



10<sup>th</sup> July 2023

**Subject:** Appeal FAC 003/2022 against licence decision CN89289

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 003/2022 was held remotely by the FAC on 22<sup>nd</sup> June 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, & Mr. Luke Sweetman.  
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 set aside and remit the decision of the MAFM to grant the licence CN89289. The reasons for this decision are set out hereunder.

#### **Background**

The licence decision under appeal pertains to the construction of a forest road in the townland of Garvagh Glebe, Co. Leitrim. The application which was submitted on 20<sup>th</sup> July 2021 describes the soil type at the proposal area as peat, the slope as moderate, that there are no Natura 2000 sites within 15km of the project (elsewhere on file is a screening by DAFM that identifies six Natura 2000 sites within 15km of the proposed project), that construction is to be by way of build on top, that construction duration is three days, that there are no aquatic zone / relevant water crossings required for the project, and that no new road entrance is required. The proposal is described as being in the KILLANUMMERY\_010 River Sub-Basin.

The application records that the proposed project for the construction of a new access road into an existing forest plantation also includes the associated setting back of adjacent roadside boundaries (elsewhere on file is a submission that no new road entrance is required), the provision of surface drainage works, finished hard-core structure to the access, fencing and all other associated site works. The

application materials state that where there are trees present along the line of the proposed road, a 15-20m wide corridor will be felled by a harvesting machine to facilitate road construction and that extraction of the logs to a forest road will be carried out using a forwarder machine. These trees are for subsequent collection by haulage trucks and onward transportation by road.

In relation to the road construction the application states that tree stumps will be left in situ, that a layer of geotextile will be rolled directly onto the forest floor and that crushed stone will then be deposited on top of this mat to form the base of the road. It states that the minimum depth of stone will be 500mm and that no excavation will take place to form the base of road. The road itself will have a 5.5m wide formation (base layer) with a 3.4m wide capping layer with the surface being levelled to accommodate the foundation stone. The surface of the road, it states, will be capped with crushed stone (sized) 75mm down at approximately 150mm deep. This material is to be sourced from local fully certified quarries. It is noted that there is also a specific 'Road Specification - Build on top' document dated 21<sup>st</sup> July 2021 on file.

Notwithstanding the submission that there are no aquatic zone / relevant water crossings required for the project the application states that existing forest drains which intersect the proposed forest road will be crossed by culverts, either individually or after linking several drains together with the aim to mirror the existing drainage pattern of the site. It also states that during the installation of culverts associated with roadside drains, silt traps will be installed on the outfall of all drains and that these will be monitored and maintained daily for the duration of the construction period and a written log will be maintained. The application was referred to Leitrim County Council on the 16<sup>th</sup> August 2021 who responded on the 9<sup>th</sup> September 2021 raising no objection and suggesting conditions for inclusion in the decision. The record confirms that no submission was made relating to the application.

The record shows that there is on file an undated Appropriate Assessment (AA) screening report, an AA report (containing an In-Combination Assessment) and an AA Determination all completed by or on behalf of DAFM. These are summarised in more detail later in this letter. 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 17<sup>th</sup> January 2022 subject to conditions. These include a requirement to adhere to the AA Determination dated 26<sup>th</sup> December 2021 which is said to be attached to the licence.

### **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 and the parties were notified of this.

In summary, the grounds of FAC 003/2022 submit;

- Cumulative Impact – submission that the approximate forest cover within 5km of this project is 49.17% being over 4 times the national average and significantly in excess of Government targets,

that Forest Road Projects (CN69989 1200m 2014, CN79422 750m 2017 and CN72999 150m 2015) have been approved in the townland of Garvagh Glebe during the course of the current forestry programme. The grounds also refer to licence CN69672 (600m 2014) which it states has also been approved to serve this Forest. It references that the In-Combination Statement in the AAR lists 13 Forest Road Projects approved or applied for from 2017 onwards and this amounts to almost 4500m and makes reference to project splitting.

- Emissions – submission that contrary to the EIA Directive (Annex II A) the applicant has provided no data relating to the emissions that will result from this and the cumulated forest road works in this forest area.
- Water Quality – submits in relation to the extent of forest cover in the RSB and that the project is on peat soil, references that water quality for the Killanummery\_010 waterbody is recorded as Poor and At Risk and that forestry is identified as a significant pressure on water quality and that this has not been identified in the project documentation by the applicant, nor by the forestry service (FS) in its assessment.
- Appropriate Assessment – submits that the generic mitigation used by the FS is technically and scientifically deficient and is a lacunae in the AA. The grounds refer to the judgement in C461-2017 (Holohan) and raises issues with a number of the mitigations as attached to the licence.

#### **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 sets out that the application was submitted on 20<sup>th</sup> July 2021, was advertised on 23<sup>rd</sup> July 2021, and that the application was referred to Leitrim County Council who responded on 9<sup>th</sup> September 2021. It also includes content addressing the grounds of appeal and confirms that the application was desk assessed only. The SOF records that no submission was received in relation to the application.

#### **Post Appeal Correspondence**

The appellant made a submission date stamped 5<sup>th</sup> May 2023 to the FAC which is in response to the hearing documents as circulated to the parties on 20<sup>th</sup> April 2023. A submission dated 11<sup>th</sup> May 2023 was received from the applicant which has a reference to another licence number contained in its text. These submissions were circulated to the parties.

#### **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 grounds in the appeal relating to Appropriate Assessment (AA) and related matters. The FAC finds that an AA Screening Report on file as carried out by a District Inspector does not record the date of completion while displaying a date of 17/01/2022 (which the FAC understands is the

date it was uploaded to FLV) and is the same date as the decision issued. The said AA Screening Report records that *'This project comprises 250 metres of forest road works. The predominant soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise conifer forest'*. It lists six Natura 2000 sites within 15km of the proposed project (Boleybrack Mountain SAC 002032, Bricklieve Mountains and Keishcorran SAC 001656, Lough Arrow SAC 001673, Lough Arrow SPA 004050, Lough Gill SAC 001976, and Unshin River SAC 001898) and these are shown as being screened out for stage two AA with reasons provided. In relation to Lough Gill SAC 001976 the screen-out reason given is *"- Other factors, AS per AAD"*. It includes an overall conclusion that there is *'No likelihood of a significant effect on any European site, and Appropriate Assessment not required'*.

The FAC also finds on file an Appropriate Assessment Report (AAR) dated 10<sup>th</sup> November 2021 carried out by Niall Phelan, Environmental Facilitation Ltd on behalf of the Minister for Agriculture, Food and the Marine. In the Introduction to the report, it states that *'Having carried out an Appropriate Assessment 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. Therefore, an appropriate assessment must be carried out in respect of the project by the Minister for Agriculture, Food and the Marine under the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477/2011), as amended, and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended'*. 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 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.

At section two of the AAR the FAC finds that it states that in undertaking the Appropriate Assessment of the likely significant implications and effects of the activity on European Sites, the following were taken into account:

- the initial application CN89289, including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer),
- responses from referral bodies and submissions from 3rd parties,
- any subsequent supporting documentation received from the applicant,
- any other plan or project that may, in combination with the plan or project under consideration, adversely affect the integrity of a European Site,
- if appropriate, any written submission or observation made by a consultation body or the public to the Minister in relation to the application,
- any supplementary information furnished in relation to any such report or statement,
- any information or advice obtained by the Minister,
- any other relevant information.

It also states that adequate information was available to undertake an appropriate assessment.

The AAR describes the project as being a 250m proposed forest road planned to facilitate thinning operations for a forest of approximately 10.10 hectares and that the road is proposed to be built by embankment and is located almost entirely within the forest block. It records that the project area (PA) is situated on a moderate slope (15% or less) and is comprised of 100% cutover/cutaway basin or blanket peat soils. It states that the project area is located upstream from Lough Gill SAC (screen in) and that the proposed road crosses a relevant watercourse (RWC) as noted in the BioMap. It states that an Aquatic Zone (KILLANUMMERY\_010 1 (WFD Status: At Risk, Ecological Status: Poor), is located ca. 330m north of the proposed road, which the RWC that is crossed by the proposed road drains into. The AAR at section 4 sets out the potential for the Forest Road construction project CN89289 to itself (i.e., individually) having an adverse effect on the integrity of Lough Gill SAC 001976 was identified on a precautionary basis and sets out site-specific measures identified to prevent or mitigate against such effects. These are to be inserted as conditions of the licence / approval, if subsequently issued.

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 CN89289 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 10/11/2021 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 made on 10th November 2022 reads as follows.

*'The proposed forest road project CN89289 lies in a rural landscape in the townland(s) of Garvagh Glebe, 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 250 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 CN89289, 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 CN89289 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 also understand that after concluding that the project itself would not have a significant effect on a European site, the DAFM should also consider other plans and projects and determine whether the project in-combination with other plans could have a significant effect. 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 error in the processing of the application in so far as Appropriate Assessment is concerned.

The FAC considered the Appropriate Assessment Determination (AAD) on file, which is dated 26th December 2021 and described as being for Forest Road Construction project CN89289 located at Garvagh Glebe, Co. Leitrim. At section 4 it states that the Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under CN89289, individually or in combination with other plans or projects, will not adversely affect the integrity of any of the listed European Sites, having regard to their conservation objectives, provided the mitigation listed (at A – Y) in the said section is implemented.

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. This ground of appeal questions DAFM's EIA Screening process and submits in relation to the extent of forest cover within 5km of this project as being 49.17% which is, it states, over 4 times the national average and significantly in excess of Government targets for forest cover. The grounds also reference that Forest Road Projects (CN69989 1200m 2014, CN79422 750m 2017 and CN72999 150m 2015) have been approved in the Townland of Garvagh Glebe during the course of the current forestry programme. The grounds also refer

to licence CN69672 (600m 2014) which it states has also been approved to serve this Forest. It references that the In-Combination Statement in the AAR lists 13 Forest Road Projects approved or applied for from 2017 onwards and this amounts to almost 4500m and makes reference to project splitting. It also references that the applicant has provided no data relating to the emissions which will result from the project and the cumulated forest road works in this forest area.

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement based on a Last Spatial Run Date of 11<sup>th</sup> January 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 afforestation, 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 finds that under the heading *soil, terrain, slope* the answer recorded in relation to the question *'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'* is *'No'*. The FAC considers that it is an error to make a determination that an EIA is not required in a circumstance where it records that it is not satisfied that 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. 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 a further error in the EIA screening in this case.

The FAC considered the grounds of appeal relating to Water Quality which made submissions relating to the extent of forest cover in the RSB and that the project is on peat soil in addition to references that water quality for the Killanummery\_010 is recorded as Poor and At Risk and that forestry is identified as a significant pressure on water quality. It is also submitted in the grounds that this has not been identified in the project documentation by the applicant, nor by the FS in its assessment. The FAC finds that the DAFM in its AAR at section 3 records that *'The project area (PA) is situated on a moderate slope (15% or less) and is comprised of 100% cutover/cutaway basin or blanket peat soils. The project area is located upstream from Lough Gill SAC (screen in). The proposed road crosses a relevant watercourse (RWC) as noted in the BioMap – Appendix Figure 2). An Aquatic Zone (KILLANUMMERY\_010 1 (WFD Status: At Risk, Ecological Status: Poor), is located ca. 330m north of the proposed road, which the aforementioned RWC drains into'*. 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 250m of forest road using a build on top specification. 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.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, submissions made, and the SOF submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of significant or serious errors was made in the making of the decision CN89289. The FAC is thus setting aside and remitting the decision of the MAFM regarding licence CN89289 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new Assessment for EIA Requirement and to carry out a new Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

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Seamūs Neely, On Behalf of the Forestry Appeals Committee