



31st October 2023.

Subject: Appeal FAC 088/2022 regarding CN86484.

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 (The Minister). The FAC established in accordance with Section 14A(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.

DECISION.

Having regard to the evidence before it, including the Department of Agriculture, Food and the Marine (DAFM) record of the decision, the Statements of Fact (SoF) provided by the DAFM, all materials on file, the notice and grounds of appeal and post-appeal submissions and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN86484.

THE LICENCE.

Licence CN86484 is for a forest road of 400 metres in length located in the townlands of Faughary & Shasmore, Co Leitrim.

The application for the licence was submitted to the DAFM on the 21st of May 2020. A decision approving the licence was issued on the 25th of June 2021 with conditions including compliance with the mitigation measures set out in the Appropriate Assessment Determination (AAD) attached to the licence.

The licence was appealed on the 21st of July 2021 (FAC 119/2021) and was set aside and remitted to the Minister on the 21st of October 2021 to address (i) the fact that the language "*sufficiently heavy to result in the loss of nutrients and/or the mobilisation of sediment, fine organic matter and debris into receiving waters*" used in the mitigation measure relating to cessation of works during heavy rainfall was not sufficiently clear, (ii) the fact that there is a discrepancy between the number of river crossings given in the Natura Impact Statement (NIS) & AAD (3 crossings) and that given in the Construction Management Plan (Appendix 3 of the NIS) (2 crossings), (iii) the fact that the Construction Management Plan is referred to in the NIS mitigation measures but is not referred to in the AAD mitigation measures and should have been, (iv) the fact that DAFM has given no reason why the NIS mitigation measure adherence with *CIRIA Control of water pollution from linear constructions projects. Site Guide (C949D)* was not adopted in the AAD mitigation measures, (v) that potential impacts on the Lattone_010 river waterbody should be considered in a new AA.

The application was re-advertised on the 27th of May 2022 and a new licence issued on the 14th of July 2022 with conditions including compliance with DAFM Technical Standards, DAFM Guidelines, the COFORD Forest Road Manual, compliance with the mitigation measures set out in the AAD attached to the licence, and liaison with Leitrim County Council prior to the commencement of works.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC was held remotely on the 5th of October 2023 which heard the appeal (FAC 088/2022) against the decision to issue the licence on the 14th of July 2022. In the interest of clarity and for the avoidance of doubt this sitting of the FAC considered only appeal ref: FAC 088/2022 in relation to the licence decision of 14th of July 2022. Only those documents relevant to the appeal under consideration are referred to below.

The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas.
Secretary to the FAC: Ms. Vanessa Healy.

BACKGROUND.

The proposal consists of a forest road 400 metres in length with a capping layer 3.4 m. wide, located entirely within an existing forest and connecting to an existing forest road at its eastern end. The road will serve an area of 9.46 Ha. of Sitka spruce and Lodgepole pine planted in 1956 and 1971.

The road is described as being constructed by excavation on Blanket peats & basin peats and Peaty Gleys with a road gradient of 15% or less in an easterly direction. The body of the NIS indicates that three water crossings are to be installed.

The site lies in the Water Framework Directive (WFD) Catchment 36 -Erne- and the Drowes_SC_010 Sub-catchment. The road is located within the Lattone_010 River Sub-Basin where forestry is identified as a pressure and crosses the River Waterbody Lattone_010 Lisdarush which was of Good Status in the period 2016-2021 and is to be reviewed in the 3rd WFD Cycle. The underlying Groundwater body is Kilcoo IEGBNI_NW_G_017 which was of Good Status in the period 2013-2018 and is Not at Risk in the 3rd cycle.

The application documents before the FAC included a Biodiversity map, the site notice, a photograph of the site notice in situ, Road Specifications and a NIS. These documents were made available to the FAC via the DAFM Forest Licence Viewer (FLV).

The licence application was referred to Leitrim County Council on 07/09/2020 whose Planning Section replied on 13/11/2020 stating that it had no objection to the proposal and enclosing a list of conditions and stating that the DAFM should satisfy itself regarding Environmental Impact Assessment (EIA) and Appropriate Assessment (AA).

On the DAFM file there is an Inspector's Certification Report, an Assessment to Determine EIA Requirement, an Inspector's Appropriate Assessment Screening Report (AASR), all certified on 06/07/2022 and dated 14/07/2022, a Site Details Report dated 14/07/2022, an In-combination Statement dated 05/07/2022, the latest DAFM AAD dated 18/02/2022 as completed by Niall Phelan, Environmental Facilitation Ltd, on behalf of the Minister for Agriculture, Food and the Marine, which includes as Appendix A an In-combination Statement dated 18/02/2022. All of these documents are to be found on the FLV.

The Inspector's Certification Report recommends approval of the licence subject to conditions, no conditions are specified in the report.

The Inspector's Assessment to Determine EIA Requirement concluded that the proposed afforestation is not required to undergo EIA.

The Inspector's AASR identified seven Natura 2000 sites within 15 km of the proposed forest road, Arroo Mountain SAC (Site Code 001403) Ben Bulbin, Gleniff and Glenade Complex SAC (Site Code 000623) Boleybrack Mountain SAC (Site Code 002032) Glenade Lough SAC (Site Code 001919) Lough Gill SAC (Site Code 001976) Lough Melvin SAC (Site Code 000428) and Sligo/Leitrim Uplands SPA (Site Code 004187). All sites were screened out on the basis of "Other factors, As per AAD".

The licence was desk assessed only.

The file records that there were two third-party submissions on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application. The grounds of appeal are summarised as follows:

Administration

- There was undue process in the timing of the decision.
- Incorrect location details are given in the licence.
- Licence Condition 8 is not understood by the layperson.
- Licence Condition 8 is not adequate to ensure the reasons for the condition.

Environmental Impact Assessment

- The EIA Screening determination is based on inadequate reasoning.
- The spatial & temporal criteria used to assess Cumulative Impact are not explained.
- There is inadequate ecological/environmental assessment (there is no assessment of impact on Annex IV species, impact on water quality and impact of emissions).

Appropriate Assessment

- The AAD mitigations are not precise.
- In Mitigation B the siltation report should inform the AA
- The same reasons for remittal apply to the wording of mitigation C.
- In Mitigation D actions for unforeseen environmental issues are not specified in the AA process.
- In Mitigation K no time period is specified for "following operations"
- There is no evidence of "assessment" in the In-combination statement.
- There is a chronological error in AA process, the Ecologist's AAD predates the District Inspector's AASR and the In-combination Statement of 05/07/2022 includes plans and projects that were not included in Appendix A of the AAD of 18/02/2022

An oral hearing was requested.

There were a number of post-appeal submissions by both the Appellant and DAFM. The grounds of appeal and relevant post-appeal submissions and responses were circulated to both parties.

CONSIDERATION BY THE FAC.

At its sitting on the 5th of October 2023, the FAC had before it the full DAFM record of the decision as made available on the FLV, the notice, the grounds of appeal, the post-appeal submissions, the

Statement of Fact (SoF) provided by the DAFM and all materials on file. The FAC noted the request by the Appellant for an oral hearing. Having reviewed all the documentation and submissions, including those of the Appellant, the FAC considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal which is dated the 14th of July 2023 confirms the administrative details of the licence application and indicates that the licence application was desk assessed only. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

There is also a statement from the District Forestry Inspector (DI) dated the 20th of October 2022 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and containing response to a number of the grounds of appeal.

GROUNDINGS OF APPEAL.

The FAC considered the Appellant's grounds of appeal and post-appeal submissions under the headings, Administration, Environmental Impact Assessment and Appropriate Assessment.

Administration.

The timing of the decision.

This ground of appeal contends that there is a lack of due process arising from the date the decision was made and the date the decision was published which does not comply with the Aarhus Convention. The FAC noted that the date of the decision to grant the licence was the 14th of July 2022 and that the public was notified of the decision the following day, the 15th of July 2022 and that in any event the licence was available online on the DAFM website as soon as the decision was made and that members of the public who had made a submission, including the Appellant, were made aware of this on the day of the decision. The FAC does not consider that there was undue delay and notes that the Appellant has submitted an appeal for consideration by the FAC. The FAC is satisfied that the DAFM has complied with its obligations under the Forestry Act and Regulations with respect to notification of the public of its decision and no error has occurred in this regard. The appeal period is prescribed in law.

Incorrect location details are given in the licence.

This ground of appeal contends that the address given in the licence issued on the 14th of July 2022 is incorrect. The FAC noted that the details submitted with the application and the DAFM documentation, including the licence as issued on the 25th of June 2021 refer to two townlands, Shasmore & Faughary but that the licence issued on the 14th of July 2022 refers only to the townland of Shasmore. The FAC also noted the response to this ground of appeal in the DI's statement dated the 20th of October 2022. The FAC finds that the licence decision under appeal pertains to the construction of a forest road of 400 metres in length in the townlands of Shasmore & Faughary, Co. Leitrim. The FAC also finds that there are incidences on the file of where the project is referenced as being at Shasmore & Faughary but that the licence as issued (and subject of this appeal) is for a project at Shasmore only. The FAC considered that this represents an error in the processing of the application by the DAFM. In so far as this licence is being set aside and remitted for errors identified elsewhere in this letter the matter of the quoting the correct townlands in which the proposal is located should be resolved by the DAFM before a new decision is made on the application.

Licence Condition 8 (Bullet Point 1).

This ground of appeal contends that Condition 8 of the licence cannot be understood by the layperson. Condition 8 (Bullet Point 1) states:

“The forest road project and all associated operations shall be carried out and completed in accordance with the measures set out in the Technical Standard for the Design of Forest Entrances from Public Roads, the COFORD Forest Road Manual and the Forestry Standards Manual (as amended by periodic Circulars).

Reason: In the interest of clarity and to ensure good forest practice and the protection of the environment.”

The FAC understand that this is a standard condition which is commonly used in forest road licences. The substance of the ground of appeal refers to the understanding of the contents of the three documents and the updating of two of the documents. The FAC noted that the Forestry Act of 2014 makes several references to the inclusion of conditions in a licence. Section 7 of the Act provides for the Minister to grant a licence, to revoke a licence for reasons that may include non-compliance with any conditions, that where the applicant is not the owner that the conditions are binding on the owner. 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. 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, and 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.

In relation to the ground of appeal that the licence condition is not consistent with the reason for the condition, specifically that the COFORD Forest Road Manual is outdated and does not afford sufficient protection of the environment. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. In the FAC’s view, the updating of the content of Technical standards, guidelines and manuals associated with forestry licencing (including forest roads) is a matter for the DAFM.

Inconsistency of information.

In reviewing the information available to it the FAC noted inconsistency in the length of road given in the various documents. The Road Specification submitted with the application indicates a total road length of 400 m. The NIS states the road length as 348 m. The AAD of 18/02/2022 states the road length as 348 m. however Appendix A of the AAD (the In-combination statement) states the road length to be 400 m. The forest road as licenced is for 400 m. The FAC considers this inconsistency to be a serious error since the length of the road for which the licence was granted (400 m.) exceeds that of the proposal which was subject to AA.

Environmental Impact Assessment.***EIA Screening determination is based on inadequate reasoning.***

This ground of appeal contends that there is a lack of reasoning given for the range and type of criteria contained in the EIA Screening Determination (the “Assessment to Determine EIA Requirement”). The FAC considers that this ground of appeal refers to the adequacy of the DAFM “Assessment to Determine EIA Requirement” certified on 06/07/2022 as a screening document to

allow the DAFM to determine whether a particular project should be subject to EIA. The FAC noted that the "Assessment to Determine EIA Requirement" is a standard document used by the DAFM for EIA screening. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. In reviewing the "Assessment to Determine EIA Requirement" of 06/07/2022 the FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale, and location of the proposal.

The spatial & temporal criteria used to assess Cumulative Impact are not explained.

This ground of appeal contends that the DAFM process for assessing cumulative impact is flawed because the temporal and spatial criteria in the "Assessment to Determine EIA Requirement" are restricted without adequate reasoning. The FAC noted that the DAFM in their considerations on this matter, in the section focusing on the cumulative effect, recorded answers to questions on both the length of the proposed forest road and the length of forest road in the area when considering the proposed road in combination with other recent, ongoing, or planned work, and the responses indicated lengths of less than 2000m. The DAFM also included the approximate % forest cover in the underlying waterbody (or waterbodies) and within 5km, both currently and five years previous. The DAFM concluded that based on the extent of the forest cover and the forest road network that the cumulative effect of this proposal was not likely to have a significant impact.

As stated above the role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. In reviewing the "Assessment to Determine EIA Requirement" of 14/07/2022 the FAC found no clear or obvious error in the responses given by the DAFM to the questions posed in the section "Cumulative effect and extent of project".

Also, in reviewing the "Assessment to Determine EIA Requirement" the FAC noted that questions that relate to cumulative effect only refer to forestry projects and do not consider other types of projects. The FAC noted that while the Minister recorded a separate characterisation of plans and projects in the area in the In-combination Statement completed on 05/07/2022 that this is not explicitly cross-referenced in the EIA Determination. While the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for considering that the proposal is not likely to have a significant impact on the environment might be found in separate documents, based on the foregoing, it is not apparent if adequate consideration was given to cumulative impact (including non-forestry projects) when making the determination for EIA requirement. The FAC considers this to be an error in the processing of the application.

There has been no assessment of impact on Annex IV species.

This ground of appeal contends that there has been no assessment of the impact of the proposed forest road on Annex IV species. The FAC noted the response of the DAFM ecologist to this issue in the submission of 10/07/2023 and that there is no Appropriate Assessment Report (AAR) on file and that there is no reference to Annex IV species in either the NIS or the ecologists AAD of 18/02/2022, which are the only two documents that refer to flora and fauna. The FAC noted that there is no convincing evidence submitted that any species protected under Annex IV is present on the site or would be adversely impacted by the proposal. The FAC considers that the granting of a forestry licence does not relieve the recipient of their responsibilities under the Wildlife Acts to obtain a derogation licence where works undertaken may result in the deterioration or destruction of breeding sites or nesting places of Annex IV species, even where such destruction is not deliberate. The FAC is not satisfied that an error was made in granting of the licence in relation to this ground of appeal.

Water Quality.

This ground of appeal contends that the approval of the licence is not consistent with Article 4 of the WFD and cites the Weser Case: Case C-461/13 (by which authorities are obliged to refuse authorisation for individual projects which prevent the achievement of the WFD objectives, including the achievement of Good WFD status. The ground also cites Judicial Review of Case 280 (Sweetman v An Bord Pleanala) which the FAC takes to refer to [2021] IEHC 16 Record Number: 2018 740 JR Sweetman v An Bord Pleanala, (the Hyland Judgement case which addresses the issue of unassigned waterbodies). The ground also questions the methodology employed by the EPA to establish the WFD status of the River Sub-basin Lattone_010.

The FAC noted that the AAD of 18/02/2022 considers potential impacts on the River Waterbody Lattone_010 which is assigned Good Status by the EPA for the period 2016-2021 and which is to be reviewed in the 3rd WFD Cycle and that the Hyland Judgement was only concerned with unassigned waterbodies. The FAC also noted that the EPA does not assign a WFD status to River Sub-basins.

The FAC noted that WFD status is assigned by the EPA and that the methodology used by the EPA to determine that status is not a matter for the DAFM or the FAC.

The FAC noted that the ground does not articulate how the river waterbody or water quality might be impacted in this case or how the proposed measures will fail to be effective in protecting water quality or causing it to deteriorate (the Weser case). The FAC considers that there is no evidence before it that any waterbody may be affected, for the purposes of the WFD, by the licence as issued.

The FAC noted that the mitigation measures B to AA as set out in the AAD and the licence conditions are specifically for the protection of aquatic-based species and habitat and water quality in the adjoining Lattone_010 River Waterbody and downstream Natura 2000 sites, however, as set out below the FAC has identified errors in the AAD concerning the carrying out of operations for the proposal which have the potential to impact on water quality and as such the AAD cannot be relied upon.

Failure to provide details of emissions under Article 4(4) of the EIA Directive.

This ground of appeal makes reference to the absence of any information on emissions generated by the proposal and Greenhouse Gasses (GHG) in particular which is inconsistent with the EIA Directive. In this context the FAC takes the reference to the EIA Directive to mean Annex IIA(3) of the EIA Directive.

The FAC noted that Annex IIA(3) of the EIA Directive has been transposed into Irish Law with regard to Forest Roads, in Schedule 1 of the Forestry Regulations 2017 as follows:

"INFORMATION TO BE PROVIDED BY THE APPLICANT FOR AFFORESTATION OR FOREST ROAD LICENCE.

3. A description of any likely significant effects, to the extent of the information available on such effects, of the project on the environment resulting from:

(a) the expected residues and emissions and the production of waste, where relevant;"

The FAC noted that, in accordance with the above Regulations, the applicant is only required to submit such information where there will be "any likely significant effects" and that the applicant, having submitted details of the construction of the road in the Road Specification and NIS, was aware that residues, emissions, or waste would arise from the project. It appears to the FAC that, in deciding not to address the issue of expected residues and emissions and the production of waste

arising from the project, the applicant did not consider that such likely effects would be “significant effects” as referred to in the Regulations referred to above. The appellant has not adduced any evidence that there are any likely significant effects from the proposal regarding emissions.

Appropriate Assessment.

AAD Mitigation Measures.

This ground of appeal contends that the AAD Mitigation Measures are not sufficiently precise or substantiated with scientific evidence such that they will avoid adverse effects on Natura 2000 sites refers to mitigation measures B, C, D, K and AA of the AA dated 18/02/2022 in particular.

The Appellant contends that the siltation and sediment and risk assessment report referred to in mitigation measure B which is to be undertaken prior to any works should, in fact inform the AAD and should not be an output from it. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 in which it is stated that *“The siltation and sediment and risk assessment report is a method of recording the implementation of these measures on the ground.”* The FAC considers that a report requiring the *“recording the implementation of these measures on the ground.”* prior to the measures having been carried out represents a serious and significant error in the making of the decision.

The Appellant refers to previous decision of the FAC which found that the wording *“Relevant operations must cease during and after periods of rainfall sufficiently heavy to result in the loss of nutrients and/or the mobilisation of sediment, fine organic matter and debris into receiving waters”* in the mitigation measure to be insufficiently clear so as to ensure an objective interpretation. The FAC noted that mitigation measure C had been amended with the addition of *“Operations should be carried when ground conditions are drier where there has been no significant rainfall for at least two weeks.”* at the beginning of the paragraph but that the wording that concerned the FAC in its previous decision remains the same. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 in which it is stated that *“Works are overseen by the operational manager who takes the mitigation above apply and it with their professional judgement.....”*. The FAC considers that the lack of a consistent and objective interpretation that would ensure the implementation of the mitigation for its intended purpose remains and still constitutes a serious and significant error in the making of the decision.

The Appellant contends that mitigation measure D allows the operation manager and relevant team members to specify actions which have not been considered a part of the AA and therefore reasonable scientific doubt remains. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 and considers the response to be reasonable. However, the FAC noted that the wording of the mitigation measure appears to make an assumption regarding the awareness and familiarity of the operation manager and relevant team members with the NIS and AAD mitigation measures. The FAC considers that the mitigation measure should require the operation manager and relevant team members to be aware of and familiar with the with the NIS and AAD mitigation measures.

The Appellant contends that the lack of a clear time period in mitigation measure K for *“following operations”* is a lacuna in the AA. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 that *“The time period would be as long as it takes ensure “run off of silt and sediment” is prevented;.....”* The FAC considers that, given the nature of the mitigation measure K and the purpose for which it required, taken within the ordinary meaning of the words, can be readily understood by a layperson demonstrating average judgment to mean a definite end of the time period will occur when no run-off of silt and sediment can occur, therefore specifying a time period is not appropriate. 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 contends that the term “*absolute minimum*” period in mitigation measure AA is ambiguous and so the potential for impact cannot be clearly quantified. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 that the condition “*is an obligation on the operator to work in a manner that further ensures a minimal impact footprint.*”, the FAC further noted the reason for the condition. 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, and 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.

There is no assessment of other plans & projects in the In-combination report.

This ground of appeal contends more generally that the cumulative effect of other plans & projects in the area has not been assessed although there is no specific evidence of this provided. The FAC noted that the In-combination Statement prepared by the DAFM contained as Appendix A of the AAD dated 18/02/2022 recorded other forestry plans and projects in the area, the planning register of the Local Authority, An Bord Pleanala, the Leitrim County Development Plan, the EPA and further information is available on the Forestry Licence Viewer. The Forestry Licence Viewer shows applications and licences for felling to be spread out spatially and temporally which would be in keeping with Good Forestry Practice and the Standards for Felling and Reforestation. However, in the AAD of 18/02/2022 the DAFM recorded the following in the In-combination Statement:

“It is concluded that there is no possibility that the proposed forest road project CN86484, 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 Melvin SAC (IRE) & Lough Melvin SAC (UK). 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.”

and in the In-combination Statement of 05/07/2022 the DAFM recorded the following,

It is concluded that there is no likelihood of the proposed forest road project CN86484 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project.

The FAC understands that the consideration of other plans and projects should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in the assessment of the impact of such effects of the project itself and in-combination with other plans and projects on the integrity of the European site. The FAC considers this to be a serious error as it suggests that the determination undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other plans and projects result in a significant effect on a European site.

The FAC noted that the DAFM file contains two separate In-combination Statements which reach different conclusions as regards effects, the In-combination Statement in the AAD of 18/02/2022 states *"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."* while the "stand alone " In-combination Statement of 05/07/2022 states *"there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project."*. The FAC considers that two In-combination Statements with different conclusions based on different criteria is confusing, and furthermore, while the "stand alone " In-combination Statement of 05/07/2022 states *"Note that the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment"* which, on the face of the record, indicates that this In-combination Statement (the latest) was prepared prior to the Stage 2 AA (NIS) when such is not the case. The FAC considers that the above issues constitute serious errors in the processing of the licence.

Chronological error in AA process.

This ground of appeal contends that there is an error in the AA process due to the chronology of the documentation on file in that an AAD cannot precede an AASR. The FAC noted that the FLV contains the following documents in chronological order relating to AA:

A NIS dated 19th October 2020 uploaded 16/11/2020.

A second NIS dated 19th October 2020 uploaded 16/03/2021.

An AAD 17/06/2021 with an In-combination Statement of 28/05/2021.

A second AAD dated 18/02/2022 with an In-combination Statement of the same date.

A further In-combination Statement of 05/07/2022.

An Inspector's AASR certified 06/07/2022.

The FAC noted that the latest AAD (18/02/2022) states that the Minister, as the relevant public authority, undertook a screening for AA and screened in two European sites however the only DAFM AA screening on file (the AASR of 06/07/2022) post-dates that AAD and screens out all European sites based on the findings of the AAD. The FAC noted the submission from the DAFM ecologist dated 10/07/2023 which describes the AA process indicating that an AASR is the first step in the AA process and that the AAD is the final, definitive position of the competent authority. Therefore, it is the opinion of the FAC that the AASR cannot post-date an AAD. The first paragraph of the DAFM ecologist's response outlines the DAFM administrative process dealing with AA screening and AAD. The FAC noted that, notwithstanding the statement that the *"The District Inspectors conduct their screening prior to sending the file to Ecology (basis for sending it to Ecology) but it is dated with the final certification date."* However, the DI's AASR refers to the ecology AAD *"Other factors, As per AAD"* as the conclusion as to why the proposal will not have a significant effect on a European Sites (including those site for which the NIS was prepared), and has an In-combination Statement dated 05/07/2022 which post-dates the AAD as completed by an Ecologist which includes projects not mentioned in the AAD.

The FAC also noted that the mitigation measures contained in the AAD of 18/02/2022 are materially different to those published in the NIS of 19/10/2021 and because they are materially different the public should have been afforded an opportunity to comment by way of a DAFM Appropriate Assessment Report (AAR) published for 30 days in accordance with the DAFM procedures.

It is not clear to the FAC on what basis the DAFM decided that the two European sites were to be "screened in" given the fact that DAFM AASR post-dates the AAD. If that decision was based on the screening in the NIS explicit reference should have been made to that fact in the AAD rather than a

general statement that “*The information provided in the NIS was sufficient to derive appropriate conditions for a determination.*”. and if such was the case a DAFM AASR would not be required.

The FAC finds that on the face of the record the AASR was prepared after the AAD and that the material changes to the publicly available mitigation measures in the NIS should have been re-advertised. The FAC considers that these constitute serious errors in the processing of the licence in so far as Appropriate Assessment is concerned.

FAC letter of 27th October 2021.

In dealing with the Appellant’s ground of appeal referring to the previous decision by the FAC (the FAC letter of 27th October 2021 regarding appeal FAC 119/2021) the FAC noted that a number of reasons for remittal have not been addressed in the documentation currently on file.

Water-crossings: in the letter the attention of the DAFM was drawn to the fact that the NIS and the AAD both identify that three water-crossings are proposed but that the Construction Management Plan (Appendix 3 of the NIS) specifies only two and that the AAD does not address this discrepancy. Having reviewed the documentation on file the FAC noted the AAD of 18/02/2022 has not addressed the discrepancy. The FAC considers that in failing to address this previous error the DAFM has erred in its processing of the licence.

The Construction Management Plan: in the letter the attention of the DAFM was drawn to the fact that the Construction Management Plan forms part of the NIS mitigation measures but is not referred to in the AAD. The FAC considered that given the nature of the proposed operations the Construction Management Plan should have formed part of the AAD. Having reviewed the documentation on file the FAC noted the AAD of 18/02/2022 makes no reference to the Construction Management Plan. The FAC considers that in failing to address this previous error the DAFM has erred in its processing of the licence.

CIRIA Good Practice Guidelines: in the letter the attention of the DAFM was drawn to the fact that the NIS included a measure to adhere to the *CIRIA Control of water pollution from linear constructions projects. Site Guide (C949D)* and that while that provision was not adopted in the AAD the FAC required that a reason should have been given in the AAD for not doing so. The FAC noted that the AAD of 18/02/2022 makes no reference to the CIRIA Guidelines or gives a reason why they were not adopted in the AAD. The FAC considers that in failing to address this previous error the DAFM has erred in its processing of the licence.

Conclusion

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. 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 in relation to licence CN86484. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence CN86484 to carry out a new AA screening of the proposed development both individually and in combination with other plans and projects, and to carry out a new assessment to determine the requirement for EIA and to address the errors identified by the FAC earlier in this letter before a new decision is made.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee