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11<sup>th</sup> June 2021

**Subject:** Appeals FAC 644/2020, 663/2020 and 664/2020 regarding licence CN84980

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

#### Background

Licence CN84980 for 1260 metres of forest road at Kelshabeg, Co. Wicklow, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 6<sup>th</sup> August 2020.

#### Hearing

An oral hearing of appeals FAC 644/2020, FAC 663/2020 and FAC 664/2020, of which all parties were notified, and representatives of the DAFM, the Applicant and the Appellant in the case of FAC 644/2020 attended, was held by the FAC on 21<sup>st</sup> April 2021.

#### In attendance at Oral Hearing:

Department Representative(s):	Ms. Mary Coogan, Mr. Robert Windle, Mr. Séamus Ó Murchú,
Appellant (FAC 644/2020):	[REDACTED]
Appellants (FAC 663 & 664/2020)	Not in attendance,
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway and Mr. Seamus Neely.
Secretary to the FAC:	Ms. Marie Dobbyn.

#### 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 set aside and remit the decision of the Minister regarding licence CN84980.

The licence pertains to 1260 metres of forest road at Kelshabeg, Co. Wicklow. The Soil type underlying the project area is described in the Appropriate Assessment screening documentation as being predominantly brown podzolic in nature, the slope is described as being predominantly flat to moderate (<15%) and the project area is said not to adjoin or contain an aquatic zone(s). The project area is in the river sub-basin of the SLANEY\_070 (river waterbody has a good WFD status assigned for the assessment period 2013-18). The specification of the road was provided with the application and it is to be constructed through excavation.

The DAFM undertook a screening of the proposal for Appropriate Assessment and found that there were five European sites (Holdenstown Bog SAC 001757, River Barrow And River Nore SAC 002162, Slaney River Valley SAC 000781, Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040) within 15km of the proposed road and that there was no reason to extend this radius in this case. Each site is considered in turn along with their qualifying interests as listed and the reasons for the screening conclusions reached are documented. All five sites were screened out for the purposes of Appropriate Assessment. DAFM also recorded other plans and projects that were considered in combination with the proposal. The DAFM 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 application was referred to the Wicklow County Council and the Inland Fisheries Ireland and there is no response from either recorded on the file.

There are three appeals against the decision to grant the licence in this case. The grounds in appeal FAC 644/2020 contend that there is, a breach of Articles 2 (1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU and submits, that (the) Member state exceeds the limits of its discretion in circumstances where it does not take into account all relevant selection criteria set out in Annex III, that the developer has not provided all of the information required under Annex II A of the Directive, specifically that the application for the licence does not represent the whole project and is part of a larger scheduled programme of works and therefore it is not in compliance with the EIA Directive, that the Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned, that 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 the conclusion is made and there is, in consequence, an error of law in the processing of this application, that the Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned, that 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 the conclusion is made and there is, in consequence, an error of law in the processing of this application, that the Stage 1 AA Determination is not legally valid by reason of failure to ensure that the assessment has no lacunae and to ensure that it contains 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, 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, that the application 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, specifically that in the absence of adequate consultation the achievement of the objectives set for the underlining waterbody or waterbodies under the plan cannot be assured, and that in the absence of an adequate assessment of the



cumulative impact of this project with other existing forestry and non-forestry projects and land uses, approved or planned 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, 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 those species, particularly during the period of breeding, rearing, hibernation and migration, and that the licence approval 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.

The grounds in appeal FAC 663/2020 and FAC 664/2020 are similar and contend that, an agreement was in place with an agent of the applicant to position the entrance to the forest road 50m to the west of the appellant's existing gateway to their own property, that the enlargement of the existing narrow farm track from the public road to the appellant's gateway (which is minimal in width at present and is flanked by very old established stone/earthen banks) as indicated on the maps available to the appellant will result in substantial damage and unnecessary opening up of their gateway effectively for the full extent of the track, that the removal of existing stone walls should be referred to the Department of Heritage and the Planning Department, that an agreement was in place with an agent of the applicant to avoid the removal of these walls (through careful scraping back of existing vegetation), that an agreement was in place with an agent of the applicant that the extraction of timber could only be achieved through the use of smaller trucks and that multi-axel trailer and tractor units are not appropriate as their use could not be achieved without the destruction of the old walls and existing stone gate piers, neither of which is consented to by the issue of the proposed licence granted to the applicant, that the appellants are mindful of the practical requirements relating to the extraction of a timber crop, wish to co-operate with any reasonable approach to such works, but are of the opinion that the location of the new entrance should be as previously agreed with the agent of the applicant, and that any licence issued should be accompanied by sufficient, legally binding conditions to protect their property and that an incorrect map issued with the decision.

In statements to the FAC, the DAFM submitted that the decision was issued in accordance with the procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures listed in the statement have been adhered to in making a decision on the application. The statements to the FAC also sets out that the application was subject to a site inspection on 17<sup>th</sup> January 2020 and that an error led to an incorrect map having issued with the decision. The statements also set out that a copy of the correct map issued to the submitter on 01/09/2020 and that a revised orthophoto map issued on 09/09/2020. At the oral hearing the DAFM representative outlined the processing of the application, the information submitted by the applicant including maps of the proposal, and reiterated that the project was both desk and field assessed.

In so far as there seemed to be some confusion in relation to a number of matters including, the sequencing of the receipt of documentation which was pertinent to the application and decision, a lack of clarity in relation to which maps the decision relied on with regard to the location of the entrance (and being central to some of the appeal grounds), an apparent discrepancy between the length of road applied



for and as approved, the extent to which suggested additional condition content (received after the appeals were made) with regard to Archaeology were critical to the controls required on foot of any approval to be issued and the significance of an incorrect map having issued with the approval, the FAC took the view that in advance of hearing contributions from either the appellant present or the applicants representatives that it would be helpful to go through a number of matters with the DAFM initially to clarify the record so that this would provide a clearer basis on which the remainder of the hearing might proceed. In response to queries posed to the DAFM in this context it was confirmed to the FAC,

- that the map showing the location of an entrance (which is the subject of some of the appeal grounds) and relied on in making the decision was the map (dated 1th April 2020) and as marked 22/04/2020 on the file record,
- that it was not clear whether the said map (as marked 22/04/2020) was digitised to the DAFM application record,
- that the difference in length of road between the application and approval arose from a re-routing proposal during the currency of the processing of the application,
- that an incorrect map which was pertinent to the location of an entrance which is the subject of appeal grounds was attached / issued with the approval (and was also sent to the appellants),
- that the map that should have issued with the approval of 6<sup>th</sup> August 2020 was sent to the submitter on the 1<sup>st</sup> September 2020 and that a revised ortho map issued on 9<sup>th</sup> September 2020,
- that the additional content (regarding Archaeology) for inclusion in conditions of approval was presented as part of the DAFM response to the appeal should the FAC wish to vary the licence to include same.

The appellant during his contribution to the oral hearing contextualised the submitted grounds of appeal, noted that some of the queries that he intended raising had been covered in the initial exchanges between the FAC and DAFM, made reference to the extent of changes that had been made to the application post submission, queried whether this required re-advertisement, and queried some of the answers as recorded on the screening form '*Assessment to determine requirement*', in particular numbers 16, 22 and 37. The applicants representative during their contribution described having submitted the application on behalf of the applicant, that the site of the proposed road, in their opinion, was technically the site for application consideration purposes, that there was no need to materially widen the entrance with the public road, and that a location for the entrance being subject of appeals FAC 663/2020 and FAC 664/2020 had been agreed to be 50 metres away from the said appellants' house.

The FAC, in the first instance, considered the contentions in the grounds of appeal in FAC 644/2020 regarding Environmental Impact Assessment (EIA) and related matters including that the determination of the inspector is in terms of EIA is inadequately reasoned. The FAC noted the content of the statement of fact made by the DAFM to it, wherein it states that;



*'The Department submits 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 as detailed below' (in the statement).*

The FAC also considered the submissions made by the DAFM representative at oral hearing (and in response to questions posed by the FAC) in relation to a number of questions on the 'Assessment to Determine EIA Requirement'. In particular it was asserted by the DAFM representative that the answer to question 16 in relation to the proposed design and construction of the forest road and whether it takes into account soil, terrain and slope in a way that mitigates against any environmental damage should have been 'Yes' instead of 'No' as recorded, that the answer to questions 22 regarding referral to the Local Authority should have been 'Yes' instead of 'No' as recorded, that the answer to question 24 regarding impact on the landscape character should have been 'Yes' instead of 'No' as recorded, that the answer to question 33 regarding safety-related standards set out in the COFORD Forest Road Manual and any health and safety issues raised by the Local Authority should have been 'Yes' instead of 'No' as recorded, and that the answer to question 37 regarding any issues raised by the general public should have been 'Yes' instead of 'No' as recorded. In considering these grounds, 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 decision under appeal relates to a licence for a forest road of 1260m, and so is sub threshold for mandatory EIA as set in Irish Regulations. The FAC finds, that while 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, that a series of errors were made in recording these considerations and as set out above. While any missing data or the correct answers in relation to this series of errors in the screening record on file at the time of oral hearing, which is relied on to determine the need for an EIA, may have been known to the author of the screening report at the time of the decision, and while noting the submissions made by DAFM at the oral hearing, the FAC concluded that a new assessment to determine whether an EIA is required should be undertaken regarding this proposal.

In relation to the grounds of appeal in FAC 644/2020 regarding Appropriate Assessment and related matters including that that the Stage I AA Determination is not legally valid and 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, the FAC finds that the screening of the proposal for Appropriate Assessment by the DAFM found that there were five European sites (Holdenstown Bog SAC 001757, River Barrow And River Nore SAC 002162, Slaney River Valley SAC 000781,



Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040) within 15km of the proposed road and that there was no reason to extend this radius in this case. The FAC finds that each site was considered in turn along with their qualifying interests as listed, that the reasons for the screening conclusions reached are documented and that all five sites are screened out for the purposes of Appropriate Assessment. The FAC finds that while the DAFM also recorded other plans and projects that were considered in combination with the proposal it became apparent during the oral hearing that the full extent of the In-Combination documents dated 11/02/2020 and 18/06/2020 had not been provided to the FAC (or parties to the appeals and hearing) as part of the appeals documentation. A copy of the said documents were, subsequent to the oral hearing, supplied to the FAC, the applicant / representatives, and the appellants and an opportunity was provided for the parties to the appeal to make observations on these documents by email to [forestry@agriappeals.gov.ie](mailto:forestry@agriappeals.gov.ie) or by post to Forestry Appeals Committee, Kilminchy Court, Portlaoise, Co. Laois before Thursday 6th May, 2021. In the event one submission was received from the appellant in the case of FAC 644/2020. This submission, inter alia, makes reference to a felling licence application (WW06-FL0073) and submits that it does not appear on the In-Combination Statement or on the forestry licence viewer. It also makes reference to licence application WW06-FL0202 which was received, it states, on the 14/12/2018 and is similarly not included on the In-Combination Statement. The submission sets out that the In Combination document, stated as being relied upon by DAFM at the hearing (ie dated 18/06/2020), indicates 'No Data Found on Coillte Felling Licence Projects'. The FAC finds that while project WW06-FL0073 was listed in the In combination report dated 11<sup>th</sup> February 2020, that neither of the two projects (WW06-FL0073 and WW06-FL0202) were listed or considered as part of the In Combination assessment dated 18<sup>th</sup> June 2020 in this case. The FAC concluded that this represented a serious error in the processing of the application and decided that a new screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive is required and should be undertaken regarding this proposal.

The FAC considered the contention in the grounds of appeal in FAC 644/2020 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 2018-2021. In doing so the FAC noted the content of the statement of fact made to it by the DAFM, the submissions made at oral hearing and that the nearest point of the proposed roadworks (based on the revised location as shown on the map marked 22/04/2020) to the SLANEY\_070 is approximately 70 to 80 metres. While stating at the oral hearing that there is a watercourse within the area to be served by the proposed road the Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways related to the proposal. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality. The FAC is therefore not satisfied that a serious or significant error or a series of errors were made in making the decision as it relates to this ground of appeal.

Regarding the contention in the grounds of appeal in FAC 644/2020 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

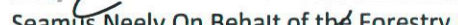


disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration and further that the licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article I of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests, the FAC considered the existing legislative safeguards in place with regard to the matters as raised in these grounds and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC further considered the nature, scale and location of the proposal being for forest road works in an area of managed agricultural and forestry land, and the measures required by the DAFM and noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. The FAC finds that the granting of the licence for the road in this case does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required.

The FAC considered the contentions in the grounds of appeals FAC 663/2020 and FAC 664/2020 that an agreement was in place with an agent of the applicant to position the entrance to the forest road 50m to the west of these appellants existing gateway to their own property, that the enlargement of the existing narrow farm track from the public road to the appellant's gateway as indicated on the maps available to the appellant will result in substantial damage and unnecessary opening up of their gateway, that the removal of existing stone walls should be referred to the Department of Heritage and the Planning Department, that an agreement was in place with an agent of the applicant to avoid the removal of these walls, that an agreement was in place with an agent of the applicant that the extraction of timber could only be achieved through the use of smaller trucks and that multi-axel trailer and tractor units are not appropriate as their use could not be achieved without the destruction of the old walls and existing stone gate piers, neither of which is consented to by the licence as issued (and now under appeal), that the appellants are mindful of the practical requirements relating to the extraction of a timber crop, wish to co-operate with any reasonable approach to such works, but are of the opinion that the location of the new entrance should be as previously agreed with the agent of the applicant, and that any licence issued should be accompanied by sufficient, legally binding conditions to protect their property and that an incorrect map issued with the decision. The FAC is of the view, having regard to the records on file, the submissions made and in particular the submissions made by the applicant's representative at oral hearing that an agreement had been reached between the applicant / representative and the appellants in the case of FAC 663 & 664/2020 and of which the DAFM was aware, in relation to an acceptable revised location for the entrance which is subject to the content of these two appeals. However, that FAC further finds that an error was made in the processing of the licence approval in so far as an incorrect map issued with the licence. The FAC considered that this was a serious error and noted that it was some time before a revised map issued. The FAC is also of the view that there remains some confusion as to the status of the map (which is asserted to show the agreed location of the entrance referenced in these two appeals) in so far as the submission from DAFM at the oral hearing indicated that the said map may not have been digitised to the DAFM record for the application.

In considering the appeals the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing and the submission made by the appellant in the case of FAC 644/2020 following circulation of additional materials (In Combination Reports) subsequent to the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors were made in making the decision in relation to licence CN84980. The FAC is therefore setting aside and remitting the decision regarding licence CN84980 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, to carry out a new screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive, to establish as part of the file record a map that clearly sets out the location of the entrance (subject to the grounds in appeals FAC 663 & 664/2020), and to seek the input of the DAFM Archaeologist regarding the application to establish clearly the conditions recommended in this case, before a new decision is made.

Yours sincerely,

  
Seamus Neely On Behalf of the Forestry Appeals Committee