



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

23 February 2021

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

FAC ref: 385/2020

Subject: Appeal in relation to licence CN84639

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence CN84639.

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

Forest Road licence CN84639 was granted by the Department of Agriculture, Food and Marine (DAFM) on 16 June 2020.

Hearing

An oral hearing of appeal 385/2020 was conducted by the FAC on 04 February 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Luke Sweetman & Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Applicant representatives: [REDACTED]

DAFM representatives: Mr David Ryan & Ms Mary Coogan

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference CN 84639).

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

Kilminchy Court,
Portlaoise,
Co Laois
R32 DWT5

Eon/Telephone 076 106 4418
057 863 1900

The proposal is for a forest road of 360m to service 17.6 ha of forest on a flat to moderately sloping site, construction is by embankment/build on top, and formation width is 5.5m with 3.4m carriageway width. The proposed road will extend from an existing forest road accessed from the L1506. The predominant soil type underlying the project area is blanket bog in nature, the project area does not adjoin or contain an aquatic zone(s). The forest area on the waterbody is stated to be 1.04% and within a radius of 5km is 3.75%. The proposal is within the Moy_Killala Bay Catchment and the Castlebar_SC_020. Proposal is in Meander_10 River waterbody for which WFD is listed as 'not at risk'. The forest to be serviced is bounded fully at its west by the Oory River.

The application was desk and field assessed. The DAFM referred the application to both Mayo County Council with no response, and to the National Parks and Wildlife Service (NPWS) who replied 13 January 2020 with concerns regards changes to water quality on the sensitive River Moy, also with concerns regards Otter, Badger and breeding birds protected by the Wildlife Act, and provided recommendations regards site works and invasive species control. Processing of the application included a screening regards the EIA Directive requirements.

The DAFM carried out an Appropriate Assessment (AA) Screening examining 14 Natura sites within a 15 km radius, these comprised; *River Moy SAC, Towerhill House SAC, Carrowkeel Turlough SAC, Lough Carra/Mask Complex SAC, Moore Hall (Lough Carra) SAC, Kilglassan/Caheravoostia Turlough Complex SAC, Ballinafad SAC, Balla Turlough SAC, Skealaghan Turlough SAC, Greaghans Turlough SAC, Ardkill Turlough SAC, Ciyard Kettle-holes SAC, Lough Carra SPA and Lough Mask SPA*. Initially the DAFM screened in the River Moy SAC due to being within 500m and the proposal being on a deep peat soil. The application was then referred to the DAFM Ecology Unit who also undertook an AA screening of the proposal and screened out for all European Sites including the River Moy SAC for reason that the proposed forest road is located c.215m from the nearest watercourse and has no hydrological connection. The DAFM also completed a screening of the proposal in combination with other plans or projects and concluded the proposal on its own or in combination with other plans or projects had no likelihood of giving rise to a significant effect on any Natura site.

The licence issued on 16 June 2020 subject to standard conditions along with the following additional conditions;

6. This forest road works licence authorises the licensee to fell only those trees which need to be removed within the road reserve to facilitate the works. The definition of a 'road reserve', unless otherwise revised or replaced by the Department, is as per that set out on page 42 of the COFORD Forest Road Manual (Second edition) (2005): The strip of land immediately affected by roadworks. In an existing plantation it corresponds to the tree clearance width.

7. Environmental & Silvicultural Considerations

*Adhere to Standards for Felling and Reforestation ,
Adhere to COFORD Forest Road Manual Standards ,
Adhere to forestry & water quality guidelines ,
All guidelines to apply*

There is one appeal against the decision to grant the licence. The Appellant contends it was the duty of the Minister to carry out an AA screening and an EIA screening according to the law, and this was not done. The Appellant submits that the decision does not comply with the Habitats Directive, the



Birds Directive, the EIA Directive or the basic guidelines of the NPWS. The test for AA Screening in Irish and EU law is that it is, merely necessary to determine that there may be such an effect. Rather than to state that it will not have a significant effect. If the development which is within 15km of a Natura 2000 site it has to be screened in. The Appellant referenced the court judgment from case C-323/17 stating Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an AA of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site. With reference to the judgement sets out as follows:

36. That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

38. In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must 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. i.e. If it is said to be in a different catchment, the screening must state the catchment that the application is in. It is also necessary to realise that Birds can fly they do all rely on watercourses to move.

The Appellant states that a map showing the SACs and SPAs and the site of the proposed development should be attached. Also, regards screening for EIA, it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha. Also, it is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development that includes thinning and clearfelling. The Appellant states it is the duty of the FAC to carry out both a full AA Screening and a full EIA Screening in accordance with the law, and that the opinion of Advocate General Kokott in Case C-254/19 interprets these requirements. In particular it states; 64. *The Court of Justice has repeatedly held that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts.* That, point (3) of the Judgement states the obligation of a national court to interpret national law as far as possible in accordance with EU law does not require that the parties to the proceedings before it expressly assert that specific interpretation, if those parties allege at least an infringement of the relevant provisions of EU law. The Appellant contends this must apply to the FAC as the obligation is binding on all the authorities of Member States.

The DAFM responded to the appeal stating that approval was issued in accordance with all procedures and Standard Operating Procedures effective at the time of issue. The project was screened by the District Inspector for AA using the Annex I Habitat table (18 December 2019) and the Bird Foraging Table (06 January 2020) and the Annex II Species Table (30 January 2020). On a precautionary basis the file was referred to the DAFM's Ecology Unit whom, following clarification from the Inspector that there was no aquatic zone, relevant watercourse or drain within the project

area, completed an AA Screening Determination on 21 May 2020 as well as an in-combination report on 10 June 2020. The DAFM also undertook an assessment to determine the *Environmental Impact Assessment requirements and approval was issued on the basis of the information contained within the Ecology AA screening documents.*

The FAC convened an Oral Hearing on 04 February 2021. The DAFM and Applicants participated remotely. The appellant did not attend. The DAFM confirmed that a field inspection was undertaken on 29 November 2019, access is off an existing forest road, and there are no aquatic zones within the proposal site, there is a watercourse at c. 200m. The proposal was the subject of an EIA screening. The DAFM stated that an initial AA screening screened in the River Moy SAC on a precautionary basis but that following submission to the DAFM's Ecology Unit all Natura sites were screened out by the Ecologist. The DAFM stated the proposal is 550m from the River Moy SAC. A report from an Ecologist at the DAFM's Ecology Unit, dated 28 January 2021, was read to the record of the hearing, the report included that the proposal will service an area of 14.7 ha and is to connect to an existing track, will *traverse through PB4 cutover bog and WD4 Conifer Plantation the site is not within or adjacent to any European site, it is 215m to the Oory Stream, but there are no aquatic zones, relevant watercourses or drains within the project area, as confirmed with the District Inspector who visited the site. There is no risk of overland flow, with no connecting drains and a flat to gentle topography, and subsequent mobilisation of sediment to said watercourse. There is also no pluvial indicative flooding recorded within the proposed application site. The proposal is either outside of the foraging range or within a different surface water catchment for many of the sites and their special conservation interests. The River Moy SAC and Balla Turlough SAC are the only Natura sites listed within the same Surface Water Catchment, however as mentioned above, there is no possible surface water connection. These Natura sites are also located within the same Groundwater Catchment (Swinford), however it is important to note that there are no Karst features, groundwater wells or springs recorded onsite. The proposed application site is also located within an area of low/ moderate groundwater vulnerability and subsoil permeability so there will be no risk to groundwater. The DAFM stated that due to the intervening distance between the Natura sites and the lack of a hydrological connection, it was determined that there will be no significant effects as a result of forestry related activities. The Applicants stated the application was submitted following a desk and ground assessment, is under the 2000m threshold for mandatory EIA, construction would be by build on top and there is no water on the proposal site and no drain in the forestry to be serviced. The Applicants stated the existing forest road being used to access the proposal runs c. 270m through their lands. The FAC enquired as to the reasons for two in-combination assessments (19 May 2020 & 11 June 2020), the DAFM was not aware as to who within the DAFM undertook the initial in-combination assessment and the second in-combination was subsequently completed prior to the approval of the licence. The DAFM confirmed the project (MO26-FL0042) to be serviced by the proposal was the subject of an AA.*

The FAC considered the Stage 1 AA screening undertaken by the DAFM. The grounds of appeal do not identify any specific European site, pathways or effects of concern. The FAC noted that the DAFM identified and reviewed in detail the 14 European sites within 15km of the proposal. The first AA screening undertaken by the DAFM concluded to screen in the River Moy SAC on the basis of precautionary principle. The subsequent DAFM AA screening found the proposed forest road to be located c.215m from the nearest watercourse (the Oory Stream) with no hydrological connection (as confirmed by a site visit on 29 November 2019), and given the distance and the topography,



determined that there is no risk of sediment entering the watercourse and deemed the proposal should be screened out.

The FAC has also had regard to the referral response from the NPWS, which clearly addressed the proposal and set out concerns regards it and the forestry to be serviced. The FAC notes from the EPA mapping the nearest point of forest to be serviced by the proposed road (MO26-FL0042) to the River Moy SAC is c. 190m and that the forest is also bounded along its eastern side by the Oory Stream. The FAC notes that while the in-combination assessment dated the 19 May 2020 double lists the felling proposal MO26-FL0042, as a 35.20 ha felling and this was erroneous, there is no assessment set out regards effects that might be considered in-combination with the proposal. The in-combination subsequently done on 11 June 2020 again lists the proposed felling MO26-FL0042 but as 17.60 ha, which is consistent to the data on the DAFM's publicly available Forest Licence Viewer, but again contains no assessment of any effects from that proposal in-combination with CN84639, the roadway that will allow the felling and replanting be serviced. The FAC considers that on the basis that much of the proposed road is contained within the lands of licence MO26-FL0042, a licence which according to the hearing evidence was subject to an AA, and there has been no assessment of any effects from that proposal in combination with the proposed roadway, that there is a significant error in the in-combination assessment.

The FAC considered the grounds relating to the EIA Directive. The EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II of the Directive 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 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 proposal as described is for the construction of 360m of forest road to service 17.60 ha of commercial, managed forest for felling. The proposal is considerably sub-threshold for the mandatory submission of an EIA report. The FAC considered the evidence given at the oral hearing regarding the existing forest road and noted that the length of the existing loop road to and from the public road, that the proposed road will be accessed from, is c. 1470m approx and is clearly visible in place on the 1995 ortho-photo imagery. Even if taken together, the total road length including the proposal would be under the threshold for mandatory EIA.

With regard to the assessment to determine the EIA requirement , the FAC reviewed the DAFM process and noted that they considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The grounds of appeal do not outline any specific errors regarding significant effects on the environment of the proposal. The proposal is contained on a relatively flat site, is accessed from an existing forest roadway and does not require its own entrance from the public road, the immediate surrounding area is a mix of open cut-over bog and of forestry plots. The wider

area is sparsely populated with dispersed settlement pattern and comprises agricultural grassland holdings in the main, and while there will be some short-term impacts from the proposal the FAC is satisfied there will be no significant effect on the environment. The FAC is satisfied that no serious or significant error or a series of errors occurred in the conclusion by DAFM that an EIA was not required in this case.

Based on the information before it, the FAC considered that the DAFM made a significant error by not adequately assessing the potential for the proposed project to have a significant effect on the River Moy SAC in-combination with the felling of the forestry that the road is to service. As such, the FAC concludes that the decision should be set aside and remitted to the Minister to carry out a new AA screening of the proposed development regards 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 AA if necessary, before making a new decision in respect of the licence.

Yours Sincerely

A large black rectangular redaction box covering the signature of Pat Coman.

Pat Coman, on behalf of the FAC