



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

14<sup>th</sup> May 2021

**Subject:** Appeal FAC780/2020 regarding licence CN85162

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 CN85162 for 1,100 metres of forest road works at Ballybur lower, Grove, Co. Kilkenny was issued by the Minister for Agriculture, Food and the Marine on 14th September 2020 with conditions.

#### **Hearing**

A hearing of appeal FAC780/2020 was held by the FAC on 5<sup>th</sup> May 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: [REDACTED]

DAFM Representatives: Ms. Mary Coogan, Mr. Robert Hamilton

Applicant Representatives: [REDACTED]

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister regarding licence CN85162.

The licence decision pertains to 1,100 metres of forest road works at Ballybur lower, Grove, Co. Kilkenny. The forest road is stated to serve a forest area of 25.7 ha in two sections. The application includes road specification details, environmental considerations, maps showing the area to be served, the route of the road, the location of the site notice and environmental information, aerial imagery and

a location map. The project area is described as being on a predominantly brown podzolic soil with a flat to moderate (<15%) slope and does not adjoin or contain an aquatic zone. The vegetation types within the project area are described as semi-mature broadleaved and coniferous plantation as well as existing farm roads. The works are described as 400m of new road construction and 700m of road upgrade and it is submitted that the northern road (upgrade section) will traverse a watercourse via an existing concrete bridge. The southern portion involves upgrading only and does not cross any waterbody. A submission was made by a member of the public in relation to rights of way across sections of the road. The application was desk and field assessed. The application was referred to Kilkenny County Council which responded on 29/01/2020 submitting that internal forestry roads are exempted development while works which consist of a means of access to a public road are not exempted.

The DAFM documented an Appropriate Assessment screening of the proposal and identified three sites within 15km and that there was no reason to extend this radius in this case. The identified sites are River Barrow and River Nore SAC 002162, River Nore SPA 004233, and Thomastown Quarry SAC 002252. A consideration of other plans and projects in combination is also on the record. The DAFM concluded that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on a European site. The record also includes a consideration of the proposal across a range of criteria and a conclusion that the proposal was not required to under an EIA process.

The application was referred to a DAFM Archaeologist who attached specific conditions in relation to monuments close to the proposed works which were agreed with the National Monument Service.

A licence issued 14/09/2020 with conditions including,

*Observe 30m exclusion zone around recorded monument and carry out Archaeological Monitoring and Report for part of both road segments as detailed in Archaeological Conditions by Forest Service Archaeologist,*

*Install roading, road drains, piping/culverts, turning areas, upgraded bell mouth entrances as per standards and specifications set out in COFORD Forest Road Manual,*

*Road approval is contingent on a written statement from Kilkenny County Council whether a required upgrade of the two existing bell mouth entrances requires Planning Permission,*

*All guidelines to apply.*

There is one appeal against the decision. The grounds contend that the afforestation of the lands was carried out without appropriate screening for EIA or an Appropriate Assessment under Article 6(3) of the Habitats Directive and that the licence should not have been issued before retrospective assessment of the need for an EIA and an AA for the afforestation of these lands had been carried out, that inter alia, that there has been a breach of Articles 2(1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU (The FAC understands this to refer to Directive 2011/92/EU as amended by Directive 2014/52/EU) in that a number of criteria required under Annex III are not taken into account and that the whole project has not been identified or assessed. It is further submitted that the Determination reached by the DAFM is inadequately reasoned and that the application did not contain sufficient information to make the determination and that the details of the application are not an accurate representation of those



required under Regulation 6(2) of the Forestry Regulations 2017. It is submitted that the Stage 1 AA Natura conclusion for site 002162 are based on errors of fact and that the in combination information lacks detail and clarity to enable a definitive position to be reached. It is submitted 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 and that the groundwater in this area is deemed to be at risk. It is submitted that there has been inadequate consultation and that there is no evidence that a third-party issue has been resolved. It is submitted that the licence conditions do not provide a system of protection for wild birds under the Birds Directive or animal species listed in IV(a) of the Habitats Directive.

In a statement to the FAC in response to the appeal, the DAFM submitted that an Assessment of Afforestation Proposal for EIA Requirement Form had been completed in this case that requires the completion of some 40 questions under a series of main headings, all of which are relatable to relevant criteria set out in Annex III of the Directive (and Schedule 3 of the Forestry Regulations 2017). It is submitted that the assessment included consideration of the application in regards the requirements of the Habitats and Water Framework Directives and referrals to the County Council and DAFM Archaeologist. It is submitted that the assessment would have had regard to any valid felling licences and the consideration of other plans and projects in combination with the proposed road. It is submitted that the application was assessed based on the information provided by the Applicant and the preliminary verifications undertaken. The DAFM submitted that that the legal requirements of Article 4(3), 4(4) and 4(5) of the EIA Directive have been fulfilled.

It is submitted that the application had been desk and field assessed and that the works would not require the crossing of any water course during construction and that the works are circa 5100m away from both the River Barrow and River Nore SAC216270 and the River Nore SPA4233. It is submitted that as there is no hydrological pathway between the road proposal and above SAC there can be no possible significant effect on any listed QI's and CO's for the SAC, now or in the future. It is submitted that an initial third-party issue regarding Right of Way ownership and widening at the Ballybur Lower entrance was resolved following consultation between the two parties and signed statements on 18/08/20.

An oral hearing of the appeal was held, of which all parties were notified, and attended by representatives of the DAFM, the Applicant, and the Appellant. The DAFM described the processing of the application and the issuing of the licence and restated their written submissions. The DAFM submitted that the site had been field inspected and that the site is very dry and well drained on a brown podzolic and that there was no risk to water quality or a Natura 2000 site. It was submitted that the works comprise 400 metres of new forest road construction and 700 metres of upgrading and that the upgrading section crosses a relevant watercourse using an existing wide bridge and that there were no proposed in-stream operations proposed. The Appellant submitted that they had no further statement to make other than the submitted written grounds. Addressing questions from the FAC, the Appellant submitted that the application should have been referred to a number of bodies that have a role in the management of the natural environment, that they had no personal interest in the right of way, that ground water could be threatened by spillages during operations, that the Appropriate



Assessment screening did not align with the DAFM's procedures and that hedgerows have not been identified. The Applicant submitted that the road was designed and submitted by an Engineer following desk and field assessment of the site, described the roading operations which would include some surfacing of the upgrading section, that they did not believe that the road should be subject to EIA and that it was subthreshold for the mandatory submission of an EIA report, and that the road would be constructed following the COFORD Forest Road Manual as required. The DAFM submitted details on the in-combination process followed and expressed satisfaction with the conclusions reached.

The FAC considered in the first instance the grounds that relate to Environmental Impact Assessment (EIA) Directive and related matters. The FAC considered that 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. In this instance the proposal is considered across a number of criteria including the Project Description, Cumulative effect and extent of project, Water, Soil, terrain, slope and other factors. The DAFM also completed a screening for Appropriate Assessment and considered other conservation sites and issues. Answers are provided to the listed questions. At 1,100 metres the forest road works are sub-threshold for the mandatory submission of an EIA Report. As noted, the forest road would be located in an area of managed forest and existing agricultural track and is outside of any areas designated for nature conservation.

The stream or drain crossed by an existing bridge and agricultural track flows northeasterly to join Ennisnag stream 010 which has been assigned a Poor and At Risk regarding the Water Framework Directive based on information provided by the EPA. The pressure on the waterbody for the second WFD cycle is identified as Agriculture. There is no proposal for upgrading of this bridge or any in-stream works and the FAC is satisfied that the proposal would not impact on the waterbody. The groundwater body at the southwestern section of the proposal area is identified as Callan (IE\_SE\_G\_026) and is assigned a status of Good but At Risk. EPA information states that there is no monitoring status in place but reference is made to pesticides in the chemical description and none would be employed in the proposal. The northeastern section is on a groundwater body identified as Clifden Northwest which has been assigned a status of Good and Not at Risk. The works are of a small scale involving 400 metres of unbounded road construction through shallow excavation and 700 metres of upgrading which would involve some surfacing and would also not involve any deep excavations. The FAC is satisfied that the proposal would not pose a threat to the status or quality of any surface or ground waterbody. The FAC considered that there was no evidence that the proposal as licenced would present a risk to water quality or the achievement of the objectives of the Water Framework Directive. The EIA considerations of the DAFM also document a consideration of this issue.



Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The proposed forest road works are not situated within the boundaries of a European site and are not directly connected with or necessary to the management of a site. As noted, the DAFM recorded a screening for Appropriate Assessment that included plans and projects considered in-combination with the proposed forest road works. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same three sites within 15km of the proposal.

The proposal would lie 5.3km from the boundary of the River Barrow and River Nore SAC (002162) and its qualifying interests include a number of terrestrial and aquatic habitats and species, a number of which are sensitive to water quality. The proposal area does not lie within a Freshwater Pearl Mussel Catchment and none lie downstream. The proposal does not provide for any in-stream works or works on the existing bridge crossing a small stream or drain and it was submitted that this was not significant and that the bridge is wide at this section. This stream flows south-easterly and enters the boundary of the SAC north of Stonyford after some 13km. The River Nore SPA (004233) also lies c.5.3km from the proposal and has been designated for the Kingfisher (*Alcedo atthis*) and the FAC is satisfied that the proposal is sufficiently removed and unsuitable for any effects to arise. Thomastown Quarry SAC (002252) lies some 12.9km from the proposal and has been designated for a terrestrial habitat. While the Appellant contested the conclusion regarding River Barrow and River Nore SAC no evidence was submitted that contradicted the facts as provided in the application and at the oral hearing. The FAC considered the range and type of plans and projects considered in-combination with the proposed road and concluded that they were acceptable. Having regard to the record of the decision, the grounds of appeal and submissions at the oral hearing the FAC does not consider that there is any evidence that the DAFM Appropriate Assessment screening contains serious or significant errors and concurs with the conclusions reached. The EIA considerations of the DAFM also record that no Natural Heritage Area or other designated site would be impacted by the proposal.

The DAFM had completed each section of its EIA determination and the responses appeared to the FAC to be fundamentally in keeping with the facts of the matter. The FAC queried the response recorded 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' and it was submitted that this was an error and that the DAFM had desk and field inspected the application and was satisfied with the design and specification. It was submitted by the Applicant that the road had been designed and specified by an Engineer following desk and field assessment of the area. The FAC did not consider that there was any evidence to contradict this. As noted, the DAFM considered the proposal across a range of criteria and recorded its reason to conclude that the proposal should not proceed to EIA. The FAC considered that the criteria considered, in addition to the screening and other parts of the record, were appropriate in this case and that the reasons are recorded and display sufficient reason for the conclusion reached that the proposal should not be subject to the EIA process and are appropriate having regard to the nature, scale and location of the proposal.

Regarding consultation with referral bodies and public submissions, the FAC considered that the application had been referred to Kilkenny County Council and a response had been provided. The FAC considered that the DAFM had desk and field assessed the application and established an absence of pathway of significant effects to a watercourse or a designated area. The DAFM submitted at the oral hearing that it had regard to the nature and location of the proposal and considered that there was no requirement to refer the application to other bodies in this case but that such referrals are made regularly where deemed to be appropriate. The FAC considered this to be reasonable having regard to the nature of the proposal and the assessments undertaken by the DAFM.

As noted, the application included project design details, road specification, environmental considerations and maps. The maps show the general area and field boundaries and environmental features and the proposed forest road works are marked. The FAC considered this information and concluded that there was no reason to conclude in this case that the information provided was inadequate to facilitate the considerations of the DAFM which were supplemented with field inspection. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached and did not consider that any convincing evidence was provided to it that proposal would be likely to have a significant effect on the environment.

In relation to the appellant's stated 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 or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM record, including the screenings and assessment undertaken. The FAC noted that no details or evidence of the presence of species on the site was provided by the Appellant. The FAC considered 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 is not satisfied that an error was made in making the decision.

Regarding the issue raised by a third party in relation to the use of a shared right of way. The Appellant submitted that they had no direct interest in this matter. The DAFM and Applicant submitted that this issue had been resolved and provided signatures of a number of parties. The FAC considered that this issue appeared to be primarily related to a civil matter between the two parties that has been resolved and that there was no reason that this would affect the decision before the FAC.

While not raised directly in the grounds of appeal the FAC had considered the condition that,

*Road approval is contingent on a written statement from Kilkenny County Council whether a required upgrade of the two existing bell mouth entrances requires Planning Permission*

It was submitted at the oral hearing that the DAFM had some concerns regarding the access and that clarification regarding the status of the entrance was considered necessary. The response from the County Council had stated that internal forest roads are exempted developments but that works which



consist of a means of access to a public road are not exempted development and require the benefit of planning permission in accordance with Section 4(1) (ia) of the Planning and Development Regulations 2011-2019. The response did not provide clarity to the particular proposal before the FAC. The FAC did not consider that this condition as stated provided for sufficient clarity and enforcement regarding the issues raised by the DAFM at the oral hearing. The FAC is thus varying the condition to provide for the submission of this information prior to the commencement of works. The identified licence condition should be removed and replaced with the following condition.

*Prior to the commencement of any forest road works a written statement from Kilkenny County Council that the required upgrade of the two existing bell mouth entrances does not require Planning Permission or a copy of the relevant Planning Permission must be submitted to and acknowledged by the Department of Agriculture, Food and the Marine. Reason: For clarity and to ensure adherence with Good Forestry Practice.*

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is satisfied that the identified condition as stated represents a serious and significant error in the making of the decision. The FAC is therefore vary the decision of the Minister regarding licence CN85162 in line with Article 14B of the Agricultural Appeals Act 2001, as amended to replace the identified licence condition.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton / On Behalf of the Forestry Appeals Committee

