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19th May 2021.

Subject: Appeal FAC 702/2020 regarding licence CN85342

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

Licence CN85342 is for the construction of a forest road 110 metres in length at Carn, Co Mayo, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 3rd of September 2020 subject to standard conditions.

Hearing

An oral hearing of appeal FAC 702/2020 was held by the FAC on 7th May 2021.

In attendance:

FAC Members; FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Mr. Iain Douglas, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms Mary Coogan, Mr. David Ryan.

Applicant: [REDACTED]

Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN85342.

Licence.

The licence pertains to the construction of a forest road of 110 metres in length in length to serve 4.9 hectares of forestry at Carn, Co Mayo. The proposed road is accessed from the public road and planning permission was granted by Mayo County Council for an access, upgrade of forest access road and

associated security gate and turning area under P.A. Ref. No. P20/232 in July 2020. The project site is within the subcatchment of Cloonalaghan_010 River Waterbody WFD. The Cloonalaghan_010 River Waterbody WFD has a good WFD status (2013 -2018) and in terms of risk is indicated as not at risk. The method of construction is build on top and there is reference to a roadside drain which it is required to be piped at the entrance. The inspector certification refers to predominant soil type underlining the project area is predominantly highly modified peat & peaty podzols in nature. The slope is predominantly flat to moderate. The project area does not adjoin or contain an aquatic zone. The vegetation types within the project area comprise WD4/FW4/WL1 conifer plantation, drainage ditches and hedgerows.

The proposal was referred to Mayo Co Council and no response was received.

An Appropriate Assessment screening was carried out and recorded on the file. Six Natura sites were found to be within 15kms of the project site. Bellacorick Bog Complex SAC 001922 which was screened out due to being 7km distant and no hydrological connection. Glenamoy Bog Complex SAC 000500 which was screened out due to being 6km distant and no hydrological connection. Killala Bay/Moy Estuary SAC 000458 which was screened out due to being 3km distant and no hydrological connection. Killala Bay/Moy Estuary SPA 004036 screened out due to being 3km distant and no hydrological connection. Lackan Saltmarsh and Kilcummin Head SAC 000516 which was screened out due to being 4.5km distant and no hydrological connection. River Moy SAC 002298 screened out due to being 12km distant and no hydrological connection. The Appropriate Assessment screening concluded no likelihood of a significant effect on any European site, and therefore Appropriate Assessment was not required.

In-combination assessments dated refers to the week of 29th July 2020 are on the file indicating no effects on any Natura site concluding that the project does not have a potential to contribute to any effects when considered in-combination with other plans and projects.

The licence was issued on the 3rd of September 2020 subject to standard conditions.

Appeal.

There is one appeal against the decision to grant the licence.

The grounds of appeal indicate:

- The afforestation of these lands was carried out without appropriate screening for the requirement for an EIA or an AA under Article 6 (3) of the Habitats Directive. This was contrary to European Law. There is a requirement under EU law for the remediation of any deficiency in the Implementation of EU law. No licence should be awarded for any further activity on this project site until there has been a retrospective assessment of the need for an EIA and an AA has been conducted for the afforestation of these lands.
- Breach of Articles 2(1) and 4(3) of the EIA Directive 2014/52/EU in 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. A number of criteria set out in Annex III do not form part of the Forestry Service (FS) screening assessment.

- Breach of Article 4(4) of the EIA Directive 2014/52/EU which requires a developer to submit details of the overall project and this has not occurred as a forest road is not the entire project. This is reference in this regard to consideration of the cumulative effects arising.
- Breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/52/EU Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) 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. A number of criteria set out in Annex III 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 relevant selection criteria listed in Annex III.
- Breach of Article 4 (4) of the EIA Directive 2014/52/EU Article 4 (4) of the EIA Directive) requires a developer to submit details of the whole project. The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive. A Forest Road is not a whole project and is part of a larger scheduled programme of works which needs to be assessed in an integrated and coherent manner in respect of the potential of the programme to have a cumulative significant environmental impact. The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of elements of a project must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.
- Breach of Article 4 (5) of the EIA Directive 2014/52/EU Article 4 (5) of the EIA Directive requires a competent authority to make its determination, on the basis of the information provided by the developer in accordance with paragraph 4. Since the application for this licence does not represent the whole project therefore any determination reached in terms of EIA screening is invalid. All elements of a project must be considered as part of the determination as to whether an EIA is required for the whole project.
- The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned. There is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which include errors) 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.
- There is insufficient information included with the application to permit the Inspector to make a conclusive determination as to whether an EIA is required.
- The Inspector's certification indicates that the area is 'within 3km upstream of an NHA, pNHA, SAC, cSAC, SPA, pSPA or National Park' but the application was not referred to National Parks and Wildlife Service (NPWS).
- This licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 In the absence of an adequate consultation and an assessment of the cumulative impact of

this project with other projects 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. Inland Fisheries Ireland (IFI) was not consulted on this application.

- The Stage 1 AA conclusion is not legally valid; the project is in the catchment of two Natura 2000 sites with aquatic qualifying interests. In screening out the project the Inspector has not applied a proper test which has led to an inadequate screening conclusion 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. DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question. Where there are lacunae the precautionary principle applies.
- 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. 11. Licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and the Department is satisfied that all criteria as outlined in the relevant standards and procedures had been adhered to in making a decision on the application.

The Statement from the Forestry Inspectorate indicates as regards Article 4(3) of the EIA Directive 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; the Assessment of Afforestation Proposal for EIA Requirement Form as completed by the certifying Inspector and recorded on iFORIS; consideration of all documentation and the reasoning by the certifying Inspector for his determination that an environmental impact assessment (EIA) was not required.

District Inspectors carry out an assessment of possible in-combination impacts of all forest related plans/projects in the vicinity of the application and the Department submits that the legal requirements of Article 4(3) of the EIA Directive have been fulfilled. As part of its consideration of this application pursuant to the requirements of the Birds and Habitats Directives, a detailed list of existing or approved projects around the application was available to and also taken into consideration by the certifying Inspector in the making of his determination that an Environmental Impact Assessment (EIA) was not required.

The Department in the Statement of Fact (SoF) also 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 of 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 project was screened for the requirement for Appropriate Assessment and the screening information is on file. An in-combination report was compiled by the FS on the 29/07/2020. There is an existing entrance at the location with an existing culvert over a vegetated drain. There is no aquatic zone as defined onsite. The site is 70m distant and at a lower elevation from the nearest aquatic zone (AZ) therefore there is no hydrological connection at this point. The drain at the site runs for a distance of 480m on a gentle slope to the nearest AZ, which in turn is 420m from the Carn River. The site is not in a fisheries sensitive area, nor does it cross an AZ therefore a referral to Inland Fisheries was not required.

An oral hearing was held of which all parties were notified and representatives of the DAFM attended. The DAFM presented an overview of their processing of the licence and indicated that the site was inspected on the 24th February 2020. The project would be build on top construction and there are no aquatic zones. The assessment considered Natura sites and reasons for screening out were indicated.

At the hearing the FAC reviewed the inspector's determination and recommendation were in particular the responses in the Environmental Considerations in relation to section 3.2 and the proximity of the nearest Natura site the Lackan Saltmarsh and Kilcummin Head SAC 000516 which was clarified and also in relation to 5.1 referring to designations in the Mayo County Development Plan. The DAFM submitted that there was no requirement in this case to make a referral to the NPWS as no effects would occur on any designated site. The issue of drainage of the site, location of watercourses and potential of hydro connectivity was raised. The issue of road construction and the length of the road was raised. The issues raised were addressed to the satisfaction of the FAC. The inspector's determination and recommendation is also considered adequately reasoned based on the responses received at the oral hearing and the application details.

In addressing the grounds of appeal, the FAC considered *inter alia*; the requirements of the Habitats and EIA directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In considering the appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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. Forest roads are not referred to in Annex I or Annex II. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to 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 DAFM considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects and determined that the project was not required to undergo the EIA process. The proposal is for 110 metres of forest road construction to facilitate the management of commercial forest for timber production, which is considerably sub-threshold for the mandatory submission of an EIAR. Having regard to the record of the decision and the submitted grounds, submissions at the oral hearing and the nature, scale and location of the proposal the FAC is satisfied that the proposal would not result in any likelihood of significant effects on the environment and that the DAFM did not err in its decision concerning EIA.

In considering the appeal the FAC examined the Appropriate Assessment undertaken by the DAFM including the initial screening. The FAC considered that the decision of the Minister before it related to the 110 metres of forest road works. The FAC examined publicly available information from the EPA and NPWS and identified the same six sites; Bellacorick Bog Complex SAC 001922; Glenamoy Bog Complex SAC 000500; Killala Bay/Moy Estuary SAC 000458; Killala Bay/Moy Estuary SPA 004036; Lackan Saltmarsh and Kilcummin Head SAC 000516 River Moy SAC 002298 as the DAFM within 15km from the proposal. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for appropriate assessment. Details of other plans and projects were also examined. The proposed road works are located outside of any European site and there is no evidence of a pathway of effects to a European site. There is no evidence of protected habitats or species on the site. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached.

Specifically, in relation to potential hydrological impacts on Natura sites and on water quality generally, at the oral hearing the DAFM and the applicant submitted that field inspections clearly identified there was no significant watercourse on the site and no pathway to any Natura site. The FAC also examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area concludes that surface water from the proposed road would not drain directly to a watercourse and there was no direct pathway to any watercourse. The FAC is satisfied based on the responses received that the construction measures and the accompanying method of drainage as proposed will not impact on any Natura sites or any receiving waters.

In relation to the ground of appeal that the licence conditions do not provide a system of protection for wild animals and birds during the period of breeding and rearing consistent with the requirements of the Habitats and Birds Directives. The FAC note that the granting of a licence for a forest road does not exempt the holder from complying with any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in the grounds of appeal in relation to animals or bird nesting or rearing on the proposed site. The FAC considered that the DAFM had completed a screening for Appropriate Assessment and had undertaken a site inspection prior to making the decision. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant are not warranted.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including 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 or that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence CN85342 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government Policy and Good Forestry Practice.

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee

