



5 February, 2021

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Our ref: 215/2020

Subject: Appeal in relation to Forest Road Licence CN81955

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence CN81955. 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

The Forest Road Licence CN81955 was granted by the Department on 3/4/2020.

Hearing

An oral hearing of appeal FAC 215/2020, regarding the decision to issue the licence CN81955, was conducted by the FAC on 19/01/2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Ms Paula Lynch, Mr Pat Coman and Mr Luke Sweetman.

Secretary to the FAC: Mr Michael Ryan.

Appellant: [REDACTED]

Applicant: [REDACTED] r [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

DAFM: Mr Rory Greene, Ms Katherine Duff, Dr Orla Fahy and Ms Mary Coogan

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding set aside and remit the decision to grant this licence (Reference CN81955).

The licence pertains to 1,980 meters of forest road (6 proposed roads) in a site area of 81.65ha at Carn, Pakenhamhall, Tullynally, Nonsuch, Co. Westmeath. The proposed road is stated to be essential for harvesting. The proposal comprises a forest road upgrade, widening and re-surfacing the existing forest road with provision of drainage channels and silt traps along both sides of new and existing tracks. Special Construction Works will also take place on the replacement of a culvert/bridge on the tributary of the Yellow River. The licence that was issued on 3/4/2020 was for grant aided Forest Road of 1,980m in length, the work to be completed satisfactorily no later than 2/4/2023. The application specifies 830m as 'harvesting' and 1150 as 'upgrade'. The licence gave approval with conditions 1 to 12 and archaeological and ecological conditions attached to the approval letter. Licence condition 12 specifies environmental and silvicultural conditions, including archaeological conditions and additional conditions attached:

*12. Strictly adhere to the archaeological conditions attached,
Strictly adhere to the additional conditions attached,
Adhere to forestry bio diversity conditions guidelines,
All guidelines to apply.*

12. Specific Archaeological Conditions

*At present the six proposed roads are sufficiently distanced from any Recorded Monument not to warrant archaeological monitoring or specific conditions. The access path to the new roads passes a number of Protected Structures listed on the NIAH and associated with the Tullynally estate. Every effort should be made to avoid damage to these buildings.
See archaeological report and illustrative map for details*

The proposal was desk and field inspected on 15/01/2019. Observations from the field inspection of the site were recorded in the document entitled *Appendix- Observations from the field inspection of the site on 15th January, 2019 by the District Inspector*. The soil type underlying the project area is predominantly blanket bog in nature. The elevation is 60 to 70m. The slope is predominantly flat to moderate (<15%). The project area is crossed by /adjoins an aquatic zone. The vegetation types within the project area comprise improved



agricultural grassland, buildings and artificial surfaces, depositing/lowland rivers, conifer plantation and drainage ditches. The project is located in the Upper Shannon Catchment, the Inny (Shannon) _ SubCatchment_030 and the Yellow (Castlepollard) _ 030 River Waterbody.

Referrals were made to the Westmeath County Council (Response: forest road will not interfere with or undermine the setting of three adjoining protected structures), Shannon Regional Fisheries (No Response) and to the National Parks and Wildlife Service (NPWS). The NPWS Response advised about the potential to cause adverse impact on Lough Derravaragh Special Protection Area (SPA) and National Heritage Area (NHA) and also potential damage to local bats, red squirrel, wild birds. They recommended 4 conditions to any licence. Referrals were also made to the DAFM's Archaeologist and Ecologist. Conditions were recommended for attachment to the approval letter for the licence.

The DAFM undertook an Appropriate Assessment screening (AAS) in accordance with the provisions of the Habitats Directive. The screening procedures were carried out 8/4/2019 in accordance with those prevailing at the time (application was submitted in August, 2018 and the Standard Operating Procedures November, 2018 applied) and the DAFM observed that one European site, the Lough Derravaragh SPA, lay within a 3km radius of the proposal. This Natura site was screened in for an Appropriate Assessment (AA) as well as a Natura Impact Statement (NIS) because there was a possibility that the project would have a significant effect on the Natura site due to the following factors; direct hydrological connectivity, Whooper swan species of special conservation concern present in Williamstown townland and may be disturbed, insufficient information about mitigation measures at sensitive features of concern such as drain crossings.

An NIS was sought from the applicant on 9/4/2019 and was received by DAFM on 21/8/2019. (As part of preparation of the Report, the site was screened within a 3km referral area and another site identified within 4kms, without a hydrological connection, was also taken into account). A brief summary of the conclusions (set out at pages 27 to 30 of the NIS) are as follows;

- Project located within 2km NE of Lough Derravaragh NHA and SPA and hydrologically connected to the Lough via tributaries of the Yellow river. (Site is 4km to west of Lough Lene SAC but not hydrologically linked to it). There are water birds and aquatic habitats at the SPA and NHA, with potential impact from the project through the potential risk to water quality and disturbance. In addition, merlin, hen harrier, otter and bats were noted but these are not Qualifying Interests for the Natura sites but protected species and notable nonetheless.

- There was evidence of badger noted during the survey undertaken for the Natura Impact Assessment, but no setts were located. Protection measures were suggested.
- Road construction, drains and silt traps were commented on as well as the need to minimise disturbance. The Inland Fisheries Ireland was consulted and they provided a detailed method statement for the Special Construction Works (SCW). Details on operational/construction issues were also discussed regarding silt, sediment traps, monitoring, bridge construction, drains and proximity of the road from aquatic zones on highly erodible peat.
- Risk of transfer of invasive species discussed and washing of machinery and bio security measures advised.
- The final paragraph gives a succinct summation: *The project is not without environmental impacts (veteran trees, sediment release, timing and disturbance) and these have been explored. The qualifying interests of the Natura site nearby, namely the Whooper swan have been given priority in this case with regards suggested timing of operations even though they have adequate alternative grazing habitat available. This will impact on other species of conservation concern which are not listed and so best practice and careful handling of the SCW and works around bridges is advised with ongoing monitoring to ensure sediment output is controlled and disturbance minimised.*

The Natura Impact Assessment was then referred to the DAFM Ecologist and was reviewed by them during 11 to 17 /10/19. Mitigation measures were drawn up.

An AA was then carried out with conclusion and statement by the DAFM Forestry Inspector, dated 24/10/2019. One Natura site Lough Derravaragh SPA was listed. The conclusion of the AA was that '*...the proposed mitigation measures, as outlined in the NIS and in the conditions of approval, if fully implemented, are deemed adequate to prevent any significant effect on the Lough Derravaragh SPA therefore Conclusion 1 applies; the project Forest Road Both alone and in combination with other plans or projects, will not have a significant effect on the Conservation Objectives of this Natura site.*' Upon certification on 24 October, 2019, this case was selected for audit (part of a percentage selection) and transferred out of the Forestry Inspector's work area on the iFORIS system to the Forestry Inspector responsible for the audit. The Audit Inspector reviewed the case and discussed the approval conditions with the Forestry Inspector in December, 2019. During the first quarter of 2020, there were IT system upgrades to iFORIS which meant the case could not be transferred back to the Forestry Inspector until March, 2020. The Forestry Inspector certified the project on 11/3/2020 with a



final certification by the Audit Inspector on 1/4/2020 using the new iFORIS screens. This Inspector Certification also contained an assessment to determine the Environmental Impact Assessment (EIA) requirement and found that an EIA was not required.

There is one appeal against the decision to grant the licence. The grounds of appeal are set out in the Notice of Appeal Form dated 16/4/2020. The grounds are briefly summarised as follows:

- There is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA.
- There is a breach of Article 4(4) of the EIA Directive as details required under Annex IIA have not been provided. Project splitting is not permitted.
- There is a breach of Article 4(5) of the EIA Directive as the application does not represent the whole project.
- The application is legally deficient.
- Sections of the road are outside the indicated boundary of the land to which the application relates.
- Public consultation process was flawed. The Site Notice indicates a road length of 1930m but the licence is for a length of 1980m.
- There is potential impact on Protected Species outside the Natura 2000 site and this is not addressed.
- The DAFM AA process and conclusion is flawed. There is no evidence that Garriskil Bog and Lough Lene SAC screened for AA. Mitigation measures proposed are insufficiently clear. The incorrect process was used by the DAFM.
- Inadequate consideration was given to the objectives of the WFD River Basin Management Plan.
- The licence does not provide a system of protection of wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive.

The DAFM Statement of Facts dated 19/5/2020 and 8/12/2020 sets out their response. The DAFM advise that the decision was issued in accordance with their procedures set out in SI 191 of 2017 and the 2014 Forestry Act and that all criteria as outlined in the standards and procedures had been adhered to in making the decision. The Inspectorate confirmed that the

AA screening at the time of approval was applied. The version of the Standard Operating Procedures (SOP) applied was dated 26 November, 2018, the AA screening form of 26/11/2018 applied and the AA form version 11/11/2013. The sequence of interactions with the file by the Forestry Inspector was set out, showing the dates, processes and movements.

The FAC convened an Oral Hearing on 19/1/2021. The parties were invited to attend in person or to join electronically. The DAFM, Appellant and the Applicant's Representative (AR) participated electronically.

The DAFM described briefly how the proposal was both desk and field inspected. The list of Additional Conditions was read at the hearing and it was confirmed that they were contained in the document entitled AA Additional Conditions supplied to the FAC and all parties to the appeal. The DAFM's Forestry Inspector referred to the procedures and sequencing of them as stated in the Statement to the FAC and explained that some of the appellant's grounds related to policy but that they would address the other grounds as part of the group discussion and questioning during the oral hearing.

The AR explained briefly that correct procedures were followed in the preparation and submission of the application. In response to queries by the FAC, they confirmed that the road length of 1980 m encompassed every aspect including turning circles and bell mouths. The area serviced was clarified as 81.65ha of forest. It was explained that the existing roads are farm roads and some were used for forestry access. They were described as old roads, farm roads used for access and probably not licensed.

The Appellant then set out their position. In brief, they contended that the proposal was 20m short of the 2000m threshold for an Environmental Impact Assessment (EIA) and was located in a sensitive area. Reference was made to CN 79904 and that this would bring the project over the 2000m threshold. The site notice referred to 1930m of forest road which is in conflict with the licence for 1980m. The chronology of the AA process was very difficult to follow. There was an AA dated 24/10/19 amended subsequently but no new assessment and only the conditions attached to licence mentioned. There was no record of an Appropriate Assessment Report (AAR) or Appropriate Assessment Determination (AAD). There was no reference to impact on Natura sites. The Biodiversity maps were not adequate. There was no EIA and no assessment of protected species such as badger, otter and red squirrels. The licence allows for works to be carried out from April to October but this will significantly impact on other species of wildlife and is in conflict with the NPWS recommendations. There had not been an assessment of veteran trees which are important for bats and bat roosts. As regards the NIS, there was a conflict between winter protection and summer protection for species.

Under questioning by the FAC, the DAFM explained how they carried out the In-Combination assessment in relation to the site. The Forestry Inspector advised that the procedures in place were followed and that the NIS, which had considered in combination effects, had also been



taken into account. They acknowledged that the procedures in place currently are more rigorous. They advised that the in-combination effects were taken into account by considering in full the effects of harvest project and the road project and the distribution of the whooper swans and explained that the licence conditions addressed these issues. The matter was also referred to the DAFM ecologist. The DAFM confirmed that under the current procedures, an In-Combination Report would be supplied by another area of the Forest Service now tasked with this procedure. The DAFM ecologist explained that the NIS considered cumulative effects, albeit in a reduced way compared to that required currently. Essentially the harvesting and road project was examined but the DAFM ecologist explained that nowadays a more comprehensive review would be undertaken of forestry and other developments in the townland and vicinity and also other Natura sites.

In response to queries by the FAC, the AR explained about the final road length approved by the licence. They explained that the application was submitted for 1930m of forest road. However, after the DAFM Forestry Inspector's site inspection and engagement with them regarding possible re-alignment of the road, they jointly agreed the adjustments with DAFM which resulted in a re-aligned road length of 1980m in February, 2019. With regard to the road the subject of licence CN79904 referred to by the Appellant, the DAFM explained that CN 79904 was west of the proposal and belonged to a different applicant and landowner. The DAFM Forestry Inspector also explained, in relation to CN 81955 under appeal, that he regarded the 50m difference between the road length applied for and the road length approved, as not being materially different. They confirmed that there was no public notice about the adjusted length of 1980m. They confirmed that a new road for 50m would require public notification but advised that they did not regard the adjustment in this case as material or significant. They commented that the SCW were just one element of the overall works, and the project consisted roughly of 60% upgrade and 40% new roads. The DAFM Forestry Inspector described how most of the roads were dirt/farm roads in poor condition and that as far as they were aware there was no previous licence for them.

With regard to the farm roads, the AR explained that there was a need to improve the farm road infrastructure to limit damage to the farm and the environment. The DAFM Forestry Inspector described how there was a culvert over the Yellow River but that it was degraded, and that the water was peaty and that the works to this culvert would mitigate damaging effects. The AR explained that the construction of the road would vary according to the area; some road would be on virgin ground, some on top of farm tracks and some on top of good subsoil. The source of any infill would come from local quarries.

The DAFM Inspector with responsibility for the audit advised, with regard to the document entitled 'Inspector Cert. Pre Approval', that they had not assessed it and could only progress through the iFORIS screens to get to certification by screening out the options given. They

also explained how they had pared back the additional conditions, after consultation with the Forestry Inspector and the DAFM ecologist, to the original ecological conditions prepared by the DAFM ecologist.

In relation to an EIA, The DAFM Forestry Inspector confirmed that no EIA was required because it was sub threshold and also mentioned that there were comprehensive measures included on the licence to address any issues. They described how they had walked the site and noted the farm tracks, old drains, the surrounding intensive farmland and presence of streams and noted that the existing drainage structures would benefit from the project. They had also taken into account the NIS and the DAFM ecologist's response with regard to the project. In the NIS, the Natura site Lough Derravaragh is addressed (as well as Lough Lene). The qualifying interest of the Whooper Swan is addressed at operational phase as well as road construction phase. Lough Lene is in a different water catchment. Garriskil Bog is at the upper end of Lough Derravaragh and any effects/impacts would have to pass through the Lough to reach the bog. The DAFM Forestry Inspector also explained that under the procedures followed, the AA document represents the AAR.

Addressing the grounds of appeal regarding an EIA, the FAC noted that the licensed forest road is sub-threshold for the purposes of mandatory EIA, albeit by 20m. The FAC considered the screening undertaken by the DAFM, as evidenced to the FAC in the Inspector's Certification Pre Approval document and during the oral hearing, and also the procedures followed by them before concluding that an EIA was not required in the case. The FAC is satisfied that the DAFM had adequate information before it in respect of the characteristics of the proposed development, the location and the type and characteristics of potential impacts arising from the proposed development, to enable a screening for EIA in this regard. In addition, the FAC noted the detailed information submitted describing the proposed development, submitted information relating to the location, the forestry coverage in the townland and in the underlying waterbody and the detailed field inspection and consultations regarding the roads and culvert upgrade, carried out in advance of the making of the decision. Based on the information before it, the FAC considers that there is no convincing evidence before it to indicate that the conclusion that an EIA is not required, is incorrect.

In relation to the grounds regarding the application being legally deficient (with reference to Part 6 of the Forestry Regulations SI 191 of 2017), the sections of the road being outside the boundary of the land, and the public consultation process, the FAC considered all of the evidence before it. The FAC reviewed the documentation and mapping /imagery submitted and on the basis of the evidence before it the FAC cannot concur with this ground of appeal. The FAC also considered and examined the mapping and ortho images and could not conclude that the road is outside the boundary mentioned. As regards the public consultation process, while the FAC noted that the licence was granted for 1980m in length, it also noted that the increased length over that set out in the application is small (2.5% increase in overall road length), that it was considered by the DAFM Forestry Inspector as not material in this case,



and that it ultimately came about after the DAFM'S process of examination and site inspection and ensuing engagement with the AR about re-alignments to the road application necessitated by the need to enhance habitat protection. However, it was established that the additional road length (50m) in its own right should have required public notice and an opportunity for the public to make submissions. Therefore the FAC concludes that the public notification procedure in these circumstances was flawed in that it did not reflect the proposed length for which the licence was granted and that the DAFM made a significant error in their processing of this application prior to deciding to grant the forest road licence (CN81955).

As regards the contention that the potential impact on Protected Species outside the Natura 2000 site was not addressed, the FAC reviewed the NPWS response, the DAFM ecologist's recommendations and the NIS. They noted that the qualifying interests of the Lough Derravaragh SPA, namely Whooper Swan, had been given priority but that the impact on other species of conservation concern is to be respected and handled accordingly; by adhering to best practice and careful handling of the SCW and works around bridges and by close monitoring to ensure sediment output and disturbance is minimised. In this regard the FAC noted the additional conditions attached to the licence by the DAFM ecologist and also the fact that an Ecological Clerk Of Works (ECOW) -the DAFM ecologist- is to monitor the SCW before, during and after works and liaise with the AR, the IFI office and the engineer throughout. The method for the SCW set out by the IFI is to be followed. The FAC concluded that the potential impacts referred to in the ground of appeal had been addressed in the overall context of the project and its location.

The FAC considered the ground of appeal contending that the DAFM AA process and conclusion is flawed, that there is no evidence that Garriskil Bog SAC and Lough Lene SAC were screened for AA, that mitigation measures proposed are insufficiently clear, and that the incorrect process was used by the DAFM. The FAC had regard to the evidence before it including the AA screening carried out in accordance with the procedures in place at the time, and the reliance on the NIS as regards the In-Combination assessment in addition to the DAFM's own consideration of the factors. The FAC acknowledges the depth of review carried out with regard to the site inspection, the engagement with the AR, the ecologist's review and the archaeologist's review. However, notwithstanding the DAFM procedures in place during the processing of this licence application (which stipulated a 3km radius for AA screening), the FAC concluded that the DAFM made a significant error in their processing of this application prior to deciding to grant the forest road licence (CN81955). The FAC therefore concludes that the decision should be set aside and remitted to the Minister to carry out a new screening assessment of the proposed development's impact on Natura 2000 sites within a 15km radius, on its own and in combination with other plans and projects, and

resulting from the screening conclusion, an appropriate assessment if necessary, before making a new decision in respect of the licence.

With regard to the ground of appeal concerning inadequate consideration given to the achievement of the objectives of the River Basin Management Plan, the FAC noted that on the Assessment to Determine EIA Requirement the proposed forest road is recorded as not being in an area designated sensitive to fisheries. Furthermore, the FAC noted that the Additional Conditions attached to the licence set out detailed sediment control/silt trap measures, specify that the IFI method statement is to be followed for the SCW, specify that an ECOW will be present on site as well as specifying that the mitigation measures outlined in the NIS must be adhered to. The timing of works is also a condition specified so as to avoid not only potential impacts on protected species but those pertaining to risks to watercourses from sedimentation. Therefore, the FAC concluded that adequate consideration was given to the objectives of the River Basin Management Plan with regard to this project.

As regards the grounds of appeal concerning licence conditions and a system of protection for wild birds, the granting of the forest road licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, they are not necessary as conditions attaching to this licence. The FAC noted that the appellant did not submit any specific details in relation to birds nesting or rearing on this site. The FAC also noted that the qualifying interest of the Natura site, the Whooper swan, is prioritised. In these circumstances, the FAC concluded that additional conditions, as outlined by the Appellant, should not be attached to the licence.

In conclusion, the FAC decided that, having regard to the public notification issue in respect of the additional 50m of road length and to the Stage 1 AA screening, the decision of the DAFM should be set aside and remitted to the Minister to the public notification stage for the additional 50m of road length (and total road length of 1980m) to allow for a new public notice with opportunities for the public to make observations or submissions, and also to carry out a screening for appropriate assessment of the proposed development, under the requirements of the Article 6 of the Habitats Directive, on its own and in combination with other plans and projects, and resulting from the screening conclusion, an appropriate assessment if necessary, before making a new decision in respect of the licence.

Yours Sincerely

A black rectangular redaction box covering the signature of Paula Lynch.

Paula Lynch on behalf of the FAC