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11th June 2021

Subject: Appeal FAC 561/2020 & 590/2020 in relation to licence CN84973

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 CN84973 for forest road of 480 meters(m) at Islands, Co. Kilkenny was granted by the DAFM on 29th July 2020.

Hearing

An oral hearing of appeals FAC 561/2020 & 590/2020, of which all parties were notified, was held by the FAC on 5th May 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant (FAC 561/2020):	[REDACTED]
Appellant (FAC 590/2020):	[REDACTED]
Applicant:	[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 appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant this licence CN84973.

The licence pertains to 480m of forest road at Islands, Co. Kilkenny to serve 17.48 hectares of forestry. A pre approval submission report, photographs of the site notice, maps, management plan, the specifications of the road, diagrams of the special construction works and Freshwater Pearl Mussel (FPM) site assessment forms were found on the DAFM file as part of the application process. Construction is to be by excavation for 200m and build on top for 280m.

The proposal area is in the Nore WFD Catchment (15), Goul_SC_010 Subcatchment and Goul_030 River Sub Basin. The Goul_030 river waterbody has an unassigned WFD status, but flows to Goul_040 which has a moderate status (2013-2018). The Goul_010 and Goul_020 are also unassigned. The proposal area is also in a Freshwater Pearl Mussel catchment. The watercourse, which is part of the Goul_030, shown on the biomap does not adjoin or cross the proposed road, but is to the north and east of the proposed road, at a closest distance of c. 200m (to the north of the proposed road). The watercourse lies adjacent to the area to be served running along the northern and eastern boundaries.

The proposal was desk and field assessed by DAFM and referred to Kilkenny County Council and Inland Fisheries Ireland (IFI). No response was recorded from IFI on file. Kilkenny County Council responded observing that the proposal is within 500m of the River Goul and a number of Recorded Monuments.

DAFM's Inspection Certification document described that the predominant soil type underlining the project area is predominantly podzols 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 WD4.

The DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found six 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 29th July 2020 subject to conditions.

The decision to grant the licence is subject to two appeals. The grounds of appeal 561/2020 broadly are;

- A breach of Article 2(1) and Article 4(3) of the EIA Directive 2014/52/EU on the basis 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, that a number of these criteria do not form part of the standard FS screening assessment, 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 such relevant criteria.
- A breach of Article 4 (4) of the EIA Directive 2014/52/EU on the basis that the Directive requires a developer to submit details of the whole project, that the application for this licence does not represent the whole project therefore it is in breach of the EIA Directive.
- A breach of Article 4 (5) of the EIA Directive 2014/52/EU Article 4(5) on similar grounds to the above.
- That the Determination of the Inspector in terms of the Requirement for an EIA 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 checkbox responses of the Inspector in respect of the EIA screening contain at least one error.
- That the Stage 1 AA conclusion is not legally valid on the basis that an assessment carried out under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned, and that where there are lacunae the precautionary principle applies.
- 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 on the basis that in the absence of adequate consultation or 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 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 I of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

The grounds of appeal 590/2020 broadly are:

- That before granting a felling license, it was necessary for the Minister to establish the legitimacy of the actual forest, and that as this has not been done it is necessary for the FAC to do it.
- That the Forestry Service and the FAC have overruled the Judgement of Finlay J.
- That by requesting further information from the Forest Service, the FSC (*sic*) has upheld the appeal.
- That the FSC (*sic*) must decide whether it is deciding an appeal or a review.
- That incomplete decisions should be returned to the FS.
- That it is necessary for the FAC to carry out an Environmental Impact Assessment screening, and that in order to do this all roads in the forest and their distances must be listed.
- That the decision does not comply with the Habitats Directive, the Birds Directive, and the Environmental Impact Assessment Directive or the basic guidelines of the NPWS, for the following reasons:

- That the test for Appropriate Assessment Screening (of a proposed project) in Irish and EU law is that is merely necessary to determine that there may be an effect rather than to state that it will not have a significant effect.
- That if a development is within 15km of a Natura 2000 site it has been screened in.
- That the judgement in Case C-323/17 People Over Wind and Peter Sweetman v Coillte by the Court of Justice of the European Union (CJEU) applies, and that:
 - It is not appropriate, as the screening stage, to take account of the measures intended to avoid or reduce the effects of the plan or project on that site;
 - That an assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings capable of removing all scientific doubt as to the effects of the proposed works on the protected site concerned.
- That a map showing the SACs and SPAs and the site of the proposed development should be attached.
- That no inference should be taken from the absence of a response from NPWS.
- That regarding screening for Environmental Impact Assessment, it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50h, and also that it is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development including thinning and clear-fell.
- That it is the duty of the FAC to carry out both a full Appropriate Assessment Screening and a full Environmental Impact Assessment Screening in accordance with the law.
- The opinion of Advocate General Kokott in Case-254/19 interprets these requirements.

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, and also submitted 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. The Department submits 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. The DAFM also submitted that the site was field inspected 03/07/20, no hydrological connection is present and there is no other interactions with other Natura sites. The DAFM further submitted that: The relevant AA procedure was applied in approving this licence. The screening information can be found on file. An in-combination assessment was also carried out for this application and can also be found on file. 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. This application alone or in-combination with

other forest and non-forest plans/projects in the area will not have a significant impact the qualifying interests of the Natura 2000 sites screened as part of the AA.

At the oral hearing, the DAFM opened by summarising their approach to processing the application and issuing the licence. The applicant submitted that he delegated responsibility to his forester on the engineering aspects of the proposal. The DAFM submitted a description of aspects of the site; that the northern section is in an area that was cut away bog many years ago, that within this area the proposed road would cross ditches that were excavated many years ago to drain the land, but that these drains were dry when the DAFM site inspected the proposal and there was no hydrological connection from the proposed road to a Natura 2000 site. The DAFM representative submitted that he asked for a second in-combination assessment in order to have up to date records before he made a final determination on the application, submitting details on the in-combination process followed and of the options available having reviewed the report and submitted that all Recorded Monuments are over 200m from the proposal area. The appellant submitted that the project area was hydrologically connected to a Natura 2000 site and that the FPM form indicates mitigation measures, so an Appropriate Assessment should have been carried out. The DAFM further submitted that there was no pathway to an SAC that it was outside of 6km from the River Barrow and River Nore SAC, although is in a FPM catchment, there is an effective buffer zone, that the drains looked dry for a long time, the road will be flat and the water from the road will soak down through the soil. The appellant submitted there were issues with the Assessment for EIA Requirement specifically referring to Q.13, Q.16, Q.23 & Q.29. The DAFM submitted reasons for its answers including that Q.16 and Q.23 were answered in error. The DAFM in answering questions from the FAC submitted not following the pathway all down to the River Goul, on the boundary of the area to be served, because there was no evidence of water in the drains at the time and that from aerial imagery there is good buffers on the east of the site, while the forest is planted closer to the boundary on the north. The applicant submitted the trees were planted in 1989, just before the premium payments were introduced. The DAFM also submitted the rationale for the proposed special construction works was because of the presence of a ditch that needed to be crossed and couldn't be filled in, in order for it to deal with water in the event of a flood.

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 480m, so is sub threshold for mandatory EIA as set in Irish Regulations. The road would be built through managed forest land and outside of any area designated for conservation. 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 the question; *"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 they misread the question and that the answer should be 'yes'. In its consideration of landscape and visual amenity, the DAFM recorded an answer 'no' to the question; *"Were comments from the Local Authority received and examined"* and that the answer should be 'yes' and referral response were noted elsewhere in the document. In its consideration of water, the DAFM recorded an answer 'no' to the question; *Are there populations of Freshwater Pearl Mussel likely to be effected by the proposed forest road?* The DAFM rationalised this at the oral hearing by stating that the proposal area was not hydrologically connected to a Natura 2000 site, thereby not being connected to the River Barrow and River Nore SAC which has FPM as a qualifying interest, and while DAFM acknowledged it was in a FPM catchment that it was not within a FPM 6km zone. The FAC considered this evidence and find the 6km zone is referred to in Forestry Standards Manual, November 2015, with regard to whether FPM Requirement Forms A and B should be included with the application and in regard to referral to NPWS. The DAFM referred the proposal to Kilkenny County Council and IFI, with only Kilkenny County Council responding, who observed that the proposed works were within 500m of the River Goul. The application included FPM Requirement Forms A and B. Form A records an answer 'yes' to; *If constructing a road, does the route of the proposed road cross an aquatic zone or a relevant watercourse?* And 500m to the question; *the hydrological distance from FPM (meters) if known.* Form B – Mitigation Measures – included for mitigation the creation of effective buffer zones/strips, creation of sediment traps or other sediment control measures, brash management, and for the timing of operations to be in dry ground conditions. The FAC having considered all of the evidence before it, finds, that while the DAFM recorded a consideration of the application across a range of criteria and determined that the project was not required to undergo the EIA process, that a series of errors were made in recording these considerations. While the correct answers in relation to this series of errors may have been known to the DAFM official completing the screening report and noting the submissions made by DAFM at the oral hearing, in the context of the scale, nature and location of the proposal, the FAC concluded that a new assessment to determine whether an EIA is required should be undertaken regarding this proposal.

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 six 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 Cullahill Mountain SAC 000831, Galmoy Fen SAC 001858, River Barrow And River Nore SAC 0021, River Nore SPA 004233, Spahill And Clomantagh Hill SAC 000849 and The Loughans SAC 000407. The FAC consulted publicly available information from the NPWS and EPA and identified the same six 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, on the week of 25th June 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. The DAFM undertook and recorded a further consideration of other plans and projects, including forestry and non-forestry projects, on the week of the 28th July 2020, with other plans and projects in the vicinity of the site listed and it also concluded that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on any Natura site.

The FAC considered the specific ground submitted that the Stage 1 Appropriate Assessment Determination is not legally valid. The DAFM in screening out the River Barrow And River Nore SAC 0021, gave their reason as; *The absence of any aquatic zone within or adjoining the project area*. For the other five sites the reason given is; *The absence within and adjacent to the project area, of any habitat (s) listed as a qualifying interest of the Natura site*. A qualifying interest of the River Barrow And River Nore SAC is the FPM. The proposal is in a Freshwater Pearl Mussel catchment and the application included FPM site assessment forms, although DAFM submitted that the proposal area is not within a FPM 6km zone. However, the watercourse that lies adjacent to the area to be served running along the northern and eastern boundaries, is the Goul_030 which flows via a number of river waterbodies to the River Nore and to the River Barrow and River Nore SAC. It was submitted at oral hearing that there were ditches on site and that special construction works were needed in order to be able to cross over one of these ditches, which could not be filled in order to deal with rainwater in the case of a flood. The biomap submitted did not identify a watercourse that is to be crossed or adjoin the proposed area, however the FPM Requirement Forms submitted indicated that the "route of the proposed road does cross an aquatic zone or a relevant watercourse". The DAFM in answering questions from the FAC submitted not following the pathway all the way down to the River Goul, on the boundary of the area to be served, because there was no evidence of water in the drains at the time and that from aerial imagery there is good buffers on the east of the site, while the forest is planted closer to the boundary on the north. The FAC having considered all the evidence and being cognisant of the nature of the proposal with special construction works proposed could not rule out the possibility of a pathway from the proposed road to the River Goul_030 and subsequent hydrologically connection to the River Barrow and River Nore SAC. As a consequence and taking account of the precautionary principle, the FAC find that the DAFM erred in screening out the River Barrow and River Nore SAC for Appropriate Assessment on the basis of "the absence of any aquatic zone within or adjoining the project area".


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 Nore WFD Catchment (15), Goul_SC_010 and Goul_030 River Sub Basin. The Goul_030 river waterbody has an unassigned WFD status, but flows to Goul_040 which has a moderate WFD status (2013-2018 monitoring cycle). No EPA mapped watercourse adjoins or crosses the proposed road, but there is one in the area to be served to the north and east of the proposed road, at a distance of c. 200m to the north from the nearest end of

the proposed road. This watercourse is part of the Goul_030. The DAFM referred the proposal to Kilkenny County Council and IFI, with only Kilkenny County Council responding, who observed that the proposed works were within 500m of the River Goul. The DAFM at the oral hearing advised that the slope on the proposed road will be relatively flat and gave evidence of a buffer zone between the proposed road and the watercourse proximate to it, the Goul_030 water body. The proposal includes Special Construction Works which is for a culvert with an estimated cost of €10,000, diagrams with cross sections of this proposed road drainage work was included in the application. The applicant submitted that he delegated engineering aspects of the proposal to his forester, who did not attend the oral hearing, but the DAFM submitted the rationale for the proposed special construction works was because of the presence of a ditch that needed to be crossed and couldn't be filled in, in order for it to deal with water in the event of a flood. The DAFM submitted not following the pathway all the way down to the River Goul, on the boundary of the area to be served, because there was no evidence of water in the drains at the time and that from aerial imagery there is good buffers on the east of the site but planted closer on the north. 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 special construction works to a drain that is not mapped by the EPA as a watercourse, 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 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. 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 satisfied that a significant error or series of errors was made in making the decision and is setting aside and remitting the decision to the Minister to carry out and record a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive and to carry out a new Appropriate Assessment screening of the proposal under Article 6 of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of James Conway.

James Conway, On Behalf of the Forestry Appeals Committee