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21<sup>st</sup> May 2021

**Subject:** Appeal FAC679/2020 regarding licence CN86686

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 CN86686 for 640 metres of forest road works at Molougha, Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 14<sup>th</sup> August 2020. An oral hearing of appeal FAC 679/2020, of which all parties were notified was held by the FAC on 12<sup>th</sup> May 2021.

#### **In attendance at Oral Hearing:**

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr. Vincent Upton.
Secretary to the FAC:	Ms. Marie Dobbyn.
Department Representatives:	Ms. Mary Coogan, Mr. Kevin Keary,
Appellant:	[REDACTED]
Applicant's Representative:	[REDACTED]

#### **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 CN86686.

The licence decision pertains to 640 metres of forest road works at Molougha, Co. Clare. No new entrance or widening of entrance to public road is proposed and the road is described as servicing a forest area of 16.73 ha. 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. According to the record, the soil type underlining the project area is predominantly podzols in nature and the slope is predominantly flat to moderate (<15%) and the project area does not adjoin or contain an aquatic zone. The vegetation type within the project area

comprise coniferous high forest. The works would involve a number of excavated sections (Sections A-B, C-D, E-F on the provided maps) leading from an existing road which would be upgraded. The DAFM undertook a desk and field assessment of the application.

The application was referred to Clare County Council and the reply includes a number of requests including the submission of a traffic management plan and road condition survey and a bond. The application was also referred to Inland Fisheries Ireland and no response was recorded.

The DAFM documented an Appropriate Assessment screening of the proposal and identified six sites within 15km and that there was no reason to extend this radius in this case. A consideration of other plans and project in combination is also on the record. Each site is considered in turn and reasons are provided for the screening conclusions. 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 and that Appropriate Assessment was not required. The identified sites were Lower River Shannon SAC, Tullagher Lough and Bog SAC, Carrowmore Dunes SAC, River Shannon and River Fergus Estuaries SPA, Mid-Clare Coast SPA and Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. 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. A submission was made by the Appellant regarding a number of issues and in relation to a number of licences. The licence issued on 14<sup>th</sup> August 2020 with conditions.

There is one appeal against the decision. The grounds submit that the notification of the decision was inadequate as there are two townlands with the name Riesk in Co. Kilkenny and the notification of the decision on the DAFM website did not identify to which townland the application applies. The grounds further contend, inter alia, that there has been a breach of Articles 2(1), 4(2) and 4(3) 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. 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 representations of those required under Regulation 6(2) of the Forestry Regulations 2017. It is submitted that the proposed design and construction does not take into account soil, terrain and slope in a way that mitigates against any environmental damage. It is submitted that issues raised with the Forest Service by the general public have not been examined and considered.

It is submitted that the Stage 1 AA Natura conclusion is not legally valid 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. 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. 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 the legal requirements the EIA Directive have been fulfilled.

The statement further submits that the site was inspected on the 23/07/2020: after the time period required to have the site notice erected had expired. The site is relatively flat and there is already an access track in place, which is varying in quality from a mettled surface to a firm but muddy surface. The boundaries of the forest adjoining the central access track are heavily vegetated, there are some drains along this boundary but they are shallow drains and due to the vegetation in place and that the DAFM Inspector deemed that the probability of any run off occurring is zero. The proposed branches of road into the plantations are to be constructed off this central access road and cross these shallow vegetated drains. Considering the above and the proximity of Natura 2000 sites within the 15km zone of impact, the Inspector deemed that the application be screened out for any possibility of adverse impacts to said Natura 2000 sites.

An oral hearing of the appeal was held of which all parties were notified and attended by the Appellant and representatives of the DAFM and Applicant. During the oral hearing the DAFM restated their written submission and described the field assessment undertaken. They submitted that a detailed site assessment had been undertaken and that they established that water would not leave the site or that there was a hydrological pathway to any European site. Following questions by the FAC a number of responses provided in relation to the *Assessment to Determine EIA Requirement* were submitted to be errors. The Appellant submitted that the first ground submitted in relation to townlands was an error and that they did not wish to make a further submission. Following questions from the FAC, the Appellant clarified that they had concerns regarding the Appropriate Assessment screening in relation to European site 2165 and 4077 as they felt there was a hydrological connection to these designated sites. The Applicant described the application and proposed operations and described the road as serving 16.72 ha of forest for all management purposes. They submitted that the road would extend an existing road and would be unbounded and no concrete would be used. They submitted that there was no risk of water leaving the site and that the proposal was sub-threshold for mandatory EIA.

The FAC considered the submission from the Appellant at the oral hearing regarding the location of the proposal and the suggestion that there are two townlands named Riesk in Co. Kilkenny. The Appellant submitted at the oral hearing that this was an error. The proposal would take place in Co. Clare and the FAC accepted that the grounds were submitted in error.



The FAC 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. 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 640 metres, and so is sub threshold for mandatory EIA as set in Irish Regulations. The FAC considered that 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. 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 submitted that responses provided to questions 9, 16, 24, 26, 27, 33 and 37 were made in error. This included a consideration of the design and construction of the forest road and the consideration of submissions as identified in the grounds. In addition, the approval letter states that no submissions from third parties were received by the Department concerning this application which is also an error. Having regard to the record, the FAC is not satisfied that a number of issues were given sufficient consideration in the *Assessment to Determine EIA Requirement* and the reasons for the conclusion could not be ascertained from the overall record. In considering all of this, the FAC is satisfied that this represents a serious error in the making of the decision and that the decision should be remitted to the Minister to complete a new '*Assessment to Determine EIA Requirement*'.

Regarding the information provided with the application the FAC considered that no specific reference or example of deficiency is provided in the grounds. The FAC having considered the application on file including maps, specification details and environmental information considered that the information supplied by the applicant provided the DAFM with sufficient detail to facilitate the consideration of the application.

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 Lower River Shannon SAC,



Tullagher Lough and Bog SAC, Carrowmore Dunes SAC, River Shannon and River Fergus Estuaries SPA, Mid-Clare Coast SPA and Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. At the oral hearing the Appellant expressed specific concern regarding Lower River Shannon SAC 002165 and River Shannon and River Fergus Estuaries SPA 004077 in that they believed that a hydrological connection with these sites could be present. The DAFM submitted that they had undertaken a site assessment and had considered this issue expressly and had found that there was no hydrological connection to any European site. The boundaries of both sites lie some 3km to the south of the proposal. The proposed road is of a small scale and would involve limited shallow excavation works and does not adjoin or cross an aquatic zone. The Appellant submitted that a drain may be present at the southwestern edge of the forest based on mapping information. This lies c.170 metres from the forest road works. A separate marked stream lies c.160 metres to the north of the works. The works would take place in mature, coniferous forest which is not a habitat associated with either European site. The FAC does not consider that there is any evidence before it of a pathway of effects from the licensed works to a European site. The FAC considers that the range and type of projects considered in combination with the proposal is appropriate and that there is no evidence of a deficiency in this regard. As noted at the oral hearing, the FAC considered the description of the proposal on the record as containing an error in describing an area rather than a length but that this constituted an obvious typographical error and that it would not impact on the decision. The FAC is not satisfied that the DAFM have erred in its screening for Appropriate Assessment.

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 assessment of cumulative impact. The proposal lies in the Wood\_SC\_010 subcatchment of Shannon Estuary North Catchment (27). A marked stream, Kilcarroll stream lies c.160metres from the existing road and 350m from proposed excavation works. This forms part of the Wood 010 waterbody which has a Poor status and considered At Risk in relation to the Water Framework Directive with Agriculture and Pasture identified as pressures by the EPA. As noted by the Appellant, the mapping submitted by the Applicant shows an unmarked stream or drain to the southwest of the proposed works at a distance of some 160 metres. The licence requires adherence with standards of good practice which include the specific protections for water. There is no evidence before the FAC of a direct connection from the works to a waterbody or possible impacts on a waterbody. The FAC is not satisfied that the DAFM have erred in regard to the protection of water and the objectives of the River Basin Management Plan 2018-2021.

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 1 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 not satisfied that the DAFM have erred in relation to the specification of licence conditions in this regard.

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 was made in making the decision in relation to licence application CN86686. The FAC is therefore setting aside and remitting the decision regarding licence CN86686 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 before a new decision is made.

Yours sincerely,

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

Vincent Upton On Behalf of the Forestry Appeals Committee