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28th May 2021

Subject: Appeal FAC 757/2020 regarding licence CN82720

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 CN82720 relating to the construction of 495 metres of forest road of at Gortacoula, Co Tipperary was approved by the Department of Agriculture, Food and the Marine (DAFM) on 28th August 2020. An oral hearing of appeal FAC 757/2020, of which all parties were notified was held by the FAC on 10th May 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Mary Coogan, Mr. Ciaran Nugent.

Appellant:

[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.

Secretary to the FAC:

Ms. Heather Goodwin.

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 CN82720.

The licence pertains to the construction of a forest road of 495 metres at Gortacoula Co Tipperary and is to serve 22.74 ha of forest. The site is described as having a soil type which is predominantly podzolic in nature, that is flat to moderate in slope and that is crossed by/adjoins an aquatic zone. The project was desk and field assessed, was referred to the County Council, the Southern Regional Fisheries Board (IFI) and the National Parks and Wildlife Service who replied on 7th March 2019. No replies are recorded from

the County Council or the Inland Fisheries Ireland. The project is in the sub basin of the Newport (TIPPERARY) _040 waterbody which has a high status in the 2013 – 18 assessment period.

A screening of the proposal for Appropriate Assessment was undertaken for the DAFM (and dated 10th August 2020) which found that there were ten European sites (Lower River Shannon SAC 002165, Keeper Hill SAC 001197, Slieve Bernagh Bog SAC 002312, Clare Glen SAC 000930, Silvermine Mountains SAC 000939, Bolingbrook Hill SAC 002124, Silvermines Mountains West SAC 002258, Glenstal Wood SAC 001432, Slievefelim to Silvermines Mountains SPA 004165 and Lough Derg (Shannon) SPA 004058) 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 / special conservation interests as listed and the reasons for the screening conclusions reached are documented. Two of the sites (Lower River Shannon SAC 002165 and Slievefelim to Silvermines Mountains SPA 004165 which has some overlap with the project) were screened in and the other eight sites were screened out for the purposes of Appropriate Assessment. A second screening for Appropriate Assessment is included within the Inspectors Certification documentation which identifies the same ten sites and records that all ten sites are screened out. The DAFM representative confirmed to the FAC that the screening relied on in making the decision in this case was that dated 10th August 2000 as recorded in the separate report on the record. The 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.

There is one appeal against the decision. The grounds contend that there is;

1. A breach of Articles 2 (1), 4(2), and 4(3) 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 and that a number of criteria set out in Annex III do not form part of the standard FS screening assessment,
2. A breach of Article 4 (4) of the EIA Directive 2014 152/EU submitting that a road project does not represent the whole project.
3. A breach of Article 4 (5) of the EIA Directive 2014/52/EU submitting that the application does not represent the whole project and that any determination reached in terms of EIA screening is invalid,
4. That the afforestation of these lands was carried out without appropriate screening for the requirement for an EIA or an Appropriate Assessment under Article 6(3) of the Habitats Directive,
5. That the application is not compliant with 6(2) of the Forestry Regulation (2017) in that it is not an accurate representation of the details required under same,
6. That the site notice was in breach of Regulation 11(1),
7. 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,
8. 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, as a consequence, an error of law in the processing of this application,

9. That the mitigations contained in the AA Determination 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 Article 6(3) of the Habitats Directive,
10. That the residual effects of this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed,
11. That the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination,
12. 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,
13. 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,
14. 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. The DAFM representative at oral hearing drew attention to the statement provided by the DAFM to the FAC wherein it set out that;

'The licence application CN82720 was field and desk inspected on 13/12/18 and at least 4 other inputs by DI until approval was recommended. The required referrals to NPWS etc and the screening-in of the application for AA was based upon F.S. AA procedures and Guidance. An AA Determination was carried out outlining the mitigation measures required to protect the integrity of the relevant Natura 2000 sites by Dr Elaine Bennett Senior Ecologist DAFM and included as condition of approval. An in-combination analysis was also carried out as part of the exercise by DAFM at HQ. All DAFM procedures and standards were adhered to in making the decision to recommend approval'.

The applicants Representative at the oral hearing set out the background to the application and provided a broad context and description of the project and site. The appellant did not make a formal opening presentation to the hearing, drew attention to the grounds as submitted and indicated his willingness to provide any clarification sought by the FAC. In response to questions from the FAC the appellant provided clarification sought and elaborated on a number of the grounds including those numbered 5, 6, 7, 8 and 9 in the grounds of appeal. When responding in the context of ground number 5, the appellant drew attention to the reference in the Inspectors Certification report regarding the

presence of an invasive species (Japanese Knotweed) at the proposed entrance and asserted that the licence conditions do not provide sufficient clarity in relation to how this is to be dealt with. The appellant also asserted that the reference to 'relevant regulations' as it relates to the control of Japanese Knotweed (as contained in condition number 12 in the licence) is not sufficiently specific and asserted that the regulations concerned should be cited. The DAFM representative also responded to questions from the FAC and while noting that the author of many of the DAFM reports on file wasn't in attendance at the hearing that he was in a position to rely on the record and accordingly addressed issues raised by the appellant during the earlier contributions to the hearing. In particular, the DAFM representative asserted that the matters raised in ground No 4 were not relevant to the project subject of the appeal, that the Bio Maps met the DAFM requirements at the time; that hedgerows were identifiable from the documents available to the DAFM (and referenced a request for an updated bio map which was received), and that he considered that the location of the site notice was good and that it served the purpose required. The DAFM representative also provided response to other queries from the FAC in particular in relation to some of the answers provided to questions in the screening to determine requirement for EIA and asserted that it was evident from the photo on file which showed the site notice that the invasive species had been treated.

The applicant's representative in response to questions from the FAC provided clarification on the construction method to be used, on the nearest point of the proposed road to a specific watercourse (30 – 35m), that there is very little water in it as it rises a short distance up from it and often tends to be dry, and the relevant setback guidelines that apply. General details were also provided to the FAC on how any surface water that arises and affected by the construction might be managed and the approach generally with regard to culverts is to permit water movement from one side of the proposed road to the other together with silt trapping measures to be employed during and after the proposed works. The applicant submitted that there was a historical basis to the route of the proposed road, with the applicant's representative submitting that an old road runs along the route and distance of the proposed road. In response to query from the FAC in relation to the nature of a number of responses which appear on the screening for EIA requirement the DAFM representative reasserted that the author of same wasn't in attendance and that he could only surmise in forming a response at the oral hearing in particular to some of those where N/A had been answered.

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. 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 which it was asserted that the answers provided in some instances may have relied on other screenings carried out as part of the application. In particular the FAC found that; the answer to question 9 in relation to the cumulative impact of forest cover was recorded as N/A, the answer to question 10 in relation to whether the level of forestry related traffic on the public roads is an issue is N/A, the answers to questions 11 and 12 in relation to water quality and WFD matters is N/A, the answer to question 13 in relation to whether the Fresh Water Pearl Mussel species is likely to be affected is N/A, the answers to

questions 15 and 16 in relation to soil, terrain and slope is N/A, the answer to question 24 regarding impact on landscape character is N/A, and the answer to question 33 regarding safety related matters is N/A.

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 495 metres, 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 in particular at questions 9, 10, 11, 12, 13, 15, 16, 24 and 33 where the answer provided in each case was N/A 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.

Regarding the contention in the grounds of appeal that the afforestation of these lands was carried out without appropriate screening for the requirement for an EIA or an Appropriate Assessment under Article 6(3) of the Habitats Directive, the FAC noted the assertion by the DAFM representative at oral hearing that the matters raised in ground number 4 in the appeal does not relate to the licence CN82720. No convincing evidence was provided by the Appellant to substantiate this particular ground in the appeal. The FAC having considered all of the evidence before it, including the grounds of appeal, submissions made including at oral hearing, is not satisfied that a serious or significant error or a series of errors was made by DAFM in the making of the decision in this case as it relates to this ground of appeal. In relation to the contentions in the grounds of appeal regarding Appropriate Assessment and related matters including grounds numbered nine and ten in the appeal, the FAC finds that the DAFM had a screening of the project for Appropriate Assessment carried out which examined ten European sites within 15km and that there was no requirement to extend the radius in this case. The ten sites examined were, Lower River Shannon SAC 002165, Keeper Hill SAC 001197, Slieve Bernagh Bog SAC 002312, Clare Glen SAC 000930, Silvermine Mountains SAC 000939, Bolingbrook Hill SAC 002124, Silvermines Mountains West SAC 002258, Glenstal Wood SAC 001432, Slievefelim to Silvermines Mountains SPA 004165 and Lough Derg (Shannon) SPA 004058. Each site is considered in turn along

with its qualifying / special conservation interests and the reasons for the screening conclusions reached are documented. The FAC finds that two of the sites (Lower River Shannon SAC 002165 and Slievefelim to Silvermines Mountains SPA 004165) were screened in and the other eight sites were screened out for the purposes of Appropriate Assessment. The FAC finds that mitigations are set out in the Appropriate Assessment Determination for inclusion in the licence, as set out in the report of 25th August 2020 and that these mitigations are included in the licence as issued at condition number 12. The FAC examined publicly available information from the NPWS and EPA and identified the same ten European sites. The FAC finds that the DAFM also recorded other plans and projects that were considered in combination with the proposal. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considered that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions provided.

In relation to the contention in the grounds of appeal that the application is not compliant with 6(2) of the Forestry Regulation (2017) in that it is not an accurate representation of the details required under same, 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. In relation to the contention in the grounds of appeal that the site notice was in breach of Regulation 11(1) the FAC noted the assertions of the DAFM representative at oral hearing wherein he stated that the location of the public notice was good and that it served the purpose intended. The FAC having considered this ground in the appeal, the application materials on file, submissions made including at oral hearing concluded that the appellant did not provide convincing evidence that the site notice was in breach of Regulation 11(1).

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 including the clarifications provided by the applicant's representative. 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 nor is it satisfied that the DAFM erred in its processing of the licence 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 CN82720. The FAC is therefore setting aside and remitting the decision regarding licence CN82720 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 and to seek from the applicant details of the location, extent and proposals for the management of any invasive plant species found on site, before a new decision is made.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

