



23rd August 2023

Subject: Appeal FAC 087/2022 against licence decision CN90347

Dear

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 (MAFM). 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

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 087/2022 was held remotely by the FAC on 13th July 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, & Mr. Vincent Upton.
Secretary to the FAC: Ms. Vanessa Healy.

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 allow the appeal and set aside the decision of the MAFM to grant the licence CN90347. The reasons for this decision are set out hereunder.

Background

The licence decision under appeal pertains to the construction of a forest road of 260 metres in length in the townland of Tullynascreen, Co. Leitrim. The application was submitted on 15th March 2022 and describes the soil type at the proposal area as peat. The slope is described as moderate, construction is by way of build on top, interceptor Drains are not required, and that the road requires a new entrance to a public road or the material widening of an existing entrance. The application material records that culverts for stream crossings and formation run-off is to be provided at 40-100m intervals. The proposal is described as being in the KILLANUMMERY_010 River Sub-Basin. The application shows that the proposed project also includes for the trimming and maintenance of adjacent roadside boundaries to achieve sightlines of 120m in each direction at the entrance. The site area is said to be 5.98 ha and the Appropriate Assessment documentation indicates that the proposed road is to facilitate the thinning of 5.98 ha of forest. In relation to the road construction the application states that the road is to have a

formation width minimum 5.5 m with a maximum 300 mm camber and the carriageway width is to be 3.4 metres with a 100 mm camber minimum.

The record shows that there is on file an undated Appropriate Assessment (AA) screening report which has on it a certification date of 08/07/2022. This screening records that seven sites within 15 km of the proposal were considered and all of these (Boleybrack Mountain SAC 002032, Bricklieve Mountains and Keishcorran SAC 001656, Lough Arrow SAC 001673, Lough Arrow SPA 004050, Lough Gill SAC 001976, Union Wood SAC 000638, and Unshin River SAC 001898) were screened out. The reason recorded for screening out all seven sites is given as "Other factors, AS per AAD". The overall conclusion of this screening is that there is no likelihood of a significant effect on any European site, and that Appropriate Assessment is not required.

The record also shows that there is on file an AA report (AAR) dated 05/05/2022 completed by Niall Phelan, Environmental Facilitation Ltd on behalf of the MAFM. It states that having carried out an AA screening, it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on Lough Gill SAC 001976 and that an appropriate assessment must be carried out in respect of the project. The AAR describes the project as a 260m proposed forest road planned to facilitate thinning operations for a forest of approximately 5.98 hectares, that the road is proposed to be built by embankment, and that the project area is situated on a moderate slope and is comprised of 100% blanket peat soils. It states that the proposed road route is crossed by the aquatic zone KILNANUMMERY_010 1 (WFD Status: At risk, Ecological Status: Poor) and that aquatic zone flows approximately 6.5km downstream from this point before entering Lough Gill SAC. The record also shows that there is an AA Determination (AAD) dated 04/07/2022 on file as completed by Niall Phelan on behalf of the MAFM.

The DAFM recorded a consideration as to whether the proposal should be subject to an EIA. This records a consideration of the proposal across a range of criteria and concluded that the application should not be subject to the EIA process. The licence was issued on 12/07/2022 subject to conditions. These include a requirement to adhere to the mitigation measures set out in the AAD, dated 04/07/2022 which was said to be attached.

Appeal

There is one third party appeal against the decision and the full grounds of appeal and submissions received by the FAC have been provided to all the parties. The DAFM informed the FAC that the documents required under the Forestry Appeals Committee Regulations 2020 are provided through the Forestry Licence Viewer (FLV) and the parties were notified of this. A summary of the grounds of appeal FAC 087/2022 is set out below.

- Undue process - contending an untimely publication of decision in that the licence was issued on the 12th July 2022 and the decision was not made know to the public until the 13th July 2022.

- Application / Documentation Issues - contending that there are two BioMaps on the FLV which differ in content and that both are dated the same. Submits that when an updated document is provided it should be dated accordingly so that it is understandable.
- Licence Condition No 8 cannot be understood – contends that Licence condition 8 cannot be understood by the layperson citing inability to access documentation and is therefore not adequately reasoned and is not consistent with the principles of natural justice.
- Licence Condition not adequate to ensure the reasons for the condition – contending that the COFORD Forest Road Manual is approximately 18 years old and is very light on environmental considerations and cites that it states that Forest Roads are not subject to EIA. The submission also points out that there is a document on file indicating that the project requires a relaxation from the Technical Standards which is not consistent with the condition.
- EIA Screening – contends a lack of reasoning given for the EIA Screening determination.
- Safety – contends that SLG fails to see how the 'Yes' answer can be given to the question 'Does the proposed design and construction, combined with any condition to be attached to approval, meet safety-related standards set out in the COFORD Forest Road Manual and any health and safety issues raised by the Local Authority'.
- Inadequate ecological / environmental assessment – contends that the strict protection regime under Article 12 of the Habitats Directive is entirely separate to the Appropriate Assessment procedure under Article 6(3) of the Habitats regime. Submits that there has been no assessment of the potential impact on species listed in Annex IV of the Habitats Directive while submitting that it is for the Minister to ensure that adequate assessment takes place. Grounds also submit that there is no general ecology report from the Forest Service.
- Cumulative Impact – contends that the questions posed by the EIA Screening are not appropriately framed to allow DAFM to make an adequate assessment of the Cumulative Impact of the project.
- Water Quality – contends that as the water quality in the main River Sub-Basin (RSB) in which this project lies is deemed to be At Risk with Forestry identified as a significant pressure then the Yes answer to the question 'Will adherence to water quality guidelines, harvesting guidelines and any condition to be attached to approval, be sufficient to prevent any potential significant impact to aquatic zones and water quality arising from the project' needs to be supported with evidence.
- Appropriate Assessment - contends that the mitigation contained in the AA Determination are not written with sufficient precision and clarity regarding their requirements and permitting procedures or substantiated with adequate scientific evidence.
- No evidence that Leitrim Co. Council's opinion and recommendation has been adequately considered – reference in this connection is made in matters including the Councils assessment on Haul Route, the lack of detail relating to a stream crossed by the proposed road, that the proposal will adversely affect public safety and road safety and that further information is required.
- An oral hearing is requested.

DAFM Statement (SOF) to the FAC

The DAFM provided a statement (SOF) to the FAC in relation to the appeal which was provided to the parties. The statement provided an overview of the processing of the application and the steps and dates involved. The SOF states that seven Natura sites were screened out for Appropriate Assessment and that there was no likelihood of a significant effect on any European site, and Appropriate Assessment not required. It also sets out that the approval issued on 12/07/2022 which was a Tuesday, that the decision was advertised on the next advertising day on Wednesday 13/07/2022 which is standard practice and that the documents were available as soon as they were made public on 13/07/2022. The SOF indicates that two Biomaps present the same content at different scales 1:5000 and 1:10000 and that this would in general be readily understandable by the layperson. The SOF contends that the licencing conditions as presented are clear well-reasoned and follow standard operating procedures and that standard operating procedures were adhered too in relation to EIA screening. It also contends that DAFM's standard operating procedures regarding road application were adhered to and that a relaxation from standards document was supplied in support of the application. This document, which it states was signed by a Chartered Engineer, outlined a reduced sightline of 120m.

Post Appeal Correspondence

There have been post appeal submissions from the appellant (06/06/2023 & 15/07/2023) and DAFM (12/07/2023).

Considerations of the Forestry Appeals Committee

The FAC in the first instance considered whether an oral hearing was required in this case and having regard to the particular circumstances of the appeal, the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The FAC considered the contention in the grounds that the DAFM failed due process in that the licence issued on the 12/07/2022 and the decision was not made know to the public until the 13/07/2022. In this connection the FAC finds that the DAFM statement sets out that the licence issued on the 12/07/2022 (Tuesday) and was advertised on 13/07/2022 (Wednesday). The FAC noted that the advertising of the licence occurred on the next working day after its issue and concluded that this in itself did not constitute a failure of due process or a failure of fair procedures by the DAFM. The period in which an appeal can be taken is provided for in legislation by the Minister.

The FAC considered the grounds in the appeal relating to Appropriate Assessment (AA) and related matters. The FAC finds that an AA Screening on file as carried out by a District Inspector does not record the date of completion by the DI, while displaying a certification date of 08/07/2022, which is after the AA report had been prepared. The said AA Screening records that seven sites within 15 km of the proposal were considered and all of these were screened out. The reason recorded for screening out all seven sites is given as "Other factors, AS per AAD". The overall conclusion of this screening is that there is no likelihood of a significant effect on any European site, and that Appropriate Assessment is not required. The record also shows that there is an AA report (AAR) dated 05/05/2022 completed by Niall Phelan, Environmental Facilitation Ltd on behalf of the MAFM. It states that having carried out an AA screening,

it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on Lough Gill SAC 001976 and that an Appropriate Assessment must be carried out in respect of the project. The AAR describes the project as a 260m proposed forest road planned to facilitate thinning operations for a forest of approximately 5.98 hectares, that the road is proposed to be built by embankment, and that the project area is situated on a moderate slope and is comprised of 100% blanket peat soils. It states that the proposed road route is crossed by the aquatic zone KILNANUMMERY_010 1 (WFD Status: At risk, Ecological Status: Poor) and that aquatic zone flows approximately 6.5km downstream from this point before entering Lough Gill SAC. The FAC finds no AA screening document other than that carried out by a District Inspector and as referenced above. The said AA screening screened out all sites and concluded that there is no likelihood of a significant effect on any European site, and Appropriate Assessment not required. The only date provided on the document postdates the Appropriate Assessment Report. It is a requirement under the Forestry Regulations 2017 for the Minister to complete a screening for Appropriate Assessment in relation to the application that was made. The FAC considers that the absence of an AA Screening which concurs with the screening conclusion described in the introduction in the AAR represents an error in the processing of the application in so far as AA is concerned.

This screening document bearing the date 08/07/2022 also includes the following text,

Furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects.

An In-Combination Assessment of the proposal is to be found at section 6 of the AAR. It states that the potential for the proposed forest road project CN90347 to contribute to an In-Combination impact on European sites was considered by the Department of Agriculture, Food & the Marine (DAFM) and that various online planning systems and datasets (including DAFM's Forest Licence Viewer) were consulted on the 05/05/2022 in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Killanummery_010. The In-Combination statement which is recorded as being completed on 05/05/2022 reads as follows.

The proposed forest road project CN90347 lies in a rural landscape in the townland of Tullynascreen, Leitrim. It is within the River Sub-Basin Killanummery_010, approximately 41% of which is under forest cover, which is greater than the national average of 11%. At 260 metres, the proposed project is considered medium in scale.

The review of the DAFM Forestry Licence Viewer identified a number of forestry projects within the vicinity. These projects undergo environmental assessment, including AA screening and appropriate assessment (if necessary).

In the River Sub-Basin Killanummery_010 over the last 5 years a number of developments have been or were in the process of being granted planning permission. These too undergo environmental assessment, including AA screening and appropriate assessment, if necessary.

It is concluded that there is no possibility that the proposed forest road project CN90347, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Lough Gill SAC. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any adverse effect on the integrity of these European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the above European Site(s).

Note that this relates to the proposed activities under CN90347 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted.'

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site. The FAC considers the conclusion stated above to be an error as it suggests that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which in-combination with other plans and projects could result in a significant effect on a European site. The FAC would consider that the In-Combination test as applied in this case is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive and represents a further serious error in the processing of the application in so far as Appropriate Assessment is concerned.

The FAC considered the grounds in the appeal in relation to EIA screening and related matters and in this context noted the submission by the DAFM in the SOF relating to EIA assessment wherein it states that EIA screening standard operating procedures were adhered to. This ground of appeal contends there is a lack of reasoning given for the EIA Screening determination. The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement based on a Last Spatial Run Date of 08/07/2022 in advance of making the decision to grant the licence subject of this appeal. In this assessment the Inspector recorded a consideration of the application across a range of criteria relevant to the proposed forest road, including water, soil, terrain, slope, archaeology, designated areas, landscape and visual amenity and cumulative effects, and determined that the project was not required to undergo EIA. The FAC noted that the procedure as recorded provides for further commentary to be recorded and that no such further

commentary was included. The FAC noted that the cumulative impact assessment in the EIA screening refers only to other forestry projects and, although there is an In-Combination statement on file for the AA screening process, there is no evidence that other, non-forestry projects were considered when assessing the cumulative impact of the proposal on the environment. The FAC considers this to be an error in the EIA screening in this case.

The FAC considered the grounds of appeal relating to Water Quality which made submissions contending that as the water quality in the main RSB in which this project lies is deemed to be At Risk with Forestry identified as a significant pressure then the Yes answer to the question *'Will adherence to water quality guidelines, harvesting guidelines and any condition to be attached to approval, be sufficient to prevent any potential significant impact to aquatic zones and water quality arising from the project'* needs to be supported with evidence. The FAC finds that the DAFM in its AAR at section 3 records that *'This 260m proposed forest road is planned to facilitate thinning operations for a forest of approximately 5.98 hectares. The road is proposed to be built by embankment (see Appendices: Figure 1 for more information regarding road specifications). The project area is situated on a moderate slope and is comprised of 100% blanket peat soils. The proposed road route is crossed by the aquatic zone KILNANUMMERY_010 (WFD Status: At risk, Ecological Status: Poor) as shown on the submitted BioMap (Appendices: Figure 2). This aquatic zone flows ~6.5km downstream from this point before entering Lough Gill SAC. Therefore, a hydrological connection has been concluded between the project area and this downstream European site.'* In this context the FAC notes that the status of the waterbody concerned (as referenced in the grounds) is recorded by the DAFM and that this is the context against which the application is assessed. It is further noted that the considerations made by DAFM in its assessment to determine EIA requirement were clearly articulated in the screening form and were based on a spatial run that postdated the completion of the AAR.

The FAC finds that having consulted the Catchments.ie website on the day of the hearing of this appeal that the status of the KILLANUMMERY_010 waterbody is recorded as Good, and that the status is based on monitoring. The FAC also finds that the Catchments.ie website on the same day recorded that the said waterbody is not at risk for the 2016 - 2021 cycle. The FAC notes that the licence as issued contained numerous conditions in relation to the protection of water quality. The proposal is for the construction of 260m of forest road. Based on the information available to it and having regard to the nature, location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality. While acknowledging that the DAFM had recorded a status and risk that is different to that displayed on the Catchments.ie website at the date of hearing, the FAC considered that it is likely that the status and risk as recorded represented that which was known at the time. Having regard to all the circumstances in this case, including the nature and scale of the project, the FAC considered that the DAFM has not erred in the making of the decision in this case, as it relates to the protection of water quality, the requirements of the Water Framework Directive and related matters and as referenced in the grounds of appeal.

The FAC considered the grounds in the appeal contending that condition No 8 as attached to the licence cannot be understood by the layperson citing inability to access documentation and is therefore not

adequately reasoned and is not consistent with the principles of natural justice. The substance of the ground of appeal refers to the understanding of the contents of the documents referenced, the updating of documents, and the availability of circulars on the DAFM website and as such not all of the matters are within the remit of the FAC. In dealing with the actual wording of the condition the FAC considers that the condition, taken within the ordinary meaning of the words, can be readily understood by a layperson demonstrating average judgment. The FAC considers that requiring adherence with standards of good practice is common and accepted practice across a number of areas including Forestry. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal. The appellant submits that the conditions of the licence are not readily understood by the lay person. The FAC had regard for the submission by the DAFM in its SoF that the conditions are clear and well-reasoned and follow standard operating procedures. The FAC noted that the Forestry Act of 2014 makes several references to the inclusion of conditions in a licence. The condition that is referred to in the grounds of appeal relates to standards of good practice that are published and available on the DAFM website. On this basis the FAC is satisfied that conditions attaching to a licence are for the purposes of ensuring compliance on the part of an applicant or owner of lands on which a licence is granted, and that a basic understanding of forestry operations, including those relevant standards and circulars that may be in effect, can reasonably be assumed. The FAC is not satisfied that an error was made in the granting of the licence in relation to this ground of appeal.

The FAC considered the grounds of appeal contending an inadequate ecological / environmental assessment and that the strict protection regime under Article 12 of the Habitats Directive is entirely separate to the Appropriate Assessment procedure under Article 6(3) of the Habitats regime. The grounds submit that there has been no assessment of the potential impact on species listed in Annex IV of the Habitats Directive while submitting that it is for the Minister to ensure that adequate assessment takes place. The grounds also submit that there is no general ecology report from the Forest Service. The FAC noted the submission from DAFM ecology wherein it states that, *'Works are largely within the forestry project areas with standard perpendicular Aquatic zone crossings with no Annex IV species identified outside requiring focused consideration outside of those assessed in the AAR'*. The FAC noted that the appellant fails to provide specific details of species present on the project lands or give convincing reasons to show how the proposed development would be likely to give rise to adverse effects on them. In these circumstances, the FAC based on the information available to it, finds no reason to conclude that the DAFM has erred in its processing of the application in so far as these grounds are concerned.

The FAC considered the grounds of appeal contending that there are two BioMaps on the FLV which differ in content and that both are dated the same and that when an updated document is provided it should be dated accordingly so that it is understandable. The FAC noted the submission from the DAFM in its statement to the FAC wherein it states that two Biomaps present the same content at different scales 1:5000 and 1:10000 (and) this would in general be readily understandable by the layperson. The FAC examined the two maps concerned as they appear on the FLV and find that they accord with the description provided by the DAFM. The FAC is not satisfied that the DAFM has erred in its making of the decision in relation to licence CN90347 in so far as this ground of appeal is concerned.

The FAC considered the grounds of appeal contending that that Leitrim Co. Council's opinion and recommendation has not been adequately considered while referencing matters including the Council's assessment on Haul Route, the lack of detail relating to a stream crossed by the proposed road, that the proposal will adversely affect public safety and road safety and that further information is required. The FAC finds that the relevant DAFM publication governing the requirements for consultation at the time that this licence was processed was, ***Forest Entrances – Requirements for Mandatory Consultation, Applications for Consent for the Construction of a Forest Road Entrances from a Public Road (other than a National Road) or the Material Widening of an Existing Entrance*** (February 2020) and the ***Technical Standard Design of Forest Entrances onto Public Roads (2019)***. The FAC understands the former document to represent the policy and procedure that has been adopted by the MAFM in processing applications, such as the one related to the decision under appeal, and to have been in effect at the time the application and decision were made. The FAC considers this to be confirmed in Circular 3/2020 and Circular 10/2022, the latter postdates the application but is a clarifying document that does not amend the existing policy.

The FAC finds that at section 4 page 4 of ***Forest Entrances – Requirements for Mandatory Consultation, Applications for Consent for the Construction of a Forest Road Entrances from a Public Road (other than a National Road) or the Material Widening of an Existing Entrance*** (February 2020) it is stated,

The application shall include the following,

- *Details of alternative options considered where a relaxation or departure from standard sought;*
- *Report from a Chartered Civil Engineer, Chartered Road Engineer or other suitably qualified professional acceptable to the Minister for Agriculture, Food and the Marine, confirming that the development does not constitute a risk to public safety.*

The FAC does not consider that the application that was made complies with this requirement and that this constitutes a serious error in the processing of the application and making of the decision. The FAC is therefore allowing the appeal and setting aside the decision of the Minister.

In reviewing the *Technical Standard Design of Forest Entrances onto Public Roads* the FAC also noted that Page 11 of the Technical Standards states,

The design speed used shall be acceptable to the local authority.

As this application necessitated the relaxation from a technical standard (sight distance) the FAC considers that further clarity should have been sought from the local authority given the response that it had provided. The FAC concluded that the processing of this application without the said acceptance being in place represented an error in the making of the decision as it relates to this ground of appeal in so far as the DAFM has not met the standards / requirements for consultation that it set for applications such as CN90347 and as referenced above.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, submissions made (including post appeal documentation), and the SOF submitted by the DAFM. The FAC is satisfied that a series of significant or serious errors was made in the making of the decision CN90347. The FAC is thus allowing the appeal and setting aside the decision of the MAFM regarding licence CN90347 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended.

Yours sincerely,


Seamus Neely, On Behalf of the Forestry Appeals Committee