



13th February 2023

Subject: Appeal FAC 031/2022 in relation to licence CN89306 at Pottore, County Leitrim

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 (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC 031/2022 was held remotely by the FAC on 14th December 2022.

In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly, Mr. Iain Douglas & Mr. Vincent Upton.

Secretariat to the FAC: Mr Michael Ryan.

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN89306. The reasons for this decision are set out hereunder.

Background

A licence (CN89306) for the construction of a forest road at Pottore, County Leitrim was issued by the DAFM on 21st March 2022. The licence decision pertains to an application for the construction of a forest road with an approved length of 552 metres to harvest an area of 6.48 hectares. The soil type is described in the submitted documentation as mineral / peat /podzols and the slope is considered flat to moderate. Two separate sections of roadway are identified in relation to this project, one section of

road is a new access off the public road and the other is a section of road which is an extension of an existing road which is referred to as the long section in the grounds of appeal.

Application documentation submitted included site notices, mapping and details of the public road as indicated on photographs, an engineer's report outlining the basis of relaxation of a sightline visibility standard of 120 metres with drawings of the entrance providing for a widened/new entrance, a biodiversity map, a road specification which indicates build on top construction and a haulage route marked as uploaded on the Forestry Forest Viewer (FLV) on the 09/08/2021. A further haulage route was submitted and marked as uploaded on the FLV on the 08/09/2021.

A more detailed road specification was marked as uploaded on the 08/10/2021 which provided more details in relation to the road construction, the entrance and drainage and also refers to Natura sites and potential hydrological connections to such sites.

DAFM requested an updated biomap to reflect all relevant watercourses on the 23/08/2021 with a further map marked as uploaded on the FLV on the 22/10/2021.

DAFM Assessment

The application was subject to desk assessment by the DAFM.

The application was referred to Leitrim County Council on the 13/08/2021 who in response recommend the granting of the application subject to conditions.

An Appropriate Assessment Screening Report & Determination (AASRD) dated 18/11/2021 was also prepared by an Ecologist and is marked as uploaded on the FLV on the 29/11/2021. This AASRD identified two Natura sites Cuilcagh Anierin Uplands SAC IE0000584 and Cuilcagh Mountain SAC UK0016603 within 15 kilometres and both are screened out. DAFM determined *that there is no possibility of the forest roading (CN89306) having any significant effect, either individually or in combination with other plans or projects, on any of the European site(s) listed below, for the reasons set out in the Screening Report. Cuilcagh - Anierin Uplands SAC IE0000584. Cuilcagh Mountain SAC UK0016603. As such, the project does not advance to Appropriate Assessment stage in relation to these European Sites.*

The Appropriate Assessment Screening Report & Determination also includes an in-combination statement which indicates,

"individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura site's listed in AA screening conclusions for individual Natura sites table. Consequently, the DAFM deems that there is no potential for the project to contribute to any effects, when considered in-combination with other plans and projects. Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. Therefore, DAFM deems that this project, when considered in combination

with other plans and projects, will not give rise to the possibility of an effect on the Natura site(s) listed above”.

DAFM also prepared an Ecology Report marked as uploaded on the FLV on the 08/03/2022 which refers to the Hen Harrier species in terms of potential impacts/issues. The report recommendation outlines conditions in relation to the species with conditions set out which include no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive) and in relation to aquatic zone sensitivities, mitigation is required which is presented in the form of conditions to be attached to any licence issued.

An In-Combination Statement completed on the: 09/03/2022 by DAFM and marked as uploaded on the FLV on the 11/03/2021 concluded;

“that there is no likelihood of the proposed forest road project CN89306 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. 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 significant effects on 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 significant effect on the above European Site(s)”.

DAFM also prepared an Assessment to Determine EIA Requirement dated 21/03/2022 which concludes that on the basis of this examination this application should not be subject to the EIA process.

An Appropriate Assessment Screening Report was prepared by Inspector dated 21/03/2022 and concludes AA is not required. The record also includes an Inspector's Certification Report recommending approval with conditions marked as uploaded to the FLV on 21/03/2022.

The decision to grant the licence issued on the 21/03/2022 subject to conditions which in addition to forestry grant related conditions included; compliance with Departmental guidelines and requirements for Water Quality, Archaeology, Landscape, Harvesting and Biodiversity; Environmental & Silvicultural Conditions requiring that 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 and that the forest road project and all associated operations shall be carried out and completed in accordance with the requirements of the Forestry and Biodiversity Guidelines. There was also a condition to adhere to the mitigation measures set out in the attached Ecology Report, dated 08/03/2022 and a condition that prior to commencement of any work to liaise with Leitrim County Council.

Appeal

There is one third party appeal and the full Notice of Appeal and grounds have been provided to all parties.

In summary the grounds contend that there was a delay in the publication of the licence decision, the application was approved on the 21st March 2022 and as of 28th March 2022 no licence or EIA Screening was uploaded on the FLV and a screenshot is included in relation to this.

It is submitted that there were public consultation failures referring to the requirements of Regulation 11 parts 1 and 2 of the Forestry Regulations 2017. In particular reference is made that one site notice was not erected referring to point SN A and the appellants have video evidence to support this.

Reference is made to the revised biomap which it is contended was lodged outside of the consultation period, was not referred to proscripted bodies and the public did not have an opportunity to comment on this documentation.

It is submitted that there are contradictions in relation to locations of aquatic zones on the submitted documentation.

It is submitted that the photographs are not representative of the condition of the road which it is submitted does not show any site notice.

Reference is made to the protection of the Hen Harrier species and the different start date of the breeding season in the Ecology Report to that applied by FAC.

It is submitted that there is no EIA screening for the project.

It is submitted that part of the site is within the Yellow (Ballinamore)_020 which is not assigned a status by the EPA. In this regard, reference is made to Hyland judgement.

There is also reference to conditions in the Ecology report on water quality and the inference is that there is potential to impact on water quality.

It is submitted and reference is made to deficiencies on the biomap and in particular to a watercourse on the townland boundary and also in relation to the location of fuel storage areas.

DAFM Statement

The DAFM provided a response to the grounds of appeal which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the grounds of appeal. In relation to publishing on the FLV It states that information on the decision was placed on the department website on the 23rd March 2022. Documents were lodged on the FLV at various times in the course of the application and 28 documents were on the FLV when it was checked on the 28th March. It is submitted that the DAFM IT resource cannot give DAFM information as to when precisely documents were uploaded on the FLV but there was still ample time to view documentation and appeal the licence decision.

Specifically in relation to matters raised in the grounds of appeal reference is made to the request of further information to reflect relevant watercourses. The Hen Harrier report was prepared out of

prudence based on a reported sighting in the area by a member of the public. The project site is indicated to not be within a Special Protection Area or an identified red area or nesting site.

It is submitted that the project does not jeopardise the potential attainment or retention of good status for either waterbody. DAFM accepts there is a watercourse on the townland boundary but that it does not intersect with the proposed project area. There is a fuel storage area within 50 metres but reference in this regard is made to conditions requiring adherence to guidelines and COFORD Manual.

The Applicant made a submission in response to the appeal in which it is submitted that two site notices were erected and details by way of photographs in relation to this are submitted. The biomap was updated to show a relevant watercourse and no other details were indicated. A photograph was submitted at the location of the site entrance. In relation water quality all requirements and guidelines will be adhered to.

This submission was provided to the other parties and no response was received.

Consideration of FAC

The FAC considered in the first instance whether the application should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that the EU EIA Directive sets out in Annex I, a list of projects for which EIAR 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. Neither afforestation nor deforestation, or a class of development related to the proposal under appeal, are 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) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) of Annex II). The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified threshold where the Minister considers such development would be likely to have significant effects on the environment. At 552 metres in length the project is below the threshold for mandatory submission of an EIAR.

In the grounds of appeal it is submitted that there is no EIA screening for the project. In this instance the FAC finds that there is a record of an Assessment to Determine EIA Requirement with consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and which determined that the project was not required to undergo EIA. This is contained on the publicly available Forestry Licence Viewer (FLV) and the FAC informed the parties that it would be referring to this information in considering the appeal.

The assessment refers to an approximate % of forest cover currently in the underlying waterbody (or waterbodies) of 25.78% which is at variance with the in-combination report which refers to River Sub-Basin's Yellow (Ballinamore)_010 and Yellow (Ballinamore)_020, approximately 44% and 16% respectively of which is under forest cover) and concludes on the basis of this examination that this proposal should not be subject to the EIA process. While noting the percentage differences the assessment also notes the approximate % of forest cover currently within 5 km is stated as 33.2%. The FAC also notes that this project is for a forest road and not afforestation and no change of land use is proposed in the application and that as a consequence the percentage cover in the area is not altered.

The FAC understands that while the "Assessment for EIA Requirement" document should be read as a summary document, and in-combination with the record as a whole, it does not state which waterbody is being referenced or offer an explanation of the discrepancy or further reasons in the section provided. While it may be that the figure including in the "Assessment for EIA Requirement" represents an average across the two waterbodies this is unclear and without further reasons provided the FAC considers this to be an error. Furthermore, the document only refers to forestry projects and does not expressly cross-reference the detailed record of other plans and projects on the file, while it may be reasonable to interpret that the decision-maker had this information before them. The FAC considers this matter to be an error in the making of the decision.

In response to the two following matters the DAFM recorded an N/A or not applicable response,

- *Do soil, terrain and slope, separately or in combination, create any unusual or exceptional constraints on forest road construction?*
- *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.*

The FAC considers that these matters are of relevance to the overall consideration of the application and that these responses represent serious errors, particularly in the absence of reasons or explanations of the responses.

The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and considered that the DAFM had sufficient information available to it to inform the decision making process in this case and that the information as uploaded to the Forestry Licence Viewer was sufficient to inform the general public as to

the content of the application and furthermore that the said information as uploaded to the Forestry Licence Viewer was sufficient to enable analysis and assessment of the licence.

The DAFM recorded an Appropriate Assessment Screening Report & Determination which identified two Natura sites (Cuilcagh Anierin Uplands SAC IE0000584 and Cuilcagh Mountain SAC UK0016603) within 15 kilometres. The sites were assessed, and it was determined after being further reviewed that all sites should be screened out and reasons are provided.

Other plans and projects are recorded which were considered in-combination with the proposal. In considering other plans and projects the DAFM recorded the following in the In-Combination Statement completed on the: 09/03/2022,

"that there is no likelihood of the proposed forest road project CN89306 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. 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 significant effects on 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 significant effect on the above European Site(s)".

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 and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered which the FAC would consider to not be in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considered this to be a significant error as it suggests that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in-combination with other plans and projects might result in a significant effect.

In relation to the matters raised in the grounds of appeal, reference is made to a delay in the publication of the licence decision, the application was approved on the 21st March 2022 and as of 28th March 2022 no licence or EIA Screening was uploaded on the FLV. DAFM in response state that the licence and the EIA screening were available on the 28th March 2022 and indicate that they cannot indicate precisely when documents were uploaded on the FLV but that there was still ample time to view documentation and appeal the licence decision. The FAC note that the FLV records as uploaded indicate a date in relation to the documents referred to as 21st March 2022. The Appellant did not make a submission on the application and did not seek any records when the decision was made. The FAC provided the

statement from the DAFM and submissions made to both the Appellant and the Applicant. The FAC is further of the view that this matter relates to the publication of records after the decision had been made. The FAC are not satisfied that an error was made in the making of the decision in regard to this grounds of appeal. However, the decision is being remitted for the reasons outlined in this letter.

It is submitted that there were public consultation failures referring to the requirements of Regulation 11 parts 1 and 2 of the Forestry Regulations 2017. In particular reference is made that one site notice was not erected referring to point SN A and the appellants have video evidence to support this. The Applicant in response made a submission to the appeal in which it is submitted that two site notices were erected and details by way of photographs in relation to this are submitted.

Documentation marked as uploaded on the FLV on the 9th August 2021 indicates a site notice with a signed date of 26th July 2021 and two photos of erected site notices are on file. The maps submitted with the application include the location of two site notices. It is noted that the Applicant and Appellant offer conflicting claims in relation to the presence of two site notices though it would appear that there is agreement that at least one site notice was erected. It is also noted that in assessing the licence DAFM carried out a desk assessment and did not carry out an on site assessment and are therefore not in a position to provide further information to the FAC in this regard.

Article 11 of the Forestry Regulations 2017 outlines the requirements in relation to site notices. Specifically in relation to the site notice the applicant is required to erect a notice in a form determined by the Minister, at the entrance from the public road to the land to which the application relates or, where no entrance exists, at the point where it is proposed to create an entrance, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time. The site notices as published on the FLV would appear to comply with the requirements of 2(a) as they appear to be clearly legible and visible from a public road. The FAC is not in a position determine the length of time any notice was present, to establish its presence for a period of five weeks or whether one or two notices were present but it is reasonable to consider that notice of the licence application was available to the public in the area of licence application. The Appellant's provide no convincing evidence that that two site notices were not erected while the Applicant provided photographs and maps of the site notices erected with the application and in response to the appeal. In the absence of evidence to clearly demonstrate otherwise the FAC is not satisfied that an error has occurred in this regard.

Reference is made to the revised biomap which it is contended was lodged outside of the consultation period, was not referred to prescribed bodies and the public did not have an opportunity to comment on this documentation.

The submitted grounds refer to an absence of public consultation referring in particular to a revised biomap lodged outside of the consultation period. Part 6 of the Forestry Regulations 2017 addresses consultation in relation to forestry licences. Regulations 10 and 11 requires the publication of a notice by the Minister and the erection of a site notice by the Applicant. The FAC noted that a notice of the

application was published on the DAFM website and details were provided on the Forestry Licence Viewer starting on the 9th August 2021. The record includes copies and photos of the site notices on either side of the proposal and a map showing the location of the site notices and documentation including a biomap. A revised biodiversity/operation map was uploaded on the FLV on the 22nd October 2021 which indicates a relevant watercourse but the FAC notes no details relating to layout or location of the road was altered by this revision. The original map included the aquatic zones in the area and the changes related to relevant watercourses or drains in the area. There is no indication that the Appellant or the public attempted to make any submission on the application. The application is recorded as having been considered in the Appropriate Assessment and EIA screening documents and the new map was provided well before the generation of the Ecology Report. The FAC is not satisfied that the change made is of any material significance in the overall context of the processing of the decision. The FAC is not satisfied that an error was made in the making of the decision under the Forestry Regulations 2017 and Forestry Act 2014 in relation to public consultation.

It is submitted in the grounds of appeal that there are contradictions in relation to locations of aquatic zones on the submitted documentation. It is however noted that the revised Bio map which arose from a DAFM further information request did include an additional relevant watercourse crossing which is an updating of the location of relevant watercourses. Information on aquatic zones remained the same and reflects the location of marked rivers on EPA data. This information was available to the DAFM including in the generation of the Ecology Report.

Reference is made in the grounds of appeal to the protection of the Hen Harrier species and there is a different start date of the breeding season in the Ecology Report to that applied by FAC. The FAC notes the DAFM submission that a report on the Hen Harrier was prepared out of prudence based on a reported sighting in the area by a member of the public and applying a precautionary principle noting that the licence site is not in SPA or an identified red area or nesting site. Conditions were recommended in the report including no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). In relation to the dates indicated the FAC considers that on the basis of best information available to it, no disturbance should occur in the period 1st March to 15th August inclusive and that any condition attaching to a licence should incorporate these dates subject to the availability of new scientific information.

It is submitted in the grounds of appeal that part of the site is within the Yellow (Ballinamore)_020 which is not assigned a status by the EPA. In this regard, reference is made to Hyland judgement. The FAC viewed the information on the EPA website and current EPA mapping and data which is being updated would indicate the project is within in River Sub-Basins Yellow (Ballinamore)_010 which is stated as not being at risk and having a status that is moderate and that the Yellow (Ballinamore)_020 which is stated as not being at risk and having a status that is moderate. The FAC finds that the Yellow (Ballinamore)_020 has a status assigned to it.

In relation to submissions regarding in the grounds of appeal regarding water quality generally there is also reference to conditions in the Ecology report on water quality and the inference is that that there is potential to impact on water quality. The FAC notes that in relation to the issue of water quality the Ecology report outlines conditions for the protection of water quality including siltation and sediment and risk assessment, implementing all feasible actions to mitigate against siltation and sedimentation pathways to adjacent aquatic zone, exclusion zones in relation to water hotspots and aquatic zones, the application of best practice during the construction period, brash and branch wood are to be utilised to create and maintain brash mats along all machine routes during operations with no brash mats located within environmental setbacks along the aquatic zone, extraction routes are to be planned to avoid hotspots and ensure that individual routes are not used excessively during harvesting operations, locating timber landing bays at least 50m from the nearest aquatic zone, appropriate sediment trapping measures installed and maintained both during and following operations to prevent runoff of silt and sediment, silt traps to adhere to the specifications set out in Appendix D of the Standards for Felling & Reforestation, or similar. The conditions address the crossing of drains and other matters. The conditions of the licence in addition require compliance with Departmental guidelines and requirements of the Forestry and Water Quality Guidelines, the COFORD Forest Road Manual which identifies setbacks from watercourses and minimum distances in relation to fuel storage areas and compounds.

While the FAC is of the view that the conditions are generally appropriate, the conditions outlined in the Ecology Report include the following:

A. The operation manager and relevant team members will have a full awareness of NIS and determination conditions, ensuring adherence to onsite mitigation measures and to specify action if any unforeseen environmental issues arise.

The FAC understands that NIS refers to Natura Impact Statement and that no such document was provided with the application and that the screening exercise undertaken by the DAFM screened out the proposal for Appropriate Assessment. As no NIS was submitted or required in this case this measure is unclear and cannot be relied upon and represents a serious error in the making of the decision.

Reference is made in the grounds of appeal to the condition of the local road. The application as submitted included details of the forest road, its access onto the public road and details of a haulage route. The licence was referred to the Leitrim County Council who indicated no objections and recommended conditions. The conditions of the licence required that prior to commencement of any work to liaise with Leitrim County Council. The management of the public road network generally falls to the Local Authority. The FAC consider that the condition of the local road network was satisfactorily assessed by DAFM and the FAC are not satisfied that an error was made in the making of the decision in regard to this grounds of appeal.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or

series of errors were made in the making of the decision in respect of licence CN89306. The FAC is therefore setting aside and remitting the decision regarding licence CN89306 to the Minister to carry out a new EIA screening and Appropriate Assessment of the proposal itself and in combination with other plans or projects and to address the conditions outlined in the Ecology Report before a new decision is made.

Yours sincerely,

Derek Daly, On Behalf of the Forestry Appeals Committee