary based on the information available to it and having regard to the nature of the proposal, namely construction of a forest road with installation of a temporary bridge, the location of the proposed road and its terrain and the conditions under which operations would be undertaken, the FAC is not satisfied that there was inadequate consideration of the objectives of the WFD River Basin Management Plan by DAFM in their decision making and is not satisfied that the proposal poses a significant threat to water quality.

In relation to the appellant's grounds that the licence should contain conditions to notify the Minister of the commencement and conclusion of operations, and a condition that plans and works must be inspected by the Forest Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations; the FAC finds that the licence includes a condition that requires the Forest Service District Inspector is given two weeks commencement notice prior to forest road works commencing and that a site notice must be completed and erected in accordance with directions provided and that the DAFM have powers to undertake inspections in line with Forestry legislation as is considered appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of any further conditions relating to these grounds in the appeal in this case, was not required.

In relation to the submitted 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 and relating to the requirements of Article 12 of the Habitats Directive, the FAC had regard for the statement of fact provided by the DAFM regarding appeal 784/2020. The FAC notes 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 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 the decision was made without complying with fair procedure. The FAC is satisfied that an error was made in the processing of the licence and is therefore varying the licence such that the current licence condition:

*Strictly adhere to all conditions set by Inland Fisheries Ireland*

Be substituted with the following:

*Strictly adhere to all conditions set by Inland Fisheries Ireland including adherence to all details as set out in the Method Statement including design, location and operational details as submitted by the applicant reference MS 2020/ER/01. Any deviation from the Method Statement must be agreed in advance with Inland Fisheries Ireland and the Department of Agriculture, Food and the Marine and significant changes may require a new application to be submitted.*

Yours sincerely,



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James Conway, On Behalf of the Forestry Appeals Committee

