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22nd February, 2021

Subject: Appeal FAC667/2020 and FAC688/2020 regarding licence CN 85633

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

Licence CN85633 for Non Grant Aided Forest Road at Shrone, Co. Kerry was approved by the Department of Agriculture, Food and the Marine (DAFM) on 26th August, 2020.

Hearing

An oral hearing of appeals FAC667/2020 and FAC688/2020 was held by the FAC on 15th January, 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Ms. Mary Lawlor, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellant [REDACTED]

Appellant [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Ms. Mary Coogan, Mr Eugene Curran

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 affirm the decision of the Minister regarding licence CN85633.

The licence pertains to 230 metres of a forest road at Shrone, Co. Kerry. The soil type underlining the project area is described as predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The vegetation type within the project area comprises of grass/forestry.

The specification of the road construction and maps delineating the route were submitted with the application.

The DAFM undertook and documented an appropriate assessment screening that found five European sites within 15km, and found that there was no reason to extend this radius in this case. The European sites considered were Blackwater River (Cork/Waterford) SAC 002170, Killarney National Park,, Macgillycuddys Reeks And Caragh River Catchment SAC 000365, Mullaghanish to Musheramore Mountains SPA 004162, St. Gobnets Wood SAC 000106 and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161. The five sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites.

The development it is noted was referred to Kerry County Council on the 8th June, 2020 and to the NPWS on the 17th June, 2020 and no response was received from either of the bodies. The licence was approved on 26th August, 2020 with standard conditions.

There are two appeals against the decision. The grounds contend that the licence was issued in breach of Articles 2 (1), 4(3) and 4(4) of the EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex II of the Directive; that the DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA; that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening and the application has not described any aspects of the environment which are likely to be significantly affected.

The grounds also refer to the inspector's determination recommendation in respect of the requirement for an EIA as inadequately reasoned and that there are errors in a number of responses to the EIA. It is contended that an inadequate conclusion is reached based on the IFORIS checkbox. It is stated that the proposed design and construction of the forest road does not take into account soil, terrain and slope in a way that mitigates against any environmental damage.

It is stated that there is inadequate consideration of feedback from consultation bodies; the Stage 1 AA determinations are not legally valid. It is submitted that this licence 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. Reference is also made to the conditions of the licence and the absence of a general system of protection for all species of birds.

It is submitted that no legal Appropriate Assessment screening, screening for Environmental Impact Assessment nor Environmental Impact Assessment has taken place. It is contended that cumulative forest roads in this forest exceeds 2km.

In a statement to the FAC, the DAFM submitted that in regard to the granted proposed new road CN85633, information submitted by Coillte in the form of maps (GIS and softcopy), details of the road construction were considered during the licencing process. The site was subject to desk assessment and a site inspection was also carried out.

Standard procedures were followed in regard to spatial checks related to designated sites at or near the project location. Standard procedures were followed in respect of referrals issued to statutory bodies in respect of the licence application. The DAFM stated that they are satisfied that the decision met their criteria and guidelines and that they confirm the licence. They submit that they followed the current DAFM AA Screening guidance document and considered Natura 2000 sites within 15km. They submitted that the qualifying interests of European sites were assessed and screened out and that the project will not adversely affect the integrity of s European site. DAFM subsequently carried out an in-combination assessment and concluded that it was deemed that there is no potential for the project to contribute to any effects, when considered in combination with other plans and projects and that it will not give rise to the possibility of an effect on a Natura site.

An oral hearing was held which was attended by representatives of the Applicant and the DAFM and the Appellant in FAC688/2020. The DAFM provided an overview of the processing of the application, including referrals, and reiterated the contentions outlined in its written statement. The DAFM presented an overview of their processing of the licence and the screening assessment undertaken. DAFM also at the hearing outlined details relating to the in-combination assessment of the project including plans and projects and gave a detailed description of the site based on their site inspection. The DAFM submitted that there was no response from the County Council or NPWS and that there is no hydrological connection to the site. The DAFM submitted that a mistake had been made in recording the description of the proposal area which suggested that it crossed or adjoined an aquatic zone. It was submitted that the area had been subsequently field inspected and that the road would not cross or adjoin an aquatic zone and that there was no hydrological connection with a designated site. The Appellant re-iterated parts of their grounds and queried the maps provided and distances and location of the proposal. They questioned whether environmental features had been identified on the maps and the hydrological connections with the proposal. It was submitted that the application should have been referred to the NPWS in relation to the Fresh Water Pearl Mussel as a qualifying interest. The Appellant submitted that there was an error in the responses to Question 27 and that the application should have been referred to an ecologist.

The Applicant's representatives described the documents and information provided with the application and submitted that the route, construction type and specification reflected the conditions of the site and forest. They submitted that the road would be of a "build on top" type and would not result in a lowering of the water table. They submitted that an Engineer had surveyed the site and lined out the road and chosen the design to reflect the site conditions. They submitted that the road leading into the project site was a long established route with a right of way which already had access to the public road and that the proposed road was below the 2,000 metre EIA threshold at 230 metres.

In considering the appeal the FAC examined the appropriate assessment undertaken by the DAFM including the initial screening. The FAC examined publicly available information from the EPA and NPWS and identified the same five sites as the DAFM within 15km from the proposal. These are Blackwater River (Cork/Waterford) SAC 002170, Killarney National Park,, Macgillycuddys Reeks And Caragh River Catchment SAC 000365, Mullaghanish to Musheramore Mountains SPA 004162, St. Gobnets Wood SAC 000106 and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161. The FAC is satisfied that there is no requirement to extend this radius in this case given the scale, nature and location of the proposal.

The DAFM considered each site in turn and provided the reasons for screening all of the sites out for appropriate assessment. SAC 002170 was screened out due to an absence of any significant relevant watercourse(s) within or adjoining the project area. Both the Applicant's Representatives and DAFM submitted that they had confirmed this through site inspection. No convincing evidence was provided to the FAC that contradicted this conclusion. The FAC is satisfied that the DAFM did not make any serious or significant error in their appropriate assessment screening and concurs with the conclusions reached. At the hearing the FAC raised issues relating to the details of the in-combination; the road construction methodology, the layout and gradient of the road, , the presence of culverts and the bridge over the stream to the west and outside of the proposal area which were addressed by DAFM and the applicant to the satisfaction of the FAC.

The inspector's determination and recommendation based on the IFORIS checkbox was also reviewed by the FAC at the hearing and is considered adequately reasoned based on the responses received, written statement and clarifications provided at the oral hearing.

In relation to the EU EIA Directive, the Directive sets out in Annex II 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 is considerably sub-threshold for the mandatory submission of an EIA report.

The DAFM 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 proposal as described is being for 230 metres of forest road construction in a commercial forest managed for timber production which is considerably sub-threshold for the mandatory submission of an EIAR. The proposal is outside of any designated area for conservation or high landscape sensitivity and situated in a remote area. The FAC concluded that the submitted design and specification of the road demonstrate a consideration of the site characteristics. Having regard to the record of the decision and the submitted grounds and the nature, scale and location of the proposal the FAC is satisfied that the proposal would not result in any likelihood of significant effects on the

environment and that the DAFM did not err in its decision made regarding EIA. In relation to hydrological connections the FAC is satisfied that no hydrological connection exists and there was no real likelihood of a negative impact on any receiving waters. In regard to licence conditions related to bird and animal species, the FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing or protected species of animal on the site. The FAC concluded that the granting of the licence does not exempt the holder from meeting any legal requirements set out in any other statute and that it was not satisfied that the DAFM had erred in the attachment of licence conditions.

In considering the appeal the FAC had regard to the record of the decision and 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 is thus affirming the decision of the Minister regarding licence CN85633 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government Policy and Good Forestry Practice

Yours sincerely,



Mary Lawlor on behalf of the Forestry Appeals Committee

