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19th October 2021

Subject: Appeals FAC 707/2020 and 710/2020 regarding licence CN86503

Dear [REDACTED]

I refer to appeals made to the Forestry Appeals Committee (FAC) in relation to this decision 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 the parties to the appeal.

Background

Licence CN86503 is for the construction of a forest road 228 metres in length at Lismacool, Co Roscommon which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 27th August 2020 subject to conditions.

Hearing

An oral hearing of appeals FAC 707/2020 & 710/2020, of which all parties were notified, was held by the FAC on 14th June 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Mary Coogan, Mr. Momme Reibisch

Appellant(s):

[REDACTED]
[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. Ruth Kinehan.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions made at the oral hearing, all other submissions received, all materials on file, and in

particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN86503.

Licence

The licence pertains to the construction of a forest road 228 metres in length to serve a forestry of 10.4 hectares planted in 1998 at Lismacool, Co Roscommon. The method of construction is stated as 'build on top' and the road is required for the purpose of thinning. Documentation submitted includes site notice, road specification, harvest plan, a proposed haulage route and mapping.

Documentation on file refers to the site having soils that are predominantly podzolic in nature. The slope is predominantly flat to moderate and is crossed by or adjoining an aquatic zone. The vegetation type within the project area comprises conifer woodland. In relation to Water Framework Directive (WFD) the project site is within the Mantua_010 River Waterbody, for which status is currently 'unassigned' and in terms of risk is indicated as 'under review'.

The licence application was referred to Roscommon County Council and no response was received. One submission was made to DAFM during the consideration of the licence.

The assessment of the licence application by DAFM included a desk assessment as indicated in the Statement of Facts (SoF) to the FAC. In relation to Appropriate Assessment screening as indicated in the Inspector's Certification seven Natura sites were identified within 15 kilometres, Annaghmore Lough (Roscommon) SAC 001626 which was screened out due to location in a separate waterbody and unsuitability of the project area to support species listed as a QI; Bellanagare Bog SAC 000592 screened out due to its location downstream of the SAC and unsuitability of the project area to support species listed as a QI; Bellanagare Bog SPA 004105 screened out due to its unsuitability of the project area to support species listed as a QI; Callow Bog SAC 000595 screened out due to its location downstream of the SAC and unsuitability of the project area to support species listed as a QI; Cloonshanville Bog SAC 000614 which was screened out due to distance; Lough Gara SPA 004048 screened out due to its unsuitability of the project area to support species listed as a QI and distance and Mullygollan Turlough SAC 000612 screened out due to location in a separate waterbody and lack of hydrological connection. The screening concluded no likelihood of a significant effect on any European site, and Appropriate Assessment not required. The Inspector Certification on file had no responses in relation to several questions outlined on the certification.

An in-combination report was prepared with a date of the week of the 25th of August 2020. Section 1.1.5 outlines forestry related projects in the area. The In-Combination Statement indicates that the project lies in a rural landscape in Lismacool, Co. Roscommon in the River Sub Basin Mantua_010. The River Sub Basin Mantua_010 is stated to have approximately 28% forest cover *which is lower (sic) than the national average of 11%*. At 228 metres the project is considered small in scale. Individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions for individual Natura sites table. The Statement concludes that DAFM

excludes the likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on European Sites.

Appeals

There are two appeals against the decision to grant the licence.

The grounds of appeal of 707/2020 refers to;

- No legal Appropriate Screening has taken place.
- The cumulative forest roads in this forest exceeds 2 km.
- No legal screening for Environmental Impact Assessment has taken place.

The grounds of appeal of 710/2020 refers to;

- The project area does not conform to the area on the Private Forest 2019 database.
- There is, a breach of Articles 2 (1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU.
- A forest road is not the entire project and is part of a larger programme of works which require assessment. Any determination is therefore invalid without an assessment of the entire project.
- 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.
- There is insufficient information submitted included with the application to enable the Inspector to make a conclusive determination as to whether EIA is required.
- There is insufficient detail and clarity in the in-combination information to enable a definitive decision to be reached in relation to cumulative impact.
- The details submitted are not an accurate representation of those required in Regulation 6(2) of the Forestry Regulations 2017.
- The Stage 1 conclusion of the AA is not legally valid.
- 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.
- 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.
- 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 indicated that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. It also states that DAFM is satisfied that all criteria as outlined in the standards and procedures have been adhered to in making a decision on the application. The Statement from Inspectorate indicates that the AA screening procedure relevant at the time was applied and the Department submits that the relevant selection criteria set out in Annex III of the Environmental Impact Assessment (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 proposal was screened out using the Habitat Table 18Dec19 and the Bird Foraging table 06Jan20. An In-combination assessment was carried out. All relevant information can be found on file. Forest road is 228m and is significantly below the requirement for EIA.

The DAFM also submits in the SoF that pursuant to the requirements of the Birds and Habitats Directives (as transposed), it undertook a Stage 1 Appropriate Assessment of the implications of the project for Natura 2000 Sites and an assessment was made, based on the best scientific knowledge and in view of the conservation objectives of the Natura 2000 Site(s) in question, to determine if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the Natura 2000 site(s). It further submits that the legal requirements of Article 4(3) of the EIA Directive have been fulfilled and the *Assessment of Afforestation Proposal for EIA Requirement Form* 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). As regards Article 4(4) of the EIA Directive 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 EIA was not required. As regards Article 4(5) of the EIA Directive the Department submits that the documentation submitted by the applicant in relation to this application was compliant with the requirements.

At the oral hearing the appellant raised issues in relation to the project, raising matters stated in the grounds of appeal including ground no 5 that the determination of the inspector is inadequately reasoned; that the forest percentage is understated; that mapping of hedgerows on the biomap is inadequate; the likelihood of an impact on the waterbody which is unassigned; and impacts on birds in relation to the timing of works.

The FAC noted that in the documentation before it many of the questions on the Inspector Certification were not furnished with a response. The DAFM inspector asserted that the data was recorded by him at the time of certification and at the invitation of the FAC hearing, gave responses to address this deficit indicating that in relation to environmental considerations in Qs 1.1, 2.1, 3.1 3.2 4.1, 4.2 and 5.1 a response of 'no' had been recorded. In relation to registered Forester/Surveyor questions Qs 1, 2, 4, 5, and 6a a response of yes, and in relation to 6b a response of no. In relation to Assessment to determine EIA in Q1 a response of 228 metres; Q2 no; Q3 no; Q4 yes; Q9 no; Q10 no; Q11 yes; Q12 no; Q13 no; Q14 no; Q15 no; Q16 yes; Q17 no; Q18 no; Q19 A to G no; Q20 no; Q21 no; Q22 yes; Q24 yes; Qs 25 to 28 no; Qs30 to 33 no; Q37 yes; and in relation to determination both responses were no. In the final certification the response to Qs 1 to 6 was yes and Q7 and 8 were N/A.

At the oral hearing the FAC raised questions with the Inspector focusing primarily on the issue of watercourses, hydrological connectivity within and outside of the project area and the provisions of the Forestry Guidelines and standards on this matter. The issue of forest cover was raised and the difference in recorded level of forest cover noting the variation between that recorded in the Inspector

Certification and that recorded in the In-Combination Statement (which also had a typographical error in indicating 28% was lower than 11%) in relation to forest cover. The mapping of hedgerows was raised and the issue of referral to an ecologist and the issue of the unassigned status of the waterbody.

In addressing the grounds of appeal, the FAC considered 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. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation which involve 50 hectares or more and 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 proposal is for the construction of a forest road 228 metres in length which is substantially subthreshold. In relation to the estimated percentage area under forest cover, however, there is a significant variation seen between that recorded in the EIA screening and that recorded in the in-combination assessment, including potentially misleading typographical errors. The Inspector's Certification refers to a forest cover of in the underlying waterbody of 2.61% and a 28% forest cover in the In-Combination Statement. The EIA process and any assessment to determine EIA requirement as outlined in the Inspector Certification requires a robust assessment based on data which is clear and unambiguous and which is not significantly at variance with other recorded data recorded in the assessment of the project including the In-Combination Statement. Clarity on base line data is therefore required on this matter to enable a robust assessment to determine EIA requirement. The FAC considered this to be a significant error in the making of the decision to grant the licence.

The FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the construction of road 228 metres in length. Having examined the documentation submitted the FAC has identified the same seven sites as the DAFM within 15km from the proposal. 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. The proposed works are located outside of any European site and the FAC has not been provided with evidence of there being protected habitats or species on the site. Details of other plans and projects were also examined.

It is however noted that the In-Combination Statement is based on an approximately 28% forest cover within the waterbody which is significantly at variance with other recorded data on forest cover within the submitted documentation. The stated conclusion of DAFM in the In-Combination Statement that it deems that this project, when considered in combination with other plans and projects, will not give rise

to the possibility of an effect on the Natura sites requires to be based on data not at variance with other data recorded and the ambiguity on this matter requires to be addressed. In this context the FAC considers that a new AA screening of the proposal itself and in combination with other plans or projects is required.

In relation to a pathway of effects to a European site and potential hydrological impacts on water quality generally the FAC noted that the project is for a forest road; that the road as indicated in the road specification is 'build on top' on a flat site and that standards as specified in the COFORD Forest Road Manual are required by condition to protect water quality. Reference is made, however, in the Inspector's Certification that the project area is crossed by or adjoining an aquatic zone; that the bio map submitted indicates a watercourse along the northern and western boundaries of the forest to be served by the proposed road and the fact that at the oral hearing the DAFM representative indicated that it was likely that a hydrological connectivity existed between the project area and a Natura site (via the WFD Mantua_010 River Waterbody).

The FAC examined mapping and other documentation and characteristics relating to the area. While it noted a watercourse (WFD Mantua_010 river waterbody) within the forest to be served by the proposed road, the proposed road does not cross this watercourse. This waterbody does not have a status assigned per the WFD 2013-2018 assessment cycle and therefore the FAC has had due regard to the High Court (Hyland J.) judgment in *Sweetman v An Bord Pleanála* (2021) IEHC 16 delivered in January 2021. The nature of the hydrological connectivity between the project area and this watercourse has not been established by way of field assessment, nor is it clear that the standards as specified in the COFORD Forest Road Manual are sufficient to avoid an impact or effect. Therefore the FAC is not satisfied, based on the information before it, that it can be reasonably concluded that the proposed development would not have an impact on the WFD Mantua_010 River Waterbody which has an 'unassigned' status. The FAC considered this to be a significant error in the making of the decision to grant the licence.

In relation to other matters arising in the grounds of appeal the FAC noted that the appellant raised concerns in relation to the Inspector Certification. While the answers to various questions were not initially available to the FAC they were contained in the documentation circulated to the parties to the appeal. The deficits in the FAC documentation were corrected and put on record at the oral hearing and the responses were then considered. In particular, however, the FAC noted the difference of forest cover stated in the in-combination and the Inspector Certification and the response received. As already indicated the EIA process and any assessment to determine EIA requirement as outlined in the Inspector Certification requires robust assessment based on data which is clear and unambiguous and which is not significantly at variance with other recorded data recorded in the assessment of the project including the In-Combination Statement and clarity is required on this matter to enable a robust assessment of the project and potential effects to occur.

In relation to impact on birds the site is not indicated or referenced in relation to any qualifying species. The appellant has not referenced in the grounds of appeal or at the oral hearing any documentary evidence in relation to the presence of any qualifying interests.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was a serious or significant error or series of errors in the making of the decision to grant the licence. As a result, for the reasons as outlined the FAC has decided to set aside and remit the decision of the Minister regarding licence CN86503 to carry out a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive; to undertake an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive and also the assessment of the potential for the proposed development to have an impact on the unassigned WFD waterbody Mantua_010, having regard to the 'Hyland' High Court judgement previously referred to, before making a new decision in respect of the application.

Yours sincerely,

A black rectangular redaction box covering the signature of Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee

