



31/10/2023

Subject: Appeals FAC097/2022 & FAC098/2022 in relation to forest road licence CN86334

Dear

I refer to the above appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food, and the Marine. 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 all parties to the appeal.

Hearing & Decision

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine your appeal. Appeals numbered FAC097/2022 & FAC098/2022 were considered during a sitting of the FAC held remotely on the 22/06/2023 which was attended by the following participants:

FAC Members – Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman.

FAC Administration – Ms. Vanessa Healy

The record of the Minister's decision was made available to the FAC by way of the Forestry Licence Viewer¹ (FLV). The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, and the DAFM's Statement of Facts (SoF), before deciding to set aside and remit the Minister's decision to grant forest road licence CN86334 for the reasons outlined hereunder.

Licence Details

The licence under appeal was issued by the DAFM on the 22/07/2022 and is for 450m of forest road in the Townlands of Cross South/Cross North, Co. Roscommon c.5km north-east of the town of Ballagherreen, near the Sligo/Roscommon border.

The licence was issued with relatively standard conditions and also includes Condition 8, *Environmental & Silvicultural Conditions*, which requires that i) the forest road project and all associated operations be carried out and completed in accordance with specified standards, ii) that the licenced operations adhere to the mitigation measures set out in the appended Appropriate Assessment Determination (AAD), dated 22/06/2022, iii) instructing the licensee to liaise with the County Council Area Engineer prior to commencing forest road construction, and iv) outlining the restrictions on tree removal permitted to facilitate the completion of the project.

¹ <https://flv.apps.services.agriculture.gov.ie/>

Site Details

The *Site Details Report* on the FLV states the soil type is mineral in nature, at an elevation is of 95-110m and serves a site area of 23.16ha. However, the AAD states that “the project area is situated on a moderate slope and is comprised of 72% cutaway basin & blanket peats and 28% surface/groundwater gley soils”. Aerial imagery on the FLV shows the vegetation type within the project area is conifer plantation and the proposed road will be an extension of an existing forest road to the south.

The proposal is in the FALLSOLLUS_010 River Sub-Basin. The FALLSOLLUS_010 river waterbody dissects the proposed forest road flowing north to south through the planned route. Information on [Catchments.ie](https://www.catchments.ie)² shows the FALLSOLLUS_010 river waterbody currently has ‘Good’ status for the 2016-2021 period and its risk status is under review. However, the AAD states that at the time of the DAFM’s decision to issue CN86334 this waterbody’s status was unassigned. The proposal is underlain by the Curlew Mountains ground waterbody which also has ‘Good’ status and is ‘Not at Risk’.

DAFM Processing of the application

Assessment to Determine Environmental Impact Assessment (EIA) Requirement

The application was field inspected on the 01/07/2021 as well as being desk-assessed. The DAFM completed an “Assessment for EIA Requirement”, which has a certification date of 20/07/2022. The EIA assessment considered the proposal’s potential impact on the environment across a range of criteria before concluding that the application should not be “subject to the EIA process”. The assessment included the following information:

- The approximate percentage of forest cover currently in the “underlining waterbody (or waterbodies)” is 8.02%.
- The proposed area is within 3km upstream of a European or national designation including SACs, cSACs, SPAs, iSPAs, NHAs, pNHAs Nature Reserves and National Parks.
- The application should be referred to the Forest Service Ecologist.
- When considered in combination, the proposed forest road, along other recent, ongoing or planned works, does not represent the construction of single or multiple lengths of forest road totalling 2000 m or more “within the area”.
- “Is the level of forestry-related traffic on public roads known to be a significant issue within this locality?” The answer recorded is “No”.

DAFM Appropriate Assessment (AA) Screening

The following documents are published on the FLV and comprise the record of the DAFM’s AA process before the FAC:

- 1) The applicant’s Natura Impact Statement (NIS) appears to have been completed by an ecologist on 24/11/2020. The FLV publishing date is listed as 21/12/2020 but as the FAC noted, this pre-dates the launch of the FLV in January 2021. The NIS does not contain an AA Screening but addresses Lough Gara SPA as the only “screened-in” European site in Section 2 and includes an assessment of potential impacts and proposed mitigation measures. The NIS considers in-combination effects in Section 4 and determined that the potential for cumulative effects on Natura sites has been ruled out. The NIS concluded “in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project,

² https://www.catchments.ie/data/#/dashboard/overview?_k=jiik5r

individually or in combination with other plans and projects, will not have an adverse effect on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge”.

2) In-Combination Statement (ICS)

There are two ICSs on the FLV. The first is a document labelled *In Combination Statement* which was completed on 26/08/2021 and published on the FLV on the same date. It is unsigned but was produced by the DAFM following consultation with various online planning systems and datasets (including the DAFM’s own internal records) in relation to other forestry and non-forestry plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Fallsollus_010. This (first) ICS concludes that “Individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura site’s (sic) 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.” The FAC noted that this (first) ICS does not contain the “individual Natura sites table” which is referenced, and it is unclear where this table is contained.

The second ICS is contained in Section 5 of the AAD. It follows the same format as the first but was completed on the 24/02/2022. The second ICS concludes that “there is no possibility that the proposed forest road project CN86334, with mitigation measures set out in Section 4, will itself, i.e. individually, giving (sic) 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 Gara SPA. 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.”

3) The DAFM’s AAD was produced by Niall Phelan, Environmental Facilitation Ltd, on behalf of the Minister for Agriculture, Food and the Marine (the Minister) and is dated 22/06/2022. It was marked as being posted on the FLV on 09/07/2022.

- In Section 2, *Screening for Appropriate Assessment*, it is stated that that “the Minister, as the relevant public authority, undertook a screening for Appropriate Assessment to determine if the activity, individually or in combination with other plans or projects, is likely to have a significant effect on any European Site, in view of best scientific knowledge and the conservation objectives of the European Site. In this context, particular attention was paid to the following European site(s)”. The AAD then Lists 11 “screened-out” European sites, with reasons given for the screening conclusions. Lough Gara SPA is recorded as the only screened-in European site with the reason given that “The project area is located ~6.5km upstream from this European site. The project area is also located ~1.6km terrestrially north-west of the European site, where it is within disturbance distance for Special Conservation Interest(s).” No reference is made to the Qualifying Interests or conservation objectives of any of the sites screened for AA.
- Section 3, *Appropriate Assessment*, states the DAFM determined that CN86334 should undergo AA in relation to Lough Gara SPA. It is then stated, “For this reason, without being requested to do so, the applicant submitted a Natura Impact Statement (completed 24/11/2020) to facilitate the Minister carrying out an appropriate assessment.” The AAD states that the NIS was evaluated by Niall

Phelan on behalf of the Minister and that, *inter alia*, the information provided in the NIS was sufficient to derive appropriate conditions for a determination.

- Section 4 prescribes mitigation measures labelled A-Z, which include measures beyond those proposed by the NIS.
 - In relation to the protection of adjoining/downstream aquatic-based species and habitat, mitigation measure A requires that “A siltation and sediment and risk assessment report will be undertaken prior to any works with a focus on pathways of impact to FALLSOLLUS_010, recording and implementing all feasible actions to mitigate against siltation and sedimentation impact pathways”.
 - Mitigation measure B requires that “Operations to be restricted to the period 1st April to the 31st October. Ground conditions should be suitable for activities given the soil type, and operations should not be carried out within 2 weeks of heavy rainfall (>25mm/day). 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. Ground conditions must be monitored during rainfall, and records of such monitoring and of any resulting operational adjustments and postponements must be kept for possible inspection. For information, forecast details for the nearest meteorological station can be found on the Met Éireann website www.met.ie. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during and post road construction operations”.
- Section 4 of the AAD states that “The basis for this AA Determination is as follows”:
 - *...The project area is situated on a moderate slope and is comprised of 72% cutaway basin & blanket peats and 28% surface/groundwater gley soils. The project area is crossed by the aquatic zone FALLSOLLUS_0101 (WFD Status: Under Review, Ecological Status: Unassigned). From this point, the aquatic zone flows ~3.5km downstream to Tullaghanrock Bog SAC and a further 800m to Callow Bog SAC. Given the qualifying interests of both of these SAC’s and the unlikely probability of these features being affected by the proposed works, both of these European sites have been screened out. Lough Gara SPA is located ~1.6km south-east of the project area. Greenland White-Fronted Geese are a special conservation interest of this SPA. This feature is highly sensitive to disturbance at distances up to 2km and so measures must be put in place so as not to disrupt their foraging habitat...*
 - The AAD concludes “based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.”

- 4) The DAFM's Appropriate Assessment Screening Report (AASR) which was completed by the District Inspector (DI) and is dated 20/07/22. The AASR screens 12 European for AA and all are *screened out* with reasons provided. Regarding Lough Gara SPA the screen-out reason given is "The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site. - Other factors, Distance". The *overall conclusion* recorded is "Screen Out: No likelihood of a significant effect on any European site, and Appropriate Assessment not required".

Referrals

The DAFM referred the application to the National Parks & Wildlife Service (NPWS), Roscommon Co. Council, and the Forest Service Archaeology Unit.

NPWS responded 26/07/2021 stating they had "no comment to make on this application" but attached an appendix containing more general points of relevance.

Roscommon Co. Council's response is dated 02/03/2021 and states that their Roads Section has no objection to the proposal in principle subject to the following:

1) Any damage or flooding issues related to the public road, verges, Surface Drainage systems, Bridges, Culverts or public facilities caused by the works and its associated off-site transportation of timber, shall be fully reinstated by the developer at their own expense and to the satisfaction of Roscommon County Council.

2) Construction of Road/Entrance to comply with the current design standards.

The DAFM's Archaeology Unit's response is dated 30/06/2021 and concludes that there are "no specific archaeological or architectural heritage protection recommendations other than normal adherence to the relevant terms of the Forestry and Archaeology Guidelines and, in so far as they pertain to roading, the terms of the Forest Harvesting and the Environment Guidelines."

Submissions

There were 6 submissions on the application, seemingly all from local residents. The main themes are the unsuitability of the public road leading to the forest for timber extraction and the amount of damage left unrepaired following a recent harvesting and haulage operation.

Grounds of Appeal and DAFM Response

There are two third-party appeals against CN86334 (FAC097/2022 & FAC098/2022). The grounds of appeal for each have been considered in full by the FAC and are summarised below:

FAC097/2022

- The Appellant owns the land from "the main road to forest" and breeds thoroughbred horses
- The Appellant typically uses road for prepping foals for sale but unable to following recent timber extraction due to associated road damage.
- Wants written commitment that if harvesting goes ahead, the road will be "fully reinstated" and damage done to their property will be compensated for.

FAC098/2022

- Existing road not suitable for machinery needed to build forest road.
- Last roading/harvesting operation left road damaged, including outside their house.
- Cross North has its "own designated road via Clogher". No need to build new road if this was used.

- Grass verge must go undamaged. Seeking compensation for damage to road and any future damage (photographs included).
- Asking FAC to accept submission in good faith and compensate them for any damage caused by the construction of the proposed forest road.

DAFM Response to Grounds of Appeal

The DAFM provided an SoF in response to both appeals which sets out the DAFM’s administrative processing of the licence application. The SoF also stated, in relation to the FLV, “Documents which required adjustment on the Forestry Licence Viewer (FLV) for this contract are displaying 15/03/2023. This does not interfere with the work of the inspector or ecologist/archaeologist who are authorised to use the Department’s Forest Service - IFORIS system and who would have had access to this system while deciding on this forestry licence application.”

The DI provided the same response to each appeal:

- The road leading to the project is a public road. Road safety issues are a matter for the Local Authority and/or the Gardai.
- The issues raised by the Appellants do not provide sufficient grounds for DAFM to change its conditions of approval.

Findings of the FAC

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision under appeal, and if the decision was made in compliance with fair procedures.

DAFM AA Process

In the first instance, the FAC considered the DAFM’s decision to grant CN86334 in light of the requirements of the EU Habitats and EIA Directives.

Article 6(3) of the Habitats Directive states 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 thereon, either individually or in combination with other plans or projects, shall be subject to AA of its implications for the European site in view of the site’s conservation objectives.

As outlined previously in this letter, the DAFM produced an AAD in June 2022 which relied, in part, on the NIS produced by the applicant in November 2020 to reach its determination. The FAC noted that the NIS records Lough Gara SPA as being screened in but makes no reference to screened-out European sites. The AAD contains a list of 11 screened-out European sites, with reasons recorded, as well as recording Lough Gara SPA as being screened in for AA. Based on the information before the FAC, neither the NIS nor the AAD contain a Stage 1 AA Screening which identifies the relevant European sites and compiles information on Qualifying Interests and conservation objectives and determines which of those Qualifying Interests/conservation objectives could be affected by the proposed development. The only AA Screening document before the FAC is the DI’s AASR which was dated July 2022, one month after the AAD was completed. This AASR screens *out* all 12 European sites that were screened, including Lough Gara SPA, which contradicts the information contained in the NIS and the AAD in relation to this European site. The FAC considered this to be a significant error in the DAFM’s processing of the licence application.

The FAC considered the mitigation measures prescribed by the DAFM in their AAD. In relation to the protection of adjoining/downstream aquatic-based species and habitat, mitigation measure A requires

that “A siltation and sediment and risk assessment report will be undertaken prior to any works with a focus on pathways of impact to FALLSOLLUS_010, recording and implementing all feasible actions to mitigate against siltation and sedimentation impact pathways”. The FAC considered that, in the particular circumstances of this case, where potential impacts on water quality have been identified by the DAFM, along with the need for a report to record the risk assessment of siltation and sedimentation arising from the proposed works, the completion and consideration of such a report should have formed part of the AA process prior to the making of an AAD.

The FAC observed that the description of the soil on site in the AASR is “Podzols” while the AAD states that there is a mix of approximately 70% peat and 30% gley soils present. The NIS does not state what soil types are found on site. The AAD also states that the underlying river waterbody had an ‘Unassigned’ status at the time the AAD was made. While licence CN86334 is being set aside and remitted for reasons set out elsewhere in this letter and given the risks to water quality identified in the NIS and the AAD, and the increased erodibility of peat soils, the FAC considered that any new AA completed by the DAFM should accurately record the soil types on site in all relevant documents and should have regard to the updated status of the underlying river waterbody in view of the DAFM’s responsibilities under the Water Framework Directive.

The FAC noted there are two ICSs on file and there does not appear to be a statement on file clarifying which is relevant to the DAFM’s decision. In these circumstances, the FAC would understand that the most recent ICS, which is included in the AAD at Section 5, is the relevant ICS but this has not been clarified by the DAFM. The FAC observed that this ICS states “there is no possibility that the proposed forest road project CN86334, 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 Gara SPA. 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.” The FAC considered that the phrasing of this conclusion constitutes a significant error in the DAFM’s AA process as it demonstrates that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which, in combination with other plans and projects, could result in a significant cumulative effect on a European site.

The FAC observed that the AAD was made while relying, at least in part, on the applicant’s NIS. The FAC noted that over 18 months had passed between the completion of the NIS and the making of the AAD. The FAC also noted that the mitigation measures contained in the AAD of 22/06/2022 are materially different to those contained in the NIS of 24/11/2020 and because they are materially different (and having regard to the circumstance where the DAFM have taken the view that a Stage 2 AA was required due to the likelihood of a significant effect on the Lough Gara SPA) the DAFM should have completed its own up-to-date AA Report on which to base their AAD. In addition the FAC considered that an AAR should have been published in accordance with the requirements that DAFM has set for itself in this regard. The FAC considered that this represents a further significant error by the DAFM in its processing of the application in this case.

EIA Screening

The FAC considered the DAFM’s screening of the proposal for EIA. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. The Forestry Regulations 2017 (S.I. No. 191 of 2017) require that an *environmental impact assessment* is carried out in respect of an application for a licence for afforestation of an area ≥ 50 ha, the construction of a forest road of a length ≥ 2000 m, and any afforestation or forest road application below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The decision under appeal relates to a

licence for the construction of 450m of forest road, so is sub-threshold for mandatory EIA and the DAFM completed an assessment to determine the requirement for EIA before concluding that EIA was not required in this instance.

The FAC considered the DAFM's *Assessment for EIA Requirement* and noted that this document only refers to other forestry and forest road projects in the section titled *Cumulative effect and extent of project*. The FAC understands that the "*Assessment for EIA Requirement*" document should be read as a summary document, and in combination with the record of the DAFM's decision as a whole, and that the ICS considered non-forestry plans and projects in the vicinity of the proposal. However, the EIA assessment does not expressly cross-reference the detailed record of other plans and projects contained in the ICS and the FAC considered this to be a significant error on the DAFM's behalf.

The FAC also noted that where the EIA assessment asks, "Is the level of forestry-related traffic on public roads known to be a significant issue within this locality?" The answer recorded is "No". Without any qualifying statements this answer appears to be incorrect given the number of submissions referencing the impact of forestry-related traffic on the public road leading to the forest. In the particular circumstances of this case the FAC considered this to be an error on the DAFM's behalf in their processing of the licence application.

Grounds of Appeal

The FAC considered the grounds of appeal submitted under FAC097/2022 and FAC098/2022 as being relatively similar. Based on the information before it, the FAC formed the view that the issues raised in the grounds relate to a public road, outside of the area licenced for forest road construction under CN86334. The FAC has no remit regarding the maintenance or repair of public roads and has no powers to stipulate that compensation be paid to any party. The powers of the FAC are limited to those provided for in Section 14 of the Agriculture Appeals Act 2001, as amended. Based on the evidence available to it the FAC is not convinced that the DAFM has erred in its processing of the application as it relates to matters raised in the grounds of appeal FAC097/2022 and FAC098/2022.

Conclusion

Based on the evidence before it, as outlined above, the FAC found that the DAFM made significant errors in their processing of the application prior to issuing CN86334. In these circumstances, the FAC decided to set aside and remit the decision to the Minister 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 prior to the making of a new decision, while having regard to the errors identified by the FAC previously in this letter.

Yours sincerely,

Luke Sweetman on behalf of the Forestry Appeals Committee