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22<sup>nd</sup> February 2021

**Subject:** Appeal FAC 601/2020 regarding licence CN85957

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 CN85957 for a forest road of 150m at Meenbog, Co. Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 9<sup>th</sup> of July 2020.

#### **Hearing**

An oral hearing of the above appeal was held by the FAC on 6<sup>th</sup> of January 2020.

In Attendance at the oral hearing:

Department Representative(s):	Mr. Martin Regan, Ms. Mary Coogan, Mr. Seppi Hona
Appellants:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway, and Mr. Seamus Neely.
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 notices of appeal, submissions received including at the oral hearing, clarifications obtained, and the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN85957.

#### **Summary of DAFM File**

The application is noted on the Departmental file as having been received on the 24<sup>th</sup> of February 2020. On file there is: a pre-approval submission report from the applicant together with a photo of the site notice; a biomap showing the location of the site notice, location of the proposed road, and area to be

serviced by the road; and road specifications prepared by a Chartered Engineer dated the 24<sup>th</sup> of February 2020. The pre-approval submission notes that the proposed road does not require a new entrance to the public road, that the site elevation is between 140 to 145m, and that the soil type is peat.

Referrals to the County Council (on the 12<sup>th</sup> of March 2020) and to Inland Fisheries Ireland (on the 8<sup>th</sup> of August 2020) are noted. No responses are noted.

The Inspector's certification records the area as being of blanket bog with a moderate (<15%) slope which does not adjoin or contain an aquatic zone. It records that the project site does not overlap any European sites, but that it is with 15km of the Croaghonagh Bog SAC [0129], the Dunragh Loughs/Pettigo Plateau SAC [1125], the Lough Derg (Donegal) SPA [4507], the Lough Eske and Adnamona Wood SAC [0163], the Pettigo Plateau Nature Reserve SPA [4099] and the River Finn SAC [2301].

The screening process is recorded in the Inspector's certification. For each SAC and SPA, the Qualifying Interests are noted, apart from the Pettigo Plateau Nature Reserve SPA. The site synopsis available on the NPWS website for this site notes designation for White-fronted Goose and observes that these have since deserted the site. In all cases the sites have been screened out for reasons including physical separation, a lack of hydrological connection or location in a separate waterbody, and the absence of an aquatic zone within or adjoining the site.

A spatial run for EIA screening is noted as having taken place on the 8<sup>th</sup> of July 2020. The certification indicates an EIA is not required. A separate in-combination report is on file stamped the 30<sup>th</sup> of June 2020. This records planning searches with the County Council (1), An Bord Pleanála (2), Forest Roads (1) and other forestry activities including felling (1). The county development plan is also referenced.

The licence was approved on 9 July 2020 and contains several conditions requiring adherence to various guidelines and standards.

The decision to grant the Licence is subject to one appeal. The grounds include: Breach of Article 4(3) of the EIA Directive 2014/52/EU, through failure to take into account all of the relevant selection criteria set out in Annex III in assessing the requirement for an EIA in this case; Breach of Article 4(4) of the EIA Directive 2014/52/EU through failure to provide all of the information required under Annex II A; Breach of Article 4(5) of the EIA Directive 2014/52/EU through similar grounds to (2); that the determination of the Inspector is inadequately reasoned in terms of the requirement for an EIA; that the Appropriate Assessment (AA) screening conclusion is not legally valid; that the license and its associated operations take inadequate consideration of the Water Framework Directive River Basin Management Plan for Ireland 2018-21; that the licence conditions do not provide a strict system of protection for animal species listed in Annex IV(a) of the Habitats Directive; that the licence conditions do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC.

In the statement to the FAC in relation to the appeal, last updated on the 30<sup>th</sup> of October 2020, the DAFM addresses some grounds included in the appeal, in particular those relating to the EIA Directive.

### **Oral Hearing**

At Oral Hearing, the DAFM confirmed that in addition to the desk assessment noted on the Inspector's certification, a site visit occurred on the 15<sup>th</sup> of June. In relation to the Inspector's report, and that the format presented did not record the date of the Screening for Appropriate Assessment, DAFM confirmed that this took place on the 25<sup>th</sup> or 26<sup>th</sup> of June, i.e. the day before or day of the production of the in-combination effects assessment. On those sites screened for Appropriate Assessment screening, DAFM confirmed that no sites in Northern Ireland were formally considered. DAFM also clarified that the aquatic referral in this instance was addressed to the NRFB, and not Inland Fisheries Ireland (IFI) into which the NRFB was subsumed in 2010 but that the address has remained the same.

The appellant expanded on a number of the points raised on the grounds of appeal. In particular he restated his assertion that the site adjoins a watercourse and raised associated concerns. He expressed the view that the guidance notes and IFORIS questions used by DAFM in evaluating the proposal are inadequate and that the DAFM operating procedures predated the most recent amendments to the EIA directive. He also expressed the view that questions and checkboxes, such as those used by the IFORIS system, in themselves did not constitute guidance. Finally, the appellant highlighted a disparity between the pre-approval submission report which states that the area to be serviced by the road is for an area of 7.7ha and the bio-map provided which shows an area of ca. 4.5ha.

The applicant elaborated on the road design contained in the file, noting that the construction method was for a "floating road" which was considered appropriate for the gentle slope and underlying peat soil type and would end 150m from the Mourne Beg River. They submitted that the area was initially walked to identify the most appropriate route and inspected for environmental features such as watercourses. The road is to be accompanied by hydrological drains, terminating in sediment traps. The applicant acknowledged the disparity between the pre-approval submission and the bio-map and confirmed that the application is for the area shown in the bio-map and speculated that the error arose from other areas accessible from the short existing forest road and the public road being included in the calculation.

### **Consideration by FAC**

In addressing the grounds of appeal, the FAC referenced several publicly available information sources such as mapping from the EPA, the Forest Service and the OSI. It was observed by the FAC that the status of the Mourne Beg\_010 waterbody has been recorded by the EPA as having an Ecological Status or Potential of Poor in the most recent WFD monitoring cycles.

In the first instance, the FAC considered the contention as to the completeness of the Assessment to Determine EIA Requirement, and the grounds as elaborated at oral hearing that follow from that contention. 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 decision under appeal relates to a licence for the construction of a forest road of 150m. At 150 metres the forest road is substantially sub-threshold for the mandatory submission of an EIA Report. The DAFM recorded a consideration of the proposal across a range of criteria and concluded that based on this the application should not be subject to the EIA process. The FAC is satisfied that the range and type of criteria examined as part of this consideration is appropriate for the stated purpose. However, several criteria are not fully considered in the record and it could not be satisfactorily established in the submitted written statement or at the oral hearing how these issues were considered in the application and considerations. For this reason and in relation to this ground (other grounds are examined elsewhere in this letter), the FAC concluded that the decision should be set aside and remitted back to the Minister for a new Assessment to Determine EIA Requirement.

In relation to the contention that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the FAC considered this together with the ground of appeal that the Stage 1 Appropriate Assessment Determination is not valid.

The AA screening contained in the Inspector's Report referenced six Natura sites as being within 15km of the proposed development. All six sites were screened out for reasons including physical separation, a lack of hydrological connection or location in a separate waterbody, and the absence of an aquatic zone within or adjoining the site. The FAC consulted with mapping available from the EPA which confirms the presence of six Natura sites within the 15km of the site, and a further two sites in Northern Ireland. These are the River Foyle and Tributaries SAC [UK0030320] one branch of which is an extension of the River Finn SAC and another branch of which is ca. 4.3km from the project site, and the Moneygal Bog SAC [UK0030211]. At oral hearing the DAFM stated that sites in Northern Ireland were not considered in the screening but that no effects would occur on the basis that they had no direct hydrological connection by virtue of been located in a different branch of the water body or being in the same waterbody as the River Finn SAC which was screened out.

While the FAC understands the logic presented by DAFM at oral hearing, the Forestry Regulations 2017 (S.I. No 191/2017) Section 19. (1) require that the Minister assess if the development is likely to have a significant effect on a European Site. The Screening for Appropriate Assessment presented in the Inspector's report does not consider sites in Northern Ireland in the same spatial search area (15Km) as was used for sites in Ireland, and consequently it must be considered as procedurally incomplete and that a European site within relatively close proximity to the proposal and within the same subcatchment was not considered.

The Inspector's Certification indicates that the site is within 3km upstream of an SAC, and mapping from the EPA indicates that the Mourne Beg\_010 river flows into the River Finn SAC [2301] at a hydrological

distance of ca. 2.2km from the project site. The certification also indicates that the proposed forest road is within an area designated as being sensitive to fisheries. The qualifying interests for the River Finn SAC include Atlantic Salmon. The conservation of Atlantic Salmon in Ireland is the responsibility of Inland Fisheries Ireland (IFI), except in those water bodies that are under the remit of the Loughs Agency which is the case for the Foyle catchment in which the Mourne\_Beg\_010 is located. At Oral Hearing it was confirmed by DAFM that the application was referred to the Northern Regional Fisheries Board, now IFI, and not the Loughs Agency, and that no response from either body was received. Having regard to the location of the proposed road within a fisheries sensitive area and within a sub catchment that contains aquatic SACs and has been assigned a poor status, and to facilitate the statutory function of referral bodies, the FAC considers that the application should be referred to the Loughs Agency and that any new decision of the Minister should have regard to any corresponding response made within the required timeframe.

The Inspector's certification observes that the project does not adjoin or contain an aquatic zone, and at both oral hearing and in the statement provided by DAFM to the FAC it confirmed that a site visit took place. Reference was made by both DAFM and the applicant to the distance from the end of the proposed road to the Mourne Beg\_010 waterbody, a distance of ca. 150m. Also, at Oral Hearing the appellant restated his assertion made in the grounds of appeal that the site adjoins a watercourse and associated concerns. Following the oral hearing, the FAC reviewed the DAFM file and publicly available mapping from the OSI and the EPA.

The proposed forest road is marked on the bio-map provided with the application, which shows it extending a short length (ca. 25m) of existing road. From here it can be observed to run diagonally to the northwest. Mapping provided on-line by the EPA indicates a water course that runs south to north, crossing the road to the south of the site to be serviced by the proposed forest road, and running along the east of the site before flowing into the Mourne Beg\_010 river. This water course can also be observed on the bio map provided. A comparison of the recorded location of the proposed forest road on the Forest Service Forestry Licence Viewer with EPA mapping indicates that the early part of the proposed road is within ca. 30m of this water course. OSI contour mapping indicates that the site has a gentle slope falling in a north to north-east direction. Aerial photography from the OSI, Google Maps and other public sites indicates that the watercourse is likely a small drain predating the afforestation of the site, and with the growth of forestry adjacent to it has become obscured and non-functional.

The FAC considered whether the presence of this marked water course could constitute an adjoining aquatic zone. The COFORD Forest Road Manual (COFORD 2004), refers to the Forest and Water Quality Guidelines (Dept of Marine and Natural Resources, 2000), which along with the Forestry and Fisheries Guidelines (Dept of Marine and Natural Resources, 1995) and the Code of Best Forest Practice (Dept of Marine and Natural Resources, 2000), all state that forest roads should not be constructed within 50m of an aquatic zone if possible. The licence granted includes a requirement that the requirements of the COFORD Forest Road Manual be followed, however the 50m requirement stated in this and the above documents is qualified by a statement that this distance should be achieved where possible. The site

was subject to a site visit by DAFM, and the possibility of a direct hydrological connection was excluded by the Inspector.

In light of the above, the FAC is satisfied that the marked watercourse is not extant, and that in any event the proposed road design will preclude the possibility of a direct hydrological connection to a river waterbody.

However, given the uncertainty whether the application was notified to or considered by the Loughs Agency and the absence of formal consideration of Natura Sites in Northern Ireland, the FAC concluded that the decision should be set aside and remitted back to the Minister for screening for Appropriate Assessment.

In relation to the appellants stated 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 Article 5 of the Birds Directive and Article 12 of the Habitats directive the FAC considers that the granting of a license does not preclude or remove obligations under other legislation.

#### **Conclusion**

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds in the appeal, other submissions received, and the submissions and clarifications obtained at the oral hearing. In the above circumstances, the FAC concluded that the decision of the DAFM regarding CN85957 should be set aside and remitted back to the Minister to refer the application to the Loughs Agency and, having regard to any response received within the stated time-frame, undertake and record a new Assessment to Determine EIA Requirement, and to carry out a new screening for appropriate assessment of the likely effects of the proposal itself and in-combination with other plans and projects under Article 6 of the Habitats Directive before a new decision is made.

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John Evans On Behalf of the Forestry Appeals Committee