



3rd October 2024.

Subject: FAC 030/2024 regarding CN93132

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Hearing and Decision

A hearing of appeal FAC 030/2024 was held remotely by the FAC on 19th September 2024 and having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. FAC Members in attendance at the hearing were Mr. Seamus Neely (Chairperson), Mr. Derek Daly and Mr. Luke Sweetman. The Secretary to the FAC for the hearing was Ms. Aedin Doran.

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN93132. The reasons for this decision are set out hereunder.

Background

A licence (CN93132) for the construction of a forest road 775 metres in length, at Lissatinnig, Dromnakilly, Co. Kerry was issued by the DAFM on the 4th March 2024. The licence decision pertains to the construction of a forest road to serve for the harvesting of an area of 9.14 hectares. The project would involve the construction of road over peat with a carriageway width of 3.4 metres with cambers of 100mm. The peat is to be stripped and overlain with a subbase and pavement surfacing and with provision for culverts and silt traps for sediment control and interceptor drains.

The site is shown to be located on EPA mapping within the River Sub-Basins Inny (Kerry)_010 and Inny (Kerry)_020. Mapping data indicates that the Inny (Kerry)_010 waterbody has a moderate status and is at risk. The Inny (Kerry)_020 waterbody has a moderate status and is at risk. In terms of risk forestry and clear felling are identified as risks and pressures. The proposal is underlain by the Beara Sneem Ground Waterbody which has good status and is not at risk.

Applicant Documentation

The application submitted included a biodiversity map, harvesting road map, road gradient map, a road specification, forest road drainage details, details of the access to the public road, details of the public road in the area, a haulage route, a statement regarding relaxation of road standards based on the road network in the area, and a pre-approval submission report, all of which were marked as uploaded on the Forestry Licence Viewer (FLV) on the 08/11/2023.

DAFM Assessment

The application is recorded as being subject to desk assessment by the DAFM.

The **Inspector's Certification Report** is bears the date 04/03/2024 and marked as uploaded on the FLV on the 04/03/2024. The date inspection certified is recorded as 02/02/2024. This certification recommends approval subject to conditions.

The **Assessment to Determine EIA Requirement** as carried out by DAFM is marked as uploaded on the FLV on the 04/03/2024 and has a date of inspection certified as 02/02/2024. The FAC noted that in this report the DAFM carried out an Assessment to Determine EIA Requirement and recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA.

The **Appropriate Assessment Screening Report (AASRD)** is marked as uploaded on the FLV on the 04/03/2024 and shows the date inspection certified as 02/02/2024. The AASRD also bears the date 04/03/2024 and describes the project as comprising 228 metres of forest road works. Eight European Sites were assessed as being within 15 kilometres of the project;

- Ballinskelligs Bay and Inny Estuary SAC 000335 was screened out due to absence of any significant relevant watercourse(s) within or adjoining the project area.
- Blackwater River (Kerry) SAC 002173 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area
- Castlemaine Harbour SAC 000343 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.
- Castlemaine Harbour SPA 004029 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.
- Iveragh Peninsula SPA 004154 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.
- Kenmare River SAC 002158 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection,

and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.

- Killarney National Park, Macgillycuddys Reeks and Caragh River Catchment SAC 000365 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.
- Old Domestic Building, Askive Wood SAC 002098 was screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the absence of any significant relevant watercourse(s) within or adjoining the project area.

The overall conclusion was to screen out the project as having no likelihood of a significant effect on any European site, and Appropriate Assessment not required.

The **Appropriate Assessment Screening Report Appendix A: In-combination report** for Forest Road project CN93132 was completed on the 05/01/2024 and it included the following statement.

“there is no likelihood of the proposed Forest Road project CN93132, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed elsewhere in the Screening Report, have been taken into consideration in reaching these conclusions. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that they do not have any significant effect on those same European Site(s). There is no likelihood that the proposed project will have, or contribute to, any significant effect on those same European Site(s), when considered in combination with other plans and projects. Note that those European Site(s) upon which, a likelihood of a significant effect arises when considering the project individually, are screened in and will be progressed to, and addressed in, Stage 2 Appropriate Assessment”.

Referrals

The application was referred to Kerry County Council on the 09/11/2023 and no response is recorded as having been received. There was a referral to South West Regional Fisheries Board (Inland Fisheries Ireland) on the 09/11/2023 who responded on the 07/12/2023. The response notes that *“the proposed site is within the catchment of the Inny (Kerry)_020 river, an important salmonid spawning and nursery ground including habitat for eels. All Forestry Roads and Water Quality guidelines should be followed”*. Other recommendations relating to control of sediment and protection of water quality are made in the IFI response.

Decision to issue the licence

The licence was issued on the 04/03/2024 and is marked as uploaded to FLV on the same date. The licence was subject to eight conditions. Condition No. 8 set out a range of requirements relating to Environmental and Silvicultural considerations.

Appeal

There is one appeal against the decision to grant the licence. The full grounds of appeal were considered by the FAC and are to be found on file. The Notice of Appeal and full grounds of appeal were provided to the parties. In summary, the grounds submitted that;

- The Appropriate Assessment Screening is flawed citing that the term 'significant relevant watercourse' is not defined in DAFM's literature or in any scientific document and therefore not a valid scientific term to use in respect of screening out projects from the need for Appropriate Assessment. In the absence of an agreed scientific definition all watercourses must be considered to be relevant. The Advocate General of the CJEU has found that all watercourses are relevant under the WFD – see Case C-301/22. The test is not whether there is direct hydrological connectivity, whether there is a relevant watercourse or a significant relevant watercourse – the test is whether the project may have a significant effect and a significant effect does not require there to be direct (channelled) hydrological connectivity and significant effects can result from overland flow of silt or contaminants where soils are saturated, or where water cannot percolate at a rate commensurate with the rate of rainfall.
- Natura site 000335 has been screened out on the basis that there is 'an absence of any significant relevant watercourse(s)'; watercourses identified on the BioMap connect directly to the Natura 2000 site; the BioMap indicates that there are four points at which the proposed road crosses a watercourse and all of these crossings are indicated to have silt traps installed.
- Reference is made to Natura sites 004029 and 004154 which have been screened out on the basis of 'an absence of any significant relevant watercourse(s)'. These sites are said to be SPAs with avian Qualifying Interests (QIs) that can be affected by more than water quality.
- Natura site 002098 has been screened out on the basis of 'an absence of any significant relevant watercourse(s)' - the single QI for this SAC is the Horseshoe Bat. It is contended that this is not a sound scientific basis for screening out the relevant Natura site.
- The In-Combination document has referenced the wrong iteration of the County Development Plan.
- The majority of the Forest Road crosses open land and there has been no assessment of the habitat that will be impacted by the construction of the road.
- Reference is made to the project is in the DED of Doire Ianna/Cloon which is said to have a HNVF score of 4.375. In the absence of an ecological assessment, it is contended that it cannot be assured that there will not be harm to the environment.
- Reference is made to the EIA Screening Report in relation to Annex I habitat(s) and / or overlap with the Irish Semi-Natural Grasslands Survey layer, and it is contended that there are errors in the report.
- The grounds contend that the applicant is not the owner of the land on which the road will be constructed and the issue of right of way from the public road along the route of the proposed road is raised.

- Issues are raised in relation to responses in the EIA Screening Report relating to the length of the road and whether it exceeds 2000 metres; the use of local knowledge as a reason which led to a particular decision and that the screening out from EIA on the basis of cumulative impact needs to be adequately reasoned.
- It is contended that the sensitivity of Water and Freshwater Pearl Mussel (FPM) to this project has not been addressed by Ecology Section in order to result in recommendations applied, either through project redesign or conditions to be attached to the forest road licence.
- Reference is made to referral to the necessary Consultation Bodies and whether all of the referral responses received, and observations / recommendations therein, were given due consideration having regard to the 'no' response to this question in the report.
- On the face of the record the submission made by IFI was not considered. Since the position of IFI was deemed to be necessary to the processing of the application the failure to consider the response is a serious error.
- Reference is made to the 600m length of the road which is to be constructed over peat and that the construction of this road would involve an area 3 times the minimum forest area (0.1 ha) to be converted from peat to forest road, with drainage involved submitting that if this was a proposal for afforestation it would be rejected.
- The relaxation from the technical standard for the new entrance on to the public road and evidence supporting same is raised.
- In summary the grounds submit that the assessment of this application contains a series of serious errors.

DAFM Statement (SOF)

The DAFM provided a response to the grounds of appeal (SOF) which was provided to the other parties. In summary, the SOF provides an overview of the processing of the application and makes a response to the appeal. This records the consultation with prescribed bodies and that the application was subject to public consultation. It indicates that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act. In relation to the grounds of appeal it included the following content;

“Upon further consideration I have identified some issues within the processing of this file that will need to be addressed. I recommend the file be reverted back to the department for a revised Stage 1 appropriate assessment”.

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the completeness of the assessment of the licence application and an examination of the procedures applied which led to the decision to grant the licence. The FAC considered that the appeal raises general concerns in relation to Appropriate Assessment (AA) and Environmental Impact Assessment (EIA) as recorded by the Minister but does not submit any specific concerns in relation to significant effects or impacts on European sites and their interests.

The FAC had regard to the documentation provided through the DAFM's Forestry Licence Viewer (FLV) as notified to the parties, the notice of appeal and the statement provided by the DAFM. In relation to the contention in the grounds that the Appropriate Assessment is flawed the FAC noted the response of DAFM in the SOF wherein it identifies some issues within the processing and that this needs to be addressed and added that the file be reverted back to the department for a revised Stage 1 appropriate assessment.

In relation to Appropriate Assessment, the FAC noted that eight European sites are recorded in the Appropriate Assessment Screening and that all eight sites were screened out and the screening conclusion for each site included as a reason the absence of any significant relevant watercourse(s) within or adjoining the project area. The FAC also noted that in relation to seven of the sites the subsequent lack of any hydrological connection was also given as a reason. As advanced in the grounds of appeal a number of the sites have qualifying interests which are not wholly related to hydrological connection. In such circumstances the FAC considers that the reasons stated for screening out these sites are flawed and that this represents a serious error. It is also noted that there is reference in the Appropriate Assessment documentation that the project comprises 228 metres of forest road works whereas the licence application in this case was for the construction of 775m of forest road.

The FAC notes that the In-Combination assessment which was completed on the 05/01/2024 predates the Appropriate Assessment Screening Report which was certified on 02/02/2024 and which also bears the date 04/03/2024. The FAC considers this to be a serious error as the In-combination Assessment cannot predate a report on which it relies. It also appears to the FAC that it is not clear that the potential for significant effects to arise from the proposal In-Combination with other plans and projects was correctly considered by the DAFM as these were ruled out at screening stage which post-dated the In-Combination report. The FAC considers that this is a further error in the processing of the application.

The FAC noted that the In-Combination Statement for project CN93132 included the following wording;

"It is concluded that there is no likelihood of the proposed Forest Road project CN93132, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed elsewhere in the Screening Report, have been taken into consideration in reaching these conclusions. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that they do not have any significant effect on those same European Site(s). There is no likelihood that the proposed project will have, or contribute to, any significant effect on those same European Site(s), when considered in combination with other plans and projects. Note that those European Site(s) upon which, a likelihood of a significant effect arises when considering the project individually, are screened in and will be progressed to, and addressed in, Stage 2 Appropriate Assessment".

Notwithstanding the serious error identified by the FAC in relation to the sequencing of the In-Combination report dealing with the screened out sites and the screening report that reached that conclusion, it appears to the FAC that it is not clear that the wording in the In-Combination statement relating to the screened out sites demonstrates that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as the wording refers to consideration on the basis that there is no likelihood of 'residual effect(s)' that might arise, which are not significant in themselves, creating a significant effect in combination with other plans and projects.

In the FAC's view, the reference to 'residual effects' in the In-Combination report / assessment on file dated 05/01/2024, that appears to deal with the screened-out sites, (notwithstanding the sequencing error referenced above) creates confusion as it is not clear what effects are being referred to in this instance and there is no explanation as to what gives rise to these effects such that they can be described as being 'residual'. The FAC would understand that the term residual is generally used in the context of what remains after an action is undertaken. In the context of Appropriate Assessment (AA) the term 'residual effects' is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment entitled Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states on page 40,

'If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions'.

In the context of undertaking the screening again the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion.

In relation to Environmental Impact Assessment, the FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement that is marked as inspection certified 02/02/2024 and also bears the date 04/03/2024. In this assessment the Inspector recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC noted that a number of errors would appear to have been recorded in the assessment. The reference to the length of the proposed forest road project being 2000 metres or greater is answered as "yes". This is an error as the length of the approved road is 775 metres and below the threshold of EIA. The assessment notes the project area is wholly or partially within an area identified as being sensitive for fisheries and within or immediately upstream of a river subbasin of a River Waterbody deemed 'At Risk' or subject to Review under the relevant River Basin Management Plan. The FAC also notes that that the answer 'no' was given in relation to whether the observations / recommendations therein of the consultation bodies was given due consideration.

Specifically in relation to fisheries and water quality the FAC noted that as part of the consultation process a response was received from IFI which includes that *"the proposed site is within the catchment of the*

Inny (Kerry)_020 river, an important salmonid spawning and nursery ground including habitat for eels. All Forestry Roads and Water Quality guidelines should be followed". Other recommendations relating to control of sediment are made relating to appropriate measures put in place to traverse the watercourse without impacting on water quality or the movement of migratory fish and also in relation to consultation with IFI. While the licence conditions refer to compliance with Departmental guidelines and requirements for Water Quality, Archaeology, Landscape, Harvesting and Biodiversity and the COFORD manual in relation to forest roads, no condition requiring consultation with the Fisheries body or the inclusion of its suggested conditions specific to the site were included. Given the identified sensitivity of the site in relation to fisheries, the FAC considers that a confirmation that the IFI response was considered would have been appropriate in relation to EIA Screening. The Assessment to Determine EIA Requirement as noted contains a series of errors such that the FAC considers that the assessment should be undertaken again.

The FAC noted that reference was made in the grounds of appeal that local knowledge would not necessarily constitute a valid reasoned response. The FAC considers that the use and application of local knowledge would represent good practice in informing the decision-making process and can form a positive aspect in the overall decision-making process. The FAC considered the grounds regarding an incorrect iteration of the County Development Plan, being referenced in the In-Combination assessment as having been considered by the DAFM, and in the FAC's view, this constitutes an error in the processing of the licence application.

The FAC considered the grounds of appeal related to High Nature Value Farmland (HNVF). The appellant submitted that the DED of Doire Ianna/Cloon has a HNVF score of 4.375. In this regard, it is noted that HNV maps are on a DED level with an average indicative figure for a large area. The appellant did not submit any evidence to suggest that there are Annex I habitats present on the proposed site. The FAC noted that question 6.1 in the applicant's Pre-Approval Submission Report states that the project area does not "traverse an area(s) having the characteristics of an Annex I habitat(s) (e.g. Semi-Natural Grasslands, Annex Woodland)". Additionally, the DAFM's Assessment to Determine EIA Requirement indicates that the proposal does not overlap with the Irish Semi-Natural Grasslands Survey layer. Based on the information before it, the FAC considered that there is no convincing evidence that the DAFM erred in its processing of the application in this case as it relates to HNVF.

In relation to the sensitivity of Water and Freshwater Pearl Mussel not being addressed there is no evidence based on an examination of National Parks and Wildlife data and mapping to indicate the presence of the species in an area which is hydrologically connected to the project site. In relation to the Water Framework Directive and effects on water quality generally the FAC viewed the information on the EPA and Catchments.ie websites and current mapping and data which confirmed that the project is within the River Sub-Basins Inny (Kerry)_010 and Inny (Kerry)_020. Mapping data indicates that the Inny (Kerry)_010 waterbody has a moderate status and is at risk. The FAC noted that the status of the Inny (Kerry)_020 waterbody is recorded as moderate and that it is recorded as being at risk. The FAC noted that forestry and clear felling are identified as risks and pressures within these sub basins.

The FAC noted that the documentation submitted includes details for the control of sediment and road drainage and also noted that the conditions of the licence decision require that operations are carried out in accordance with Forestry guidelines as they relate to water quality and the Code of Best practice for Forest Practice Roads in the interest of the protection of water quality generally.

It is noted that the documentation as submitted provides details in relation to road construction and specification including silt and sediment control, entrance details and haulage routes. The project was referred to Kerry County Council who did not respond or raise any concern in relation to the road construction and entrance. In relation to the issue of ownership the documentation indicates that the applicant is the owner. The grounds of appeal have not advanced any evidence that the applicant is not the owner of the project area.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, submissions made, and the statement of fact submitted by the DAFM. Based on the evidence before it, as outlined above, the FAC is satisfied that a series of significant or serious errors was made in the making of the decision to issue CN93132. The FAC is thus, setting aside the decision and remitting same to the Minister in accordance with Section 14B of the Agriculture Appeals Act 2001 as amended, to carry out an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and to undertake a new Assessment for EIA Requirement, before a new decision is made.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

