



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

14th May 2021

Subject: Appeal FAC 662/2020 regarding licence CN85042

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background and Hearing

Licence CN85042 for 733 metres of forest road at Moyarta east, Lisheencrony, Breaghva, Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 14th August 2020. An oral hearing of appeal FAC 662/2020, of which all parties were notified was held by the FAC on 5th May 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Mary Coogan, Mr. Kevin Keary,

Appellant:

[REDACTED]

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 to grant the licence CN85042.

The licence pertains to 733 metres of forest road (which is made up of three separate sections) to serve three separate plots totalling 29.33 ha of forest at Moyarta east, Lisheencrony, Breaghva, Co. Clare. The soil type underlying the project area is described in the Appropriate Assessment screening documentation as being predominantly 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 vegetation type(s) within the project area is said to comprise coniferous and broadleaved high forest. The project, which was

desk and field assessed, is said to be located in a rural landscape in Breaghva (ED Moyorta), Lisheencrony, Moyorta East, Co. Clare in the River Sub Basins Carrownaweelaun_010 (river waterbody has an unassigned status) and Moyana_010 (river waterbody has been assigned a Poor status in the 2013-18 assessment period). The specification of the road works was provided with the application.

The DAFM undertook a screening of the proposal for Appropriate Assessment and found that there were six European sites (Illaunonearaun SPA 00411, Kilkee Reefs SAC 002264, Loop Head SPA 004119, Lower River Shannon SAC 002165, River Shannon and River Fergus Estuaries SPA 004077 and Tullagher Lough And Bog SAC 002343) 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 six sites are 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 Clare County Council who responded raising specific matters in relation to the protection of roads in particular. The licence was approved on 14th August 2020.

There is one appeal against the decision. The grounds 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 a Member state exceeds the limits of its discretion in circumstances where all relevant selection criteria are not taken into account, that a number of criteria set out in Annex III do not form part of the standard FS screening assessment, that the licence is for an area which is part of a larger programme of works, that it does not represent the 'whole' project and therefore it is in breach of the EIA Directive, 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, that there is, in consequence, an error of law in the processing of this application, that there is insufficient information included with the application to permit the Inspector to make a conclusive determination as to whether an EIA is required, 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 a submission by a member of the public has not been examined and considered, that the proposed design and construction, combined with any condition attached to approval, does not meet the safety-related standards set out in the COFORD Forest Road Manual and any health and safety issues raised by the Local Authority, that the NPWS was not consulted despite the project area being near an SAC, that the details in the application are not an accurate representation of those required under Regulation 6(2) of the Forestry Regulations (2017) and that as a result the application was not legally complete and could not have been processed legally, 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 as in the absence of adequate consultation and assessment of cumulative impact 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 Stage I 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 conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the stated requirements of Clare County Council, 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 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.

In a statement 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. At the oral hearing the DAFM representative drew the FACs attention to some errors that the DAFM had noted in the record when preparing for the hearing. In particular the DAFM representative stated at hearing that the answer (N/A) as recorded for question 9 in the *Assessment to Determine EIA Requirement* is incorrect and that it should have been recorded as 'No'. They also provided some context to the answers as recorded at question 28 while confirming that the application was not referred to the DAFM ecologist or the National Parks and Wildlife Service. The DAFM representative set out to the hearing that the site was field inspected, that it had been walked, that there was no evidence of the project being crossed by an aquatic zone and that the nearest point of the project to an aquatic zone was some 129 metres. It was stated that while there was an entry on the 6-inch map that indicates that water rises in the project area no such evidence was visible on the ground. It was asserted that the plantation of the area likely had the effect of drying the ground over a 20 – 30 year period. In response to a query from the FAC as to whether that application should have been referred to the DAFM Archaeologist the DAFM representative stated that there is a ring fort some 150 metres from the project area and that the application should therefore have been referred to the DAFM Archaeologist.

The FAC, in the first instance, considered the contentions in the grounds of appeal regarding Environmental Impact Assessment (EIA) and related matters including that there is insufficient information in the application and available to inform EIA requirement consideration, and that the proposed design and construction of the forest road does not take account of soil, terrain and slope in a way that mitigates against environmental damage. The FAC noted the submission 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 that (and as referenced earlier in this letter) the answer to question 9 in relation to the cumulative effect of the proposal should have been 'No' instead of the 'N/A' as recorded, 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 and 23 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 733m, 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 / 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 contentions in the grounds of appeal regarding Appropriate Assessment and related matters, the FAC finds that the DAFM undertook a screening of the project for Appropriate Assessment which examined six European sites within 15km and that there was no requirement to extend the radius in this case to include further European sites. The six sites examined were Illaunonearaun SPA 00411, Kilkee Reefs SAC 002264, Loop Head SPA 004119, Lower River Shannon SAC 002165, River Shannon and River Fergus Estuaries SPA 004077, and Tullagher Lough And Bog SAC 002343. Each site is considered in turn along with its qualifying interests and the reasons for the screening conclusions reached are documented. All six sites were screened out for the purposes of Appropriate Assessment. The FAC examined publicly available information from the NPWS and EPA and identified the same six European sites (Illauonearaun SPA 00411, Kilkee Reefs SAC 002264, Loop Head SPA 004119, Lower River Shannon SAC 002165, River Shannon and River Fergus Estuaries SPA 004077, and Tullagher Lough And Bog SAC 002343). The FAC finds that the DAFM also recorded other plans and projects that were considered in combination with the proposal however it is noted that the following content '*[If the in-combination information is being sought at Screening stage, insert the following text. Otherwise, do not insert, i.e. leave blank for Ecological Unit itself to prepare an appropriate statement.]*' which is generic in nature, is recorded within the text of the In-Combination Statement on file (and appears as not having been fully finalised). The FAC is satisfied that this constitutes an error in the making of the decision and while noting

the submissions made by DAFM at the Oral Hearing, the FAC concluded 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 finds that Regulation 6(2) of the Forestry regulations 2017 require that an application for a licence in respect of forest road works shall contain—

- (a) an Ordnance Survey map or other map acceptable to the Minister, with the boundary of the land to which the application relates delineated and the route of the proposed road clearly marked and shall clearly show the following details— (i) public roads, (ii) forest roads, (iii) aquatic zones, (iv) wayleaves, (v) archaeological sites or features, (vi) hedgerows, and (vii) any other features which may be relevant to the application,
- (b) an environmental impact statement where the application involves forest road works which is 2000 metres or more in length, or where the Minister has determined that an environmental impact assessment is necessary, and
- (c) the information set out in Schedule 1 or such other information that the Minister considers necessary to issue a licence or determine appropriate conditions.

The FAC having considered the application including maps on file considered that the information supplied by the applicant provided the DAFM with sufficient detail to meet the requirements of Regulation 6(2) of the Forestry Regulations 2017 as it relates to a forest road works project.

The FAC considered the contention in the grounds of appeal 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 2018-2021. In doing so the FAC noted the content of the DAFM statement, the submissions made at oral hearing in response to questions from the FAC wherein the DAFM representative gave an account of the field inspection carried out. The Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways related to the proposal other than a reference to an absence of adequate consultation and assessment of cumulative impact. 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 considered the ground in the appeal that the licence conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the stated requirements of Clare County Council. In doing so it also considered the submission made by Clare County Council which among other matters sought the lodgement of a bond or cash deposit in the sum of €214,500.00 by the 'contractor' with the Planning Authority prior to commencement of any works on site. The Local Authority submission goes on to state that *'In the event of the non-completion of maintenance of the service the Planning Authority shall be empowered to apply the said funds or part thereof for the satisfactory completion of maintenance as aforesaid of any part of the development'*. In response to questions put by the FAC at the oral hearing the

DAFM representative confirmed that having considered the submission from the Local Authority the DAFM was not empowered to impose the requirements of the Local Authority as a condition / requirement on the applicant. The FAC having considered this aspect agreed that there is no legal provisions contained within the legislation governing the approval of a licence for a forest road to enable the inclusion and enforceability of this request. The FAC also considered that the request from the Council in this matter was somewhat ambiguous in so far as it was presented in the context of the Local Authority as Planning Authority (whereas the Local Authority function in relation to protection of the public road arises in its role as a Road Authority), and makes reference to 'the contractor' who cannot be bound directly through any licence issued in so far as it is only the applicant (or successors) that can be bound by the licence. The FAC considered that that the reference therein to the 'development' can only be read to refer to the road works proposal the subject of this application having regard to the fact that no works (development) are proposed to be carried out on the public road. The FAC also considered that the amount of bond / cash deposit sought ie €214,500.00 (if same was to make good any damage to the public road) seemed disproportionate to the scale and nature of the project (being for the construction of 733 metres of forest roading) and for which the licence was sought. The DAFM representative also asserted that it was DAFM's intention, in including condition no 12 in the licence, to bring the request / requirements set out by the Local Authority to the attention of the applicant and that compliance with the condition will ensure that this occurs. Based on the information available to it, including submissions and clarifications made by DAFM at the oral hearing, the FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision as it relates to this ground of appeal.

Regarding the contention in the appeal grounds (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 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 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. 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.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at 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 application CN85042. The FAC is therefore setting aside and remitting the decision regarding licence CN85042 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 and to seek the input of the DAFM Archaeologist regarding the application, before a new decision is made.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

