



18<sup>th</sup> September 2023.

**Subject:** Appeal FAC 165/2022 regarding CN88920

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 allow the appeal and set aside the decision of the Minister regarding licence CN88920.

**THE LICENCE.**

Licence CN88920 is a single consent application for a forest road of 155 metres in length located in the townland of Corcormick, Co Leitrim.

The application for the licence was submitted to the DAFM on the 31<sup>st</sup> of May 2021. A decision approving the licence was issued on the 18<sup>th</sup> of October 2022 with conditions including: compliance with Technical Standard for the Design of Forest Entrances from Public Roads, compliance with the COFORD Forest Road Manual, compliance Forestry Standards Manual, compliance with the DAFM Biodiversity Guidelines, liaison with Leitrim County Council and, prior to the commencement of the development, to obtain any necessary permissions from neighbouring landowners (or other parties with a legal interest) necessary to establish the prescribed sightlines from the permitted entrance, including where relevant for the removal of existing roadside boundary walls, ditches, fences or vegetation.

**FORESTRY APPEALS COMMITTEE.**

A hearing was held remotely at a sitting of the FAC held on the 31<sup>st</sup> of August 2023 which considered the appeal and the processing of the licence as it relates to the decision to issue the licence on the 18<sup>th</sup> of October 2022.

The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy.

## **BACKGROUND.**

The proposal consists of a forest road 155 metres in length with an entrance onto the public road L-42364-0 which is stated to be 2.9 m in width. The applicant seeks a relaxation of standards under Section 6 of the Technical Standard for the Design of Forest Entrances from Public Roads (2019) for the construction of a half-bell-mouth on the right-hand side of the entrance, (i.e. against the direction of travel when exiting the forest entrance) and that a reduced sight-visibility of 90m is proposed in that direction.

The road is described as being constructed by excavation on a well-drained, mineral soil (heavy clay) and includes two culverts. The road gradient will be between 1% and 10%

The site lies in the Water Framework Directive (WFD) Upper Shannon Catchment 26A and the Owegar[Leitrim]\_SC\_010 Sub-catchment where forestry is identified as a pressure but not in the Diffagher\_010 River Sub-Basin in which this forest road is located. The closest River Waterbody to the site is the Diffagher\_010 (Tullintowell River), circa 20 m. from western boundary of the forestry to be served and 330 m. from location of the proposed forest road itself. The Diffagher\_010 is of Moderate Status in the period 2016-2021 and is At Risk in the 3<sup>rd</sup> cycle. The underlying Groundwater body is Lough Allen Uplands IEGBNI\_SH\_G\_002 which was of Good Status in the period 2013-2018 and is Not at Risk in the 3<sup>rd</sup> cycle.

The application documents before the FAC included a location map, a plan of the forest entrance (scale 1:2500), a detailed plan of the forest entrance (scale 1:500), the proposed haulage route, a management plan, a harvesting road map, a biodiversity map, the site notice, a photograph of the site notice in situ, a report on the condition of public roads (including photographs), a report on the Relaxation from Standard supporting documents, an Engineer's Report, the Forest Road Required Information, the Road Specifications and an Inet Pre Approval Submission Report, these were made available to the FAC via the DAFM Forest Licence Viewer (FLV).

The licence application was referred to Leitrim County Council on 24/08/2021 whose Planning Section replied on 16/09/2021 stating that it had no objection to the proposal and enclosing a list of conditions. On 20/10/2021 a second report from the Roads Section of Leitrim County Council was received recommending that the proposal should not be granted as the proposal will have an adverse impact on road safety and public safety but enclosing a list of conditions should the DAFM decide to grant the licence. The licence application was also referred to the DAFM Archaeology Section which replied on 15/09/2022 stating that the proposal should adhere to the relevant terms of the Forestry and Archaeology Guidelines and, in so far as they pertain to roads, the Forest Harvesting and the Environment Guidelines.

On the DAFM file there is an Inspector's Certification Report, an Inspector's Assessment to Determine EIA Requirement, an Inspector's Appropriate Assessment Screening Report (AASR) all certified on 14/10/2022, a Site Details Report dated 18/10/2022 and an In-combination Statement dated the 11/10/2022 and a report from the DAFM Archaeology Section dated 15/09/2022. All of these documents were uploaded to the FLV on 18/10/2022.

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, however the Inspector made comment regarding non-compliance with safety-related standards set out in the COFORD Forest Road Manual and the health and safety issues raised by the Local Authority.

The Inspector's Appropriate Assessment Screening Report (AASR) identified three Natura 2000 sites within 15 km of the proposed forest road, Boleybrack Mountain SAC (Site Code 002032) Cuilcagh - Anierin Uplands SAC (Site Code 000584) and Lough Gill SAC (Site Code 001976). All sites were screened out for the reasons that (i) there is an absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site, (ii) there is an absence of any aquatic zone within or adjoining the project area, (iii) there is an absence of any significant relevant watercourse(s) within or adjoining the project area. The screening concluded that Appropriate Assessment of the project is not required.

The licence was subject to desk inspection only.

The file records that there was one third-party submission 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:

- **EIA**
  - Failure to provide details of emissions Article 4 (4) of the Directive.
  - EIA Screening determination is based on inadequate reasoning.
  - The spatial & temporal criteria used to assess Cumulative Impact are not explained.
  - There is project splitting as the forestry and forest road are part of the same project.
  - Confirmation is required that the mitigation measures have been carried out & are effective.
  - Concern for Public Health & Safety was expressed in the Leitrim County Council Roads Report.
  - The EIA Determination cannot be considered to be adequately reasoned and a new EIA Screening is required.
- **AA**
  - The AA Screening is not consistent with EC Screening Guidance.
  - There is no "assessment" of other plans & projects in the In-combination report.
  - There has been a failure to consult the NPWS as the management body for Natura sites.

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 31<sup>st</sup> of August 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 SoFs 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, dated the 5<sup>th</sup> 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 3<sup>rd</sup> of March 2023 confirming 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.

#### **GROUND OF APPEAL.**

##### **Environmental Impact Assessment.**

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

This ground of appeal makes reference to Annex IIA(3) of the EIA Directive and contends that the developer is required to submit information on the expected residues and emissions and the production of waste from the proposal but has not done so.

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, having examined the information to be submitted by the applicant in the pro-forma – "Pre-Approval Submission Report", noted that there is no heading or section in the document that refers to expected residues, emissions, or waste however, the details of the construction method are provided in the application. The grounds do not identify any likely significant effects from the proposal. The application was for a relatively short section of forest road which, when completed, would not involve any outgoing residues, emissions, or the production of waste.

###### ***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 bullet points in the grounds of appeal and as elaborated upon in the appellant's post-appeal submission of 06/07/2023 refer to the adequacy of the DAFM "Assessment to Determine EIA Requirement" of 14/10/2022 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 14/10/2022 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. However, as noted below the FAC considers that a serious error was made in the application and so the application and its processing cannot be relied upon.

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

The 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 and that there is no scientific basis for the 2000 m. threshold set out in the Forestry Regulations 2017. The FAC noted that the 2000 m. threshold is set down in law and it that it is not within the remit of the DAFM or FAC to alter that threshold.

The ground also refers to the criteria used in the following questions in the section on cumulative impact in the "Assessment to Determine EIA Requirement" of 14/10/2022.

*When considered in combination, does the proposed forest road AND other recent, ongoing or planned works, represent the construction of single or multiple lengths of forest road totalling 2000 m or more within the area?*

*Is this proposal in keeping with the achievement of an appropriate forest road network and density within the forest area being serviced? construction of single or multiple lengths of forest road totalling 2000 m or more within the area?*

*What was the approximate % of forest cover within this 5 km zone 5 years ago?*

*Based on the extent of forest cover as outlined above, and the existing forest road network (if any), is the cumulative effect of this proposal likely to have a significant impact? If "Yes", describe in the Inspectors comments box below.*

*Is the level of forestry-related traffic on public roads known to be a significant issue within this locality? If "Yes", describe in the Inspectors comments box below.*

The FAC noted that the second part of the second question in the appellant's grounds of appeal is not part of the same question in the "Assessment to Determine EIA Requirement" of 14/10/2022.

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 14/10/2022 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". However, as noted below the FAC considers that a serious error was made in the application and so the application and its processing cannot be relied upon.

Also, in reviewing the "Assessment to Determine EIA Requirement" the FAC noted that questions that relating 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 carried out as part of the AA process and completed on 11/10/2022 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 is project splitting as the forestry and forest road are part of the same project.***

This ground of appeal queries whether the proposed forest road and the afforestation it is to serve could be construed as project splitting (taken by the FAC as a reference to the EIA Directive). Project splitting is predicated on a project being subject to EIA. The FAC noted that the EU EIA Directive sets

out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case-by-case basis (or both), whether or not EIA is required. Forestry projects are not referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II) but does not refer to forest roads. The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to the construction of a forest road of a length greater than 2000 metres and any forest road below that specified parameter where the Minister considers such development would be likely to have significant effects on the environment. The proposed forest road is 155 m., substantially below the EIA threshold and even taking into account the existing forestry that the road is intended to serve (circa 6.22 Ha.), the threshold for EIA would not be met. The licence addresses the felling of trees that might be required as part of the works that have been applied for. FAC is satisfied that the DAFM did not err in its decision concerning the matter of project splitting.

***Confirmation is required that the mitigation measures have been carried out & are effective.***

This ground of appeal contends that the licence should include a condition requiring the licensee to produce a report on the implementation and effectiveness of the mitigation and avoidance measures considered in determining a requirement for EIA. This ground identifies no likely significant effects on the environment and the FAC does not consider that there would be any basis for this suggestion or that the FAC might conclude that an error was made in the making of the decision.

***Concern for Public Health & Safety was expressed in the Leitrim County Council Roads Report.***

This ground of appeal contends that the Inspector's response to Public Health & Safety, in the light of Leitrim County Council's recommendation that the licence application should not be granted, was not adequately reasoned.

The FAC noted that this licence is made under the Single Consent System and that the relevant DAFM publications governing the requirements for the Single Consent System and design of forest entrances onto public roads at the time this licence was processed were, the Technical Standard Design of Forest Entrances onto Public Roads (2019) and 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).

The FAC noted the design of the proposed entrance onto the public road as shown on the applicant's drawings, the Engineers Report, the Relaxation from Standards Report, and the Condition of Public Road Report. From the information provided the proposal is for a half-bell-mouth on the right-hand side of the entrance, (i.e. against the direction of travel when exiting the forest entrance) and that a reduced sight-visibility of 90m is proposed in that direction and the full 160 m sightline is proposed to the left. The design does not meet the standards set out in the Technical Standard Design of Forest Entrances onto Public Roads (2019) and a Relaxation from Standards Report has been submitted.

The FAC noted that in Figure 12 Technical Standard Design of Forest Entrances onto Public Roads (2019) a half-bell-mouth with 50% reduced sightlines is shown for traffic exiting to left only i.e. for traffic travelling on the left hand side of the carriageway, in the direction of travel, and that the requirements for such an entrance are that the road is not a national secondary road or strategic regional road and that the public road has central markings, in addition, there can be no relaxation of the sightlines in the opposite direction.

The width of the public road is given as 2.9 m by Leitrim County Council and the documentation on file indicates that the road has no central markings. The exit would be to the right rather than the left required in a relaxation of the standards.

Having regard to the Technical Standard Design of Forest Entrances onto Public Roads (2019) the FAC considers the proposal to be a Departure from Technical Standard rather than a Relaxation. The FAC considers this to be a serious error in the application.

The procedure for a Departure from the Technical Standard requires consultation with the Local Authority set out in the document *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).

The FAC finds that at section 4 page 4 of the document it states,

*The application shall include the following,*

- *Where a departure from standard is used, the following details must be given:*
  - *The reasons why a departure from standard is used;*
  - *The written agreement from the relevant Road Authority\*;*
- *Details of alternative options considered where a relaxation or departure from standard sought;*

and

*'Formal approval must be received by the applicant from the Road Authority, before the departure from a technical standard can be incorporated into a road design layout, for submission to the Department.'*

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

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

As stated above the FAC considers that the application as submitted would require a Departure from the Standards and not a Relaxation, furthermore, the FAC does not consider that the application that was made complies with the requirements for a Departure and that this constitutes a serious error in the processing of the application and making of the decision in so far as the proposal has not met the standards/requirements set out in the relevant DAFM publications governing the requirements for the Single Consent System and design of forest entrances onto public roads. Under the Forestry Regulations 2017, the Minister is required to refuse an application for forest road works where it does not conform with the Technical Standards.

As a serious error occurred in the application the FAC considered that the appropriate decision was to allow the appeal and set aside the decision.

#### **Appropriate Assessment.**

##### ***The AA Screening is not consistent with EC Screening Guidance.***

This ground of appeal contends that the AA Screening has not been carried out in accordance with EU Commission Notice: *"Assessment of plans and projects in relation to Natura 2000 sites – Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive*

92/43/EEC" is so far as it has not proven beyond reasonable scientific doubt that there will be no significant effect on the Natura 2000 Sites identified.

The FAC noted that the DAFM had carried out a Stage 1 Screening Assessment for Appropriate Assessment, in advance of making the decision to grant the licence. The FAC noted the procedures adopted by the DAFM in its screening, listing the qualifying interests and conservation interests for three Natura 2000 sites within a 15km radius of the proposal and an assessment of the project design, location of the project and possible pathways to the listed designated sites. The FAC further noted that the DAFM concluded that there was no possibility of significant effects arising in the case of all the identified Natura 2000 sites listed and that Appropriate Assessment (Stage 2) was not required.

The appellant has adduced no evidence to the contrary that this proposal will have no significant effects on the Natura 2000 sites identified in the AA Screening.

***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 recorded other forestry plans and projects in the area, the planning register of the Local Authority, An Bord Pleanála, 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 screening for Appropriate Assessment the DAFM recorded the following,

*"I conclude that it can be excluded, based on objective scientific information, that the project itself (i.e. individually) will not have a significant effect on this European Site, due to the following findings: - The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection. upper Shannon 26a 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."*

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.

***There has been a failure to consult the NPWS as the management body for Natura sites.***

This ground of appeal contends that the NPWS should have been consulted on this licence application in accordance with Commission Notice 2021/C 437/01 Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC which states that *"The opinion of the management body of the Natura 2000 site should also be taken into consideration in drafting the conclusions."* The FAC noted



that in the DI's SoF it is stated that DAFM have an agreed referral matrix with the NPWS (the management body for Natura 2000 sites) and it was not deemed necessary to consult the NPWS on this site. The FAC considers that in agreeing a matrix for referral the NPWS has indicated to the DAFM under which circumstances its opinion is required and outside of those criteria its opinion is not required, therefore if the NPWS does not wish to proffer an opinion, there is no opinion to take "*into consideration in drafting the conclusions*". The FAC does not consider that the DAFM has erred in this aspect of the decision.

### **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 CN88920 and that this included a serious error in the application that was submitted. The FAC is thus allowing the appeal and setting aside the decision of the Minister regarding licence CN88920 in accordance with Section 14B of the Agriculture Appeals Act 2001.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

