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26th February 2021

Subject: Appeals FAC 320/2020 & 412/2020 in relation to licence CN84138

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 CN84138 for forest road of 1,010 meters(m) at Cullencastle and Carrickavrantry North, Co. Waterford was granted by the DAFM on 17th June 2020.

Hearing

An oral hearing of appeals FAC 320/2020 & 412/2020, of which all parties were notified, was held by the FAC on 17th February 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely, Mr. James Conway & Mr. Iain Douglas
Appellant (FAC 320/2020):	Not present
Appellant (FAC 412/2020):	[REDACTED]
Applicant / Representative(s):	Not present
Department Representative(s):	Mr. Robert Hamilton & Ms. Mary Coogan
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister to grant this licence CN84138.

The licence pertains to 1,010m of forest road at Cullencastle and Carrickavrantry North, Co. Waterford to serve 41.81 hectares of forestry. The proposal was a joint application between two separate land owners. Two pre-approval submission reports together with a photo of the site notice, maps and the specifications of the road were found on the DAFM file as part of the application process. Construction is to be by excavation. The site elevation was submitted as 80m and the soil type as mineral.

The proposal was desk assessed by DAFM and referred to Waterford County Council, who stated they had no objections in a response letter dated 19th May 2020. DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found five European sites within 15km of the proposal and there was no reason to extend this radius in this case. The sites were considered in turn with their qualifying interests listed and the reasons for screening each site out provided. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The DAFM also 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. The licence issued on 17th June 2020 with standard conditions and specific environmental, silvicultural and archaeological conditions were attached.

The decision to grant the Licence is subject to two appeals. The grounds of the first appeal (320/2020) broadly are; that the decision does not comply with the Habitats Directive, the Birds Directive and Environmental Assessment Directive, the test for Appropriate Assessment Screening in Irish and EU law is: it is, merely necessary to determine that there may be such an effect, and that if a development is within 15km of a Natura 2000 Site it has to be screened in, the CJEU judgement in case C-323/17, People Over Wind and Peter Sweetman v Coillte Teoranta, is referred to and that in relation to Article 6(3) of the Habitats Directive (92/43/EEC), specifically that:

- it is not appropriate, at screening stage to take account of the measures intended to avoid or reduce the harmful effects of the plan or project;
- that an assessment carried out under Article 6(3) of the Directive must not have lacunae and 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 site concerned.

The grounds also include that a map showing the SACs and SPAs and the site of the proposed development should be attached, that it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha, and that it is necessary to give the total km of the forest road in the area and show that no roads which are not included in the application will be needed to carry out the development, including thinning and clearfell. The appellant also refers to the Opinion of Advocate General Kokott (30 April 2020) [Friends of the Irish Environment Limited v An Bord Pleanála] in relation to the obligations of the FAC.

The grounds of the second appeal (412/2020) broadly are;

1. Breach of article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA.
2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project.
3. Breach of Article 4(5) of the EIA Directive 2014/52/EU through similar grounds to (b) above.
4. That there are fundamental errors and inconsistencies in the details of the application and this invalidates the Determination of the need for an EIA.
5. That there is no evidence that the impact on a nationally designation side has been adequately considered as part of the approval process.

6. That the completion of the Assessment to Determine EIA Requirement (IFORIS) contains errors of fact and unqualified uncertainties, that the Determination of the inspectors is inadequately reasoned with factual errors and lacunae, and as a result there no foundation for the conclusion reached.
7. That the details in the application are not an accurate representation of those required under Regulation 6(2) of the Forestry regulations and the application is not legally complete.
8. That the Stage 1 AA determination is not legally valid.
9. That the application and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21.
10. That the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing that are consistent with Article 5 of the Birds Directive.

In a statement to the FAC, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, and provided responses to the grounds of appeal with regard to EIA, and the following additional commentary:

Prior to making recommendations to approve with conditions I evaluated the forest road application (CN84138) using various appropriate GIS datasets on IFORIS system. The application was automatically referred to WWCC on 13/01/20 with no objections raised in their response.

The proposed 1010m construction of new forest road in the townland of Cullencastle, Co WD, essentially runs through the eastern edge of an existing coniferous plantation over dry, very flat and generally mineral ground (changing from alluvial to fen peat to brown podzolic) with no water to cross (as per raster maps). Initially, after the first turn, the road more or less runs parallel with a small aquatic zone for ca 200m with an approx. 15 – 40m well vegetated set back including some planted trees where wider. The proposed project is located ca 6800m away from Lower R. Suir SAC2137, hence there is no hydrological pathway between the road proposal and the SAC with no possible significant effect on listed QI's and CO's of the SAC, now or in the future.

I carried out AA Screening for each of the five individual Natura sites within the 15km zone of consideration on 16/06/20 as per fully recorded in AA Screening Conclusions for Individual Natura sites in the final IFORIS certification page on foot of a detailed and comprehensive In-Combination Assessment (available under CONTACTS dated 15/06/20) carried out by Department personnel drawing from all licensed and proposed forestry activity on IFORIS and all Planning Permission information available from the online TYCC and An Bord Pleanála planning information systems as well as the EPA Licence Information System, as recorded. Consequently, it could be concluded there is no potential for proposed project to contribute to any adverse effects on any of the Natura sites either when considered alone or in-combination with existing land use and other plans and projects.

Some technical and operational conditions were attached to final certification for approval. My recommendations went for Grade 1 Insp. audit with no amendments made.

At the oral hearing, DAFM opened by summarising their approach to processing the application and issuing the licence. The appellant in attendance contextualised his grounds of appeal and made more specific references to some of the grounds. He submitted that the proposal area was in a sensitive landscape area, with a small part of the project area on peat soil, that there was contiguous forestry planted between 1990 and 2001 and this cumulatively meant there was over 50 hectares of forest in the area and therefore the proposal should have been subject to an EIA. He queried was section A to B of the outlined road owned by the applicants or do they have a right of way, raised matters regarding the biomap submitted, contended that it is fundamentally not true that the project does not adjoin or contain an aquatic zone and not hydrological connected to the Lower River Suir SAC, and challenged some reasons given by DAFM for screening out sites for Appropriate Assessment and that the proposal should have gone for Appropriate Assessment. He submitted that the project area is both the road project and forest land it is planned to serve, and raised some concerns regarding some entries in the DAFM documentation. The DAFM in responses clarified that a revised proposal for a road of greater length was submitted during the process and that this is what has been approved (1,010m), addressed ownership of the approach road at A to B, giving some detail on its type and on the positioning of the proposed road, that it will be built in the driest part of the plantation, adjacent to an aquatic zone, but doesn't cross one, rather crosses one dry drain and several ditches, that there is a generous buffer zone to the watercourse which contains a variety of vegetation including willow and scrub. The DAFM expressed satisfaction in regard to screening out sites for Appropriate Assessment, elaborating that the fall to the point of entry to the Lower Suir SAC is less than 50m over a 6km distance that the watercourse from the plantation meanders through wetlands and swamps, that the Peregrine Falcon's preferred habitat is along cliffs, the sea shore and heather. The DAFM Inspector submitted that a site inspection had not been undertaken in relation to the road proposal but that they knew the forest well from previous inspections. The DAFM also mentioned that the existing forest stand is quite fragmented, that there are dry routes that could be used from it to access the proposed road, that the site is flat with mineral soil and the location of the road had to consider the protected well also.

In addressing the grounds of appeal, the FAC considered, in the first instance, as to the completeness of the assessment to determine for EIA requirements and the grounds as elaborated at the oral hearing that followed from those contentions. In considering this aspect, 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 felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for a forest road of 1010m, so is sub threshold for mandatory

EIA as set in Irish Regulations. The road would be built on through managed forest land and outside of any area designated for conservation. While the appellant contended that the proposal could impact on Kilbarry Bog Proposed Natural Heritage Area no evidence of this was submitted to the FAC and the FAC did not consider that effects would arise on this site. 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 DAFM in their considerations on this, in the section focusing on the cumulative effect, recorded answers to questions on both the length of the proposed forest road and the length of forest road in the area when considered the proposed road in combination with other recent, ongoing or planned work, and the responses indicated lengths of less than 2000m. The DAFM also included the approximate % forest cover in the underlying waterbody (or waterbodies) and within 5km, both currently and five years previous. The DAFM concluded that based on the extent of the forest cover and the forest road network that the cumulative effect of this proposal was not likely to have a significant impact. The appellant at oral hearing in being more specific on some of his submitted grounds raised a possible discrepancy between the % forest cover in this assessment and in the DAFM's in combination assessment and raised a concern regarding a response in the assessment to determine EIA requirement with regard to whether soil, terrain and slope was taken into account in a way that mitigates against any environmental damage. The DAFM expressed their satisfaction that they had considered the criteria appropriately, explained their considerations with regard to soil, terrain and slope and that they had sufficient information from the applicant in order to make their determinations. The application was referred to a DAFM Archaeologist in relation to a recorded monument some 210 metres to the south of the proposed road. This monument was subsequently found to be redundant but the Archaeologist attached conditions in relation to a settlement adjacent to the route. The FAC noted that this was a proposal for a forest road to serve 41.81 hectares, notwithstanding that a felling licence would have to be sought and approved to clearfell this forested land under another application. The FAC having considered all of the evidence before it, is not satisfied that a serious or significant error or a series of errors was made by DAFM in relation to their EIA consideration and concurs with the conclusion.

In addressing the Appropriate Assessment grounds of appeal, the FAC considered, under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans and projects, having regard to the conservation objectives of that designated site. The DAFM, in this case, undertook a Stage 1 screening, and found five European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Lower River Suir SAC 002137, Mid-Waterford Coast SPA 004193, River Barrow And River Nore SAC 002162, Tramore Back Strand SPA 004027 and Tramore Dunes And Backstrand SAC 000671. The FAC consulted publicly available information from the NPWS and EPA and identified the same five sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. The DAFM also undertook and recorded a consideration of

other plans and projects, including forestry and non-forestry projects, and they concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site.

The FAC considered the specific ground submitted that the Stage 1 Appropriate Assessment Determination is not legally valid and the further articulation on this at the oral hearing. The DAFM in screening out the Lower River Suir SAC for Appropriate Assessment gave their reasons as: the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site; the nature of the project area, in particular, flat, mineral soil with wide, well vegetated buffer zone between road edge and aquatic zone; and the absence of any significant relevant watercourse(s) within or adjoining the project area. The DAFM gave further details on their considerations with regard to this at the oral hearing and in their statement to FAC, where they stated;

The proposed 1010m construction of new forest road in the townland of Cullencastle, Co WD, essentially runs through the eastern edge of an existing coniferous plantation over dry, very flat and generally mineral ground (changing from alluvial to fen peat to brown podzolic) with no water to cross (as per raster maps). Initially, after the first turn, the road more or less runs parallel with a small aquatic zone for ca 200m with an approx. 15 – 40m well vegetated set back including some planted trees where wider. The proposed project is located ca 6800m away from Lower R. Suir SAC2137, hence there is no hydrological pathway between the road proposal and the SAC with no possible significant effect on listed QI's and CO's of the SAC, now or in the future.

The FAC in consulting publicly available maps and the submitted biomap, observed the marked watercourse and verified the distance stated by DAFM of the proposed road to the watercourse. Aerial imagery of the site shows the intervening area to be well vegetated. The FAC considered that no convincing evidence was before it of a pathway of effects from the proposed road to the SAC. This watercourse flows northerly to enter the SAC at Waterford city and well downstream from the habitats of a number of the qualifying interests. The FAC also considered the nature of the proposal and the description given of the site and based on all the evidence before it, the FAC is not satisfied that the DAFM erred in their decision to screen out the Lower River Suir SAC for Appropriate Assessment. The FAC observed that the other SACs included in the DAFM Appropriate Assessment screening, River Barrow And River Nore SAC and Tramore Dunes And Backstrand SAC, are in different WFD catchments from the proposal area and that the DAFM screened these out on the basis of; the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection. The absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site, was an additional reason given for screening out the Tramore Dunes And Backstrand SAC. The FAC considered all the evidence before it, and is not satisfied that the DAFM erred in their decision to screen out the River Barrow And River Nore SAC and Tramore Dunes And Backstrand SAC for Appropriate Assessment.

The SPAs included in the DAFM Appropriate Assessment screening, Mid-Waterford Coast SPA and Tramore Back Strand SPA were both screened out for the reasons of the unsuitability of the project area for use by any species listed as a qualifying interest of these Natura sites and other factors, namely that

project area is located at a distance from the SPAs which exceeds the foraging distance of any qualifying interests for the SPAs. The appellant at oral hearing made contentions regarding the foraging range of the Peregrine Falcon and referred to a Scottish Natural Heritage report on the matter, submitting that the core foraging range of the species is 2km but that it will travel considerably further than this. The Peregrine Falcon is a qualifying interest of the Mid-Waterford Coast SPA, which DAFM in their screening noted was c. 3.7km away from the proposal area. The DAFM at oral hearing outlined the type of habitat that this species associates with and contended that this proposal would not have an effect on it. The FAC considered all the evidence before it, including that a reason given for screening out these two SPAs was the unsuitability of the project area for use by any species listed as a qualifying interest of these Natura sites and the FAC is not satisfied that the DAFM erred in their decision to screen out the Mid-Waterford Coast SPA and Tramore Back Strand SPA for Appropriate Assessment.

The FAC considered the contention in the grounds of appeal that in granting the licence DAFM had taken inadequate consideration of the objectives of the WFD River Basin Management Plan. In doing so, the FAC reviewed EPA maps and data and find the proposal area is in the Williamstown_010 sub catchment and Suir WFD_Catchment and the river waterbody St John's_020 which is recorded as having a poor status in the 2013 – 2018 WFD monitoring cycle. Pressures identified by the EPA for this river waterbody include Agriculture, while Forestry is not noted as a pressure. The DAFM referred the proposal to Waterford County Council, who stated they had no objections in a response letter. The DAFM at the oral hearing advised that the slope on the site is relatively flat and in documentation stated it to be moderate (0-15%), the DAFM also gave evidence of a buffer zone between the proposed road and the watercourse proximate to it, which is a headwater of the St John's_020 water body. In summary based on the information available to it and having regard to the nature of the proposal, namely construction of a forest road, the location of it and its terrain and the conditions under which operations would be undertaken, the FAC is not satisfied that there was inadequate consideration of water matters by DAFM in their decision making and is not satisfied that the proposal poses a significant threat to water quality.

In addressing the ground that the details in the application are not an accurate representation of those required under Regulation 6(2) of the Forestry regulations and the application is not legally complete, the FAC considered the documentation on file, including a biomap and other maps outlining the proposed road and area to be served. The FAC finds the watercourse proximate to the proposed road colour coded on the biomap map for the section of road c to d, and including e and f. The FAC finds an absence of a biomap for the road g to h and including i and j. The FAC finds though the proposed route of the road is displayed on a Ordnance Survey Ireland map and an aerial image on the file which shows watercourses, recorded monuments and other environmental features. The FAC also finds that while an additional watercourse in the area to be served is not colour coded on the submitted biomap it too is marked by Ordnance Survey and that this information can be verified by viewing publicly available maps, such as from the EPA. In addition, the FAC note that this watercourse is further removed from the proposal area than the colour coded watercourse on the biomap. At oral hearing it was noted that the DAFM employ a spatial database containing a wide selection of maps and other spatial data in its assessments and that the route of the road would have been uploaded to this system. The FAC noted that the DAFM submitted at oral hearing that it had sufficient information in order to consider and make

the decision in this case. The FAC in considering all of the evidence before it, concluded that while procedurally the DAFM should have requested an updated biomap from the applicants, this did not constitute a serious or significant error such as to affect the decision and the FAC is satisfied that the decision was made with appropriate and sufficient information.

In relation to the submitted grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In considering the appeal the FAC had regard to the record of the decision, 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 in deciding to affirm the decision, considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

A large black rectangular redaction box covering the signature of James Conway.

James Conway, On Behalf of the Forestry Appeals Committee