



10th October 2022

[Redacted]

Cc:

[Redacted]

Subject: Appeal FAC 060/2022 against licence decision CN89662

Dear [Redacted]

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

Hearing

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. A hearing of appeal FAC 060/2022 was held remotely by the FAC on the 21st of September 2022. In attendance:

FAC Members: Mr. John Evans (Chairperson), Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN89662. The reasons for this decision are set out hereunder.

Background

The appeal relates to a decision to grant a licence for the construction of a forest road of 665m at Smithstown, Ballytarsna, Co. Clare to service a commercial forest of 24.33 ha in 6 plots planted in 2001. The public file is available on the Forest Licence Viewer (FLV) provided by the DAFM. The application

includes operational details for the site to be serviced by the proposed road, environmental considerations, details of construction and maps. Construction is to be by excavation.

A site notice dated the 19th of October 2021 and a photo of an erected site notice are on the record. A river, the Carrowkeel River, flows to the north and west of the proposed project. A referral was made to Clare Co. Co., and the response, dated the 23rd of December 2021 is on file which makes reference to the requirements of the Water Framework Directive and makes a recommendation in relation to any licence that may be issued.

Various documents, including a Natura Impact Statement (NIS), prepared on behalf of the applicant, and an Appropriate Assessment Screening Document (AASD) identify seven Natura sites within 15km of the project site. The AASD screens out all sites for Appropriate Assessment, however the NIS identifies that Appropriate Assessment is required for the Inagh River Estuary SAC [0036] on the basis of potential hydrological connections with the project site. Other documents, reflecting of the processing of the application are also on file, including an Assessment to Determine EIA requirement. This refers to the date the Inspection was certified, which is recorded as the 19th of May 2022. This records the “% of forest cover within 5 km of the site is stated” to be 24.96%. In relation to a question “Have any issues raised with the Forest Service by the general public and/or by non-government organisations been examined and considered?” an answer of “no” is recorded.

An Appropriate Assessment Determination (AAD) was prepared by a Forest Service ecologist dated the 5th of May 2022. The AAD notes the contents of the NIS, and sets out a number of mitigation actions in relation to nearby karst features and the screened in Inagh River Estuary SAC. The AAD also includes an assessment of in-combination and cumulative effects. An in-combination statement is included which states that:

The proposed forest road project CN89662 lies in a rural landscape in the townland(s) of Ballytarsna, Smithstown, Clare. It is within the River Sub-Basin Dealagh_010, approximately 17% of which is under forest cover, which is greater than the national average of 11%.

One submission from a member of the public, the appellant, is on file dated the 20th of October 2021, which outlines concerns similar to those outlined in the appeal.

The licence was issued on the 24th of May 2022, with licence conditions that require adherence to various standards and good practice guidelines (which encompass the recommendations received from the Local Authority), and a requirement to adhere to the mitigation measures set out in the AAD of the 5th of May 2022.

Appeal and DAFM Statement

There is one third party appeal against the decision to grant the licence, this is on the FAC file and was made available to all parties. In summary, the appeal states that the appellant lives on the road to be used to access the forestry for which the forest road is proposed, that neither the applicant or the Forest Service

consulted with the appellant, that the road to be used to access the forestry crosses a bridge that if the road or bridge are damaged the appellant would be unable to access his house.

A statement was submitted by the DAFM in response to the appeal which stated that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. The statement continues with a declaration by the inspector that the submission from the appellant was not considered at the time of certification, but that in any event the substance of the submission is not a matter for the Forest Service to adjudicate on.

Post Appeal correspondence

Following receipt of the appeal, but before consideration by the committee a number of items of correspondence were received by the FAC from representatives for the applicant and appellant. These are on the FAC file and are summarised as follows.

In a letter dated the 31st of August 2022, the applicant's forester states that the points raised by the appellant do not relate to the proposed forest road, and characterises the concerns raised in the appeal as a legal dispute between the appellant and applicant on issues unrelated to the proposed forest road.

In a letter dated the 13th of June 2022, solicitors acting on behalf of the appellant supplied the FAC with a copy of Folio 29718F Co. Clare and stated that the appellant is the registered owner of the Folio and refer to an area marked in red on a supplied map as that folio. The letter also refers to an area shaded yellow on the same map, and stated that this forms part of the application, that appellant is the owner of the area shaded yellow, that the applicant has no permission to interfere in any way with the part of the roadway through the property, that any right of way (if it exists) is for general agricultural use only, that the roadway is narrow and is not built or designed to cater for heavy trucks or heavy machinery, and that the appellant objects to the application.

This correspondence was circulated to all parties and the DAFM, and no observations were received.

In further correspondence dated the 11th of August, solicitors acting on behalf of the appellant reiterated the points previously made in relation to a right of way, that it is of an agricultural nature, and that forestry is not deemed to be an agricultural activity.

Consideration by the FAC.

In the first instance, the FAC considered the matters of consultation. Part 6 of the Forestry Regulations 2017 address Consultation in relation to forestry licences. Regulations 10 and 11 requires the publication of a notice by the Minister and the erection of a site notice by the Applicant. The FAC noted that a notice of the application was published on the DAFM website¹ and details were provided on the Forestry Licence Viewer. The record includes a copy of site notice, a photo of the site notice, and a map showing the location of the site notice. It appears from this map that two site notices were erected, one at the public

¹ <https://assets.gov.ie/203451/0fc8cbe5-8c02-4388-9e5e-f191c7bc98eb.pdf>

road and at the start of the proposed forest road. The FAC is not satisfied that an error was made in the making of the decision regarding providing for consultation.

However, the FAC also noted that in the Assessment to Determine EIA Requirement Report the question "Have any issues raised with the Forest Service by the general public and/or by non-government organisations been examined and considered?" an answer of "no" is recorded. A submission from the Appellant is on file, raising the issue of access which forms the basis for the appeal and was submitted a short number of days after the application was made and site notice erected. The Statement of Fact provided by DAFM confirms that this submission was not considered at the time of the making the decision. Regulation 20 of the Forestry Regulations 2017 requires that the Minister has regard to a submission made under Part 6 in making a forest road works licence decision. The FAC is satisfied that the failure to have regard to a submission made under Part 6 constituted a serious error in the making of the decision. The FAC considered that the decision should be set aside and remitted to the Minister.

The FAC noted the appellant's ground of appeal that the roadway leading from the public road to the site is not a public road and the applicant does not have right of way along that roadway. The FAC noted that the application is for the construction for a forest road of 665m to service a commercial forest of 24.33 ha in 6 plots planted in 2001. The ownership of the lands on which the road is to be constructed is not disputed. Furthermore, both parties have expressed the view that a right of way of some form exists on this road. The FAC is not in a position to adjudicate on legal entitlements in relation to rights of way but noted that a granting of a licence does not confer any entitlements to such a right or the suitability of the road in question for use in bringing materials to and from the site. The FAC is also of the view that while there is a requirement for DAFM to consider issues of access at the time of afforestation, the DAFM may similarly not be an appropriate body to adjudicate on such matters, and that any dispute between the parties as to the use of a right of way is a civil matter. The FAC is not satisfied that the Minister made an error in the making of the decision in relation to these grounds of appeal.

In considering the appeal, the FAC also had regard to the processing of the licence application and fidelity to European law. The FAC noted that in the Assessment to Determine EIA Requirement the approximate % of forest cover currently in the underlying waterbody (or waterbodies) is provided as 54%. The combination report states that approximately 17% of the *River Sub-Basin Dealagh_010* is under forest cover. Given the extent of the divergence in this case the FAC is satisfied that this constitutes a serious error.

In considering the appeal, the FAC had regard to the record of the decision, the submitted ground of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001(as amended) the FAC is satisfied that a serious or significant error or series of errors was made in the making of the decision. The FAC is thus setting aside the decision of the Minister regarding licence CN89662 and remitting it to the Minister to make a new decision having regard to any submissions made under Part 6 of the Forestry Regulations 2017 and to undertake a new determination for EIA requirement, and if necessary following consideration of the differences between the figures given

in relation to forest cover in the In-combination statement, a new Appropriate Assessment screening and Appropriate Assessment under Article 6 of the Habitats Directive.

Yours sincerely,

A large black rectangular redaction box covering the signature of John Evans.

John Evans, On Behalf of the Forestry Appeals Committee

