



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

24th September 2021.

Subject: Appeals FAC 426/2020 and 538/2020 regarding licence CN86354 at Commons, Ballymartin, Byrnesgrove, Co Kilkenny.

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 as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN86354 is for the construction of a forest road 235 metres in length to serve 9.4 hectares of forestry at Commons, Ballymartin, Byrnesgrove, Co. Kilkenny, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 7th of July 2020.

Hearing

An oral hearing of appeals FAC 426/2020 and FAC 538/2020 was held by the FAC on 19th April 2021.

In attendance:

FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Mr. Seamus Neely and Mr. James Conway

Secretary to the FAC: Ms. Heather Goodwin

DAFM Representatives: Ms. Mary Coogan, Mr. Robert Windle.

Applicants: [REDACTED]

Appellants: [REDACTED]
[REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN86354.

Licence.

The licence pertains to the construction of a forest road of 235 metres in length at Commons, Ballymartin, Byrnesgrove, Co. Kilkenny. The Inspector's Certification refers to the predominant soil type underlying the project area as being predominantly brown earths in nature. The slope is mostly flat to moderate (<15%). The project area is indicated as not being crossed by or adjoining an aquatic zone. The vegetation type within the project area comprise WD4. The site would appear to be located within the sub-catchment of the Cloghnagh_010 River Sub and the waterbody has a good WFD status (2013-2018) and is indicated as not being at risk.

The proposal was referred to Kilkenny Co Council on the 05/06/2020 and no response was received.

An Appropriate Assessment screening was carried out and is recorded on the file. Five Natura sites were found to be within 15kms of the project site and all were screened out. Cullahill Mountain SAC 000831 was screened out because of the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. Lisbigney Bog SAC 000869 was screened out because of the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. River Barrow And River Nore SAC 002162 was screened out because of an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. River Nore SPA 004233 was screened out because of an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. Spahill And Clomantagh Hill SAC 000849 was screened out because of an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site.

An In-combination assessment dated the week of the 8th June 2020 was carried out and is recorded on the file. It states "Individually, the project does not represent a source, or if so, no pathway for an adverse effect on any European site exists. Consequently, the DAFM deems that there is no potential for the project to contribute to any such effects, when considered in-combination with other plans and projects." The overall conclusion was to screen out all sites concluding that there was no possibility of a significant effect on any Natura site, and that Appropriate Assessment was not required.

The licence was issued on the 7th of July 2020 subject to standard conditions.

Appeal.

There are two appeals against the decision.

In relation to the grounds in appeal FAC 426/2020 they may be summarised as follows;

- Reference is made what is the cumulative distance of roads in the area and the Directive refers to metres and not percentages.
- It is submitted that the decision does not comply with the Habitats, Birds and EIA Directives.
- The grounds contend that in relation to the test for Appropriate Assessment screening it is necessary merely to determine that there may be an effect rather than to state it will not have a

significant effect. If the development is within 15 kilometres of a Natura 2000 it must be screened in.

- The licence does not comply with the Habitats Directive and reference is made to the stated judgement EUCJ 323-17.
- A map showing all SACs and SPAs and the site of the proposed development should be attached in relation to a screening.
- Details of all forestry in the area should be given to show there is not a cumulative afforestation of more than 50 hectares and all forest roads should be shown.
- Reference is made to the judgement EUCJ 254-19. It also references the Court of Justice stating that it 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, to ensure fulfilment of that obligation which is binding on all the authorities of Member States. The grounds also set out that this must apply to the FAC as the obligation is binding on all the authorities of Member States.

In relation to the grounds in appeal FAC 538/2020 they may be summarised as follows;

- The decision is a breach of Article 4(3) of the EIA Directive 2014/52/EU as all the relevant selection criteria set out in Annex III have not been taken into account by the DAFM in assessing of EIA in this sub threshold application as the proposal does not represent the entire project.
- A breach of Article 4(4) of the EIA Directive 2014/52/EU as the applicant has not provided all the information required under Annex II A and therefore does not comply with the Directive.
- A breach of Article 4(5) of the EIA Directive 2014/52/EU as the proposal does not represent the entire project and the screening for EIA is therefore invalid.
- The proposal is project splitting as this project and CN86110 are essentially part of the same project.
- The determination for EIA is inadequately reasoned. There is no foundation for the conclusion reached based on the documentation lodged or any basis and therefore is as a consequence an error in law.
- The Stage 1 AA is not legally valid. An assessment carried may not have any locunae and must have complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to effects of any proposed works on the protected areas concerned.
- The project threatens the achievement of the objectives of the WFD River Basin Management Plan for Ireland 2018-2021 due to the absence of an assessment of cumulative effects of projects in the same waterbody as to ensure the objectives of the Plan.
- That the licence conditions do not limit works to particular years. There is nothing within the terms of the licence to prevent all of the trees being felled once the licence is issued.
- That the licence conditions do not provide a system of protection for animals consistent with the requirements of Article 12 of the Habitats Directive.

- 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.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act and the Department is satisfied that all criteria as outlined in the relevant standards and procedures had been adhered to in making a decision on the application.

The Statement from the Forestry Inspectorate indicates that the relevant AA procedure was applied in approving this licence. The screening information can be found on file. An In-Combination assessment was also carried out for this application. Using the current AA procedure in conjunction with the Habitat & Foraging guidance tables all Natura 2000 sites have been screened out as outlined on the file. The DAFM Statement to the FAC states that an Appropriate Assessment and an Appropriate Assessment Determination were also carried out and that this application alone or in-combination with other forest and non-forest plans/projects in the area will not have a significant impact the qualifying interests of the Natura 2000 sites screened as part of the AA.

As regards Article 4(3) of the EIA Directive, the Department submits that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered. The application for 235m of Forest Road was considered under a detailed process. The process is outlined in the statement referring to the Assessment of Afforestation Proposal for EIA Requirement Form as completed by the certifying Inspector and recorded on iFORIS and the findings and conclusions therein and approved by District Inspector with conditions on the 15/06/20 and also in relation to referral for consultation to relevant bodies. The cumulation of any impact with any impact of other existing and/or approved projects was assessed, a detailed list of existing or approved projects around the application was taken also into consideration by the certifying inspector in the making of their determination that an environmental impact assessment (EIA) was not required for this application and provided the reasons for reaching that conclusion. The Department submits that the legal requirements of Article 4(3) of the EIA Directive have been fulfilled.

As regards Article 4(4) of the EIA Directive as part of its consideration of this application pursuant to the requirements of the Birds and Habitats Directives, a detailed list of existing or approved projects around the application was available to and also taken into consideration by the certifying Inspector in the making of his determination that an environmental impact assessment (EIA) was not required.

As regards Article 4(5) of the EIA Directive, the Department in the statement submits that the documentation submitted by the applicant in relation to this application was compliant with the requirements of Article 4(4). The Department further submits that it complied with these requirements by assessing the information submitted by the applicant and which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account of the results of the

preliminary verifications or assessments of the effects on the environment carried out under the Birds and Habitats Directives and the Water Framework Directive.

In relation to the grounds of appeal that this project and CN86110 are essentially part of the same project and the application represents project splitting in terms of the EIA Directive it is stated that there is two projects adjoining each other CN86110 and CN86354, the two projects have different owners, hence the need for two separate applications. There is no likelihood that this project either alone or in combination with other plans and projects will have an effect on this European site. This projects length (235m) along with the adjoining project (610m) combined make for a total of 845m of forest road works, which is below the 2000m meter threshold for an EIA.

An oral hearing was held of which all parties were notified and representatives of the DAFM, applicant and an appellant attended. The DAFM presented an overview of their processing of the licence and the screening assessment undertaken, that five Natura 2000 sites were initially screened out and that there was no possibility of a significant effect on any Natura site.

The appellant asserted that the proposed forest road goes into another forest road serving the same forest block. Clarification was required in relation to ownership and also in relation to the townland boundary. It was submitted that the project had a direct connection and drained to an SAC. The determination in relation the requirement for EIA was questioned. There were issues in relation to the quantum of forest roads in the area which was stated as over 2,000 metres in a small area and this raised the issue of assessment of cumulative effects. Issues were also raised by the appellant in relation to responses in the Inspector's Certification in particular Qs 12, 16 and 18 where the response is indicated as no. The appellant also raised an issue in relation to the sourcing of materials for the construction of the road and that the issue of impacts in relation to the Birds Directive were not addressed.

The applicant's representative in a submission indicated that the site was the subject of a desk and field assessment. In relation to the submitted documentation the townland boundary is indicated on the mapping. The project road it was indicated does not cross a watercourse and in relation to aquatic zones there was an aquatic zone 200 metres south of the proposed road.

At the oral hearing the FAC raised issues relating to the road construction and the method of construction; the source of materials for its construction was outlined and material would be imported to the site. There was clarification in relation to the screening undertaken in particular to specific responses recorded on the 'Assessment to Determine EIA Requirement'. The DAFM representative asserted that the response to question 12 *"in relation to the underlying waterbody or waterbodies, is the project, together with any condition to be attached to approval, compatible with Water Framework Directive objectives, i.e. to prevent any deterioration in waterbody status and to restore the waterbody to at least good status"* should have been 'Yes' rather than 'No' as stated in the certification. That the responses to question 16 *"Do the proposed design and construction of the forest road take into account soil, terrain and slope in a way that mitigates against any environmental damage"* and question 18

"Does the area proposed for forest road construction, ancillary features, or associated aggregate sourcing / quarrying contain, adjoin or lie within 200 m of a listed archaeological site or monument, or another area of recognised historical, cultural or archaeological significance, such as an "archaeological area", a "zone of archaeological amenity", a World Heritage Site, or a battlefield" should also have been 'Yes' rather than 'No' as stated in the certification.

The issue of the location of watercourses and aquatic areas was raised in particular in the context of possible hydrological connection to a Natura site in particular the River Barrow And River Nore SAC 002162 and clarification in relation to the basis of the finding for screening out this Natura site. Clarification was sought in relation to potential impact on the Fresh Water Mussel species was raised. The issue of impacts arising from the project in relation to animal and birds species was also raised.

In addressing the grounds of appeal, the FAC considered whether or not the decision was in compliance with the requirements of the EIA and Habitats Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

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. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined. The proposed road works are located outside of any European site. There is no evidence of protected habitats or species on the site.

In the FAC's review of the Appropriate Assessment screening particular examination arose in relation to potential hydrological connectivity to the River Barrow And River Nore SAC 002162 which was screened out because of an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site and the River Nore SPA 004233 which was screened out because of an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site.

The appellant at the oral hearing contended that the absence of a watercourse within and adjacent to the project area was not in his view correct and that an examination of maps demonstrates the presence of a watercourse and connectivity between the project and this watercourse. This view was contested by other parties. The FAC examined this matter including an examination of historical mapping and maps submitted with the application. The historical mapping and the biomap indicates the presence of a watercourse to the west and northwest of the proposed road running southwards and

extending to the existing right of way and the western commencement of the proposed road. There is also a watercourse which has a hydrological connectivity to the River Barrow And River Nore SAC 002162 and the River Nore SPA 004233 located to the south of the proposed road. There is therefore potential sources and pathways from the project site to these Natura Sites and therefore as a consequence potential effect in relation to any of the habitats and species listed as a qualifying interest of these Natura sites cannot be excluded without further assessment and determination. The FAC is therefore satisfied that the DAFM make a serious error in their Appropriate Assessment screening in this regard. The FAC also noted that the DAFM statement (SoF) indicated that an Appropriate Assessment and an Appropriate Assessment Determination had been undertaken in relation to this application, however no record of same is to be found on file and that the Inspector's Certification indicated no Appropriate Assessment was required after the initial AA screening.

In relation to the grounds of appeal of potential effect on birds and animals and that the licence conditions do not provide a system of protection for animals consistent with the requirements of Article 12 of the Habitats Directive or 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. Notwithstanding that the licence conditions require compliance with Departmental guidelines and requirements for Landscape, Water Quality, Harvesting, Biodiversity and Archaeology the FAC concluded that in the absence of an appropriate evaluation of effects arising from consideration of potential effects given a potential source pathway receptor it cannot be stated that protection of qualifying interests have been fully addressed in the Appropriate Assessment screening nor can it be stated that the conditions are sufficient to provide protection for the qualifying interests in this case. In addition, however, the FAC noted that no details or evidence of the presence of species on the site was provided by the Appellant. The FAC considered that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute.

In relation to potential hydrological impacts the site would appear to be located within the sub-catchment of the Cloghnagh _010 River Sub Basin which has a good WFD status (2013-2018) and in terms of risk is indicated as not at risk. The FAC noted the response to question 12 of the Inspector's Certification regarding the underlying waterbody or waterbodies and whether the project, together with any condition to be attached to approval, compatible with Water Framework Directive objectives, i.e. to prevent any deterioration in waterbody status and to restore the waterbody to at least good status wherein the DAFM indicated the response should have been 'Yes' rather than 'No' as stated in the certification. The FAC, however, in relation to a possible hydrological impact has concluded that there is a potential hydrological pathway or connection from the proposed development to a watercourse which cannot be excluded based on the information available. It is noted that the conditions of the licence require adherence to the COFORD Forest Road Manual and that the Manual does set out detailed requirements in relation to road construction, drainage and the prevention of the deposition of material

to watercourses. The FAC notes the specification of the road indicates that no interceptor drains are required however it is also noted that by the FAC that two culverts are proposed and referred to in the road specification. The FAC concluded, based on an overall evaluation and that the answer in the screening record on file at the time of oral hearing in relation to question 12 was incorrect, which is relied on to determine the decision to grant the licence, that the DAFM made an error in this case. The FAC is therefore not satisfied based on the information before that there was an adequate consideration of water quality issues and that the construction measures as proposed will not impact on any Natura sites or receiving waters.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds of appeal, the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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. Forest roads are not referred to in Annex I or Annex II. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to 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. In this case the FAC finds having regard to the record on file and the responses provided to it at the oral hearing that incorrect answers were recorded for questions 12, 16, and 18 on the file record for the 'Assessment to Determine EIA Requirement'. These incorrect answers in the screening record on file at the time of oral hearing, which is relied on to determine the need for an EIA, is considered by the FAC to be an error in this case. While the correct answers to these questions may have been known to the author of the screening report at the time of the decision, the error is regarded as significant. While noting the submissions made by DAFM at the Oral Hearing, the FAC concluded that a new assessment to determine whether an EIA is required should be undertaken regarding this proposal.

In relation to the issue of the townland the FAC are satisfied that the townland boundary is correctly identified on the maps submitted in the licence application.

In considering the appeals in this case the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors were made in making the decision in relation to licence application CN86354. The FAC is therefore setting aside and remitting the decision regarding licence CN86354 to the Minister to undertake a new Appropriate Assessment screening of the likely significant effects on European sites of the proposed forest road itself and in-combination with other plans and projects and to carry out a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive before a new decision is made.

Yours sincerely,



Derek Daly On Behalf of the Forestry Appeals Committee

