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22<sup>nd</sup> September 2021

**Subject:** Appeals 669/2020 and 686/2020 regarding licence CN83610

Dear [REDACTED]

I refer to appeals made to the Forestry Appeals Committee (FAC) in relation to this decision 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 the parties to the appeal.

### **Background and Hearing**

A licence for construction of a 380m road under CN83610 at Cloontagh, Co. Donegal was approved by the Department of Agriculture, Food and the Marine (DAFM) on 21<sup>st</sup> August 2020.

An oral hearing of appeals FAC 669/2020 & 686/2020 regarding CN83610 was held by a division of the FAC on 10<sup>th</sup> May 2021. In attendance at Oral Hearing:

FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr. Derek Daly
Department Representative(s):	Ms. Mary Coogan, Mr. Martin Regan (District Inspector)
Appellant (FAC 669/2020):	[REDACTED]
Appellant (FAC 686/2020):	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Secretary to the FAC:	Ms. Heather Goodwin

### **Decision**

Having regard to the evidence before it, including the licence application, processing by the Department of Agriculture, Food and the Marine (DAFM), the grounds of appeal, submissions made

at the oral hearing and all other submissions received, all materials on file, and in particular the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN83610.

## **Background**

The proposal was for construction of a 380m road under CN83610 at Cloontagh, Co. Donegal. According to the Inspectors Certification report the predominant soil type underlining the project area is predominantly blanket bog in nature. The slope is predominantly flat to moderate (<15%). The project area does not adjoin or contain an aquatic zone(s). The vegetation type(s) within the project area consist of conifer plantation. The project is located in Catchment 40 Donagh - Merville and Sub-Catchment Clonmany\_SC\_010 and lies partially within Sub-Basin Clonmany\_020 and largely within sub-basin Cloontagh\_010. The river waterbodies associated with each sub-basin have a WFD 2013-18 status of 'poor'. Forestry is not identified as being a significant pressure for any of the waterbodies in the vicinity.

The project area does not fall within any designated Natura 2000 site but seven such sites were identified within 15km of the proposal: Ballyhoorisky Point to Fanad Head SAC 001975, Horn Head to Fanad Head SPA 004194, Lough Swilly SAC 002287, Magheradrumman Bog SAC 000168, Malin Head SPA 004146, North Inishowen Coast SAC 002012 and Trawbreaga Bay SPA 004034.

## **Approval**

The licence application was submitted on 25<sup>th</sup> April 2019 and the project was referred to Northern Regional Fisheries Board and to Donegal County Council with the former responding with no objection. There is no response on file from the latter. One third party submission was received on 17<sup>th</sup> June 2020.

The application was desk and field assessed and an AA Screening conclusion was made that all seven sites be screened out using the AA Screening procedure in place at the time (November 2019 version). The basis used for screening out all sites was that there is an absence of any aquatic zone or any significant relevant watercourse within or adjoining the project area. An in-combination assessment is also completed for the site, indicating that DAFM considers that this 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. Approval issued on 21<sup>st</sup> August 2020 with standard conditions.

## **Appeals**

There are two third party appeals against the decision. The first appeal (669/2020) submits that no legal Appropriate Assessment screening has been conducted; the cumulative forest roads exceed 2km; no legal screening for Environmental Impact Assessment (EIA) has been conducted; no EIA has been conducted. The second appeal (686/2020) submits that the decision is not valid due to a breach of Article 2(1) and Article 4(3) of EIA Directive 2014/52/EU; breach of Article 4(4) of EIA Directive 2014/52/EU - road is part of a larger project.; breach of Article 4(5) of EIA Directive 2014/52/EU; the

determination of the Inspector is inadequately reasoned; response to the iFORIS check-box questions include errors; uncertainty regarding the effect of forestry-related traffic on public roads; insufficient information included in the application to permit the Inspector to make a determination as to whether an EIA is required; the design of the road does not take into account factors that mitigate any environmental damage; the Stage 1 AA conclusion for Site 002012 is not valid; the application does not comply with the River Basin Plan for Ireland (2018 - 2021); the In-combination Report does not allow a definitive position re. the cumulative effect of projects and other plans and projects; the Licence Conditions do not comply with Article 12 of the Habitats Directive; the Licence Conditions do not comply with Article 5 of the Birds Directive as referred to in article 1 of that Directive.

### **DAFM Statement to the FAC**

The DAFM in a statement to the FAC confirmed that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. It also sets out the various processing dates relating to the application and that submission(s) were received from members of the public in June 2020. It concludes with a statement from the District Inspector (DI) that he carried out both a desk audit and field inspection, reviewed the submission and appeals and is satisfied that all criteria referred to above have been fully adhered to and approval is in order.

### **Hearing**

An oral hearing of the appeal was held and was attended by representatives of the DAFM and the appellant in the case of FAC 686/2020. The DI clarified the absence of relevant watercourses or aquatic zones relevant to this development. The DI shared his view that constructing a road in this location would be a very low risk activity, given the shallow soils and availability of a strong formation/foundation for the road construction. The DI clarified that the soils in the proposal area would have a thin layer of peat but that the road formation would be made on mineral subsoils. Regarding the screening of Natura 2000 sites the DI re-iterated that there would be no pathway from this site to any Natura site and that the in-combination raised no concerns. Acknowledging that there is a stream to the east of the forest plot being served by the road, the DI confirmed that this stream would not be relevant to the road proposal.

The area of forestry in the vicinity of the development was subject of some discussion at the hearing with the DI explaining that he uses his own judgment in assessing the existing forest levels. Questioned directly on the grounds of appeal that stated there was cumulatively over 2km of road being approved the DI stated that the true level was far lower than this. He outlined how agricultural activity is intense in the area and population density is relatively high with pressures being linked to these sources rather than forestry. The appellant drew attention to the existence of suitable habitat for foraging for hen harrier or merlin within 1.2kms to the north of the site and that, as Annex I species, and while the areas are not explicitly mapped, the proximity of such areas to the proposal site should be taken on board when assessing the development. Two versions of the biomap were on file with the only difference being the townland name. It is clear from the documentation on file that a site notice dated 27<sup>th</sup> May 2020 marks the townland correctly and the in-combination assessment and other materials focus on the correct townland (Cloontagh). The hearing drew attention to the fact that questions 15

and 16 under the heading 'Soil, terrain, slope' in the Inspectors Certification are marked as 'N/A' or Not Applicable. At oral hearing the DI clarified that he was very familiar with the area and its environmental sensitivities; it was very well suited to road construction, being moderately sloped, having a shallow top soil and good basis for construction of road formation and that his decision benefitted from both a field visit and desk review.

### **Consideration by the FAC**

The FAC held an oral hearing of the appeal on 10<sup>th</sup> May 2021. Addressing the written grounds of appeal, the Committee considered, in the first instance the Appropriate Assessment screening undertaken by the DAFM. The FAC finds that the screening of the proposal for Appropriate Assessment established that there were seven European sites within 15km of the proposed road and that there was no reason to extend this radius in this case. Each site was found to have been considered in turn and all sites were screened out for the purposes of Appropriate Assessment. The FAC finds that the reasons for the screening conclusions reached in respect of each site are provided in the screening documentation on file and that the DAFM also recorded other plans and projects that were considered in combination with the proposal.

The DAFM representative in response to query at oral hearing, confirmed it was the contention of the DAFM that the Appropriate Assessment screening carried out and conclusion reached in relation to these European Sites was in compliance with the requirements of the law and relevant procedures. The FAC examined publicly available information from the NPWS and EPA and identified the same seven European sites. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions reached.

Addressing the grounds on the consistency of the decision to grant the licence with the requirements of the EU EIA Directive, the 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. The Irish Regulations, in relation to forestry licence applications, require mandatory EIA 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 for the construction of 380m of road and therefore does not attract mandatory submission of an EIA report. The road would be built to and through managed forest land outside of any area designated for conservation. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated and non designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The FAC is satisfied that the DAFM did not err in the decision regarding EIA, and that the proposal was not required to undergo the EIA process.

With regard to compliance with the Water Framework Directive, the FAC considered that given the scale and nature of the proposal, the conditions attached and the absence of a watercourse on or near the site of the proposed road (and as confirmed by the DAFM representative in response to question at the oral hearing), there will be no effect on either Cloontagh\_010 or Clonmany\_020 river waterbodies for the purposes of the Directive.

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 and relating to the requirements of Article 12 of the Habitats Directive, the FAC notes 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 no error arose in relation to the licence conditions of the nature described by the appellant.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received, including at the oral hearing. The FAC is satisfied that no serious or significant error was made in the making of the decision in this case and is therefore affirming the decision of the Minister regarding licence CN83610.

Yours sincerely,

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Myles Mac Donncadha On Behalf of the Forestry Appeals Committee.

