



**An Coiste um Achomhairc
Foraoiseachta**

Forestry Appeals Committee

15 May 2020

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Our ref: FAC 119/2019

Subject: Appeal in relation to afforestation licence CN83106

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine in respect of afforestation licence CN83106.

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

Background

Afforestation licence CN83106 was granted by the Department on 25 April 2019.

Hearing

A hearing of appeal 119/2019 was conducted by the FAC on 23 April 2020.

FAC Members:

Mr Des Johnson (Chairperson), Mr Vincent Upton, Ms Mary Lawlor
and Mr Pat Coman

Decision

Having considered all of the information before it, including a consultant's report, the FAC has decided to cancel the licence relating to CN83106 for the reasons set out below.

The proposal is for afforestation of a 2.89 ha site at Derrynaveagh, Co Clare. There is no evidence provided that the proposal was subject of any referrals including to Clare County Council or to the NPWS. This proposed plantation is in a rural setting and close to but set back from a public road, dwellings are dispersed locally, and most are to north of project. Locally lands are mainly agricultural and there is some dispersed forestry. There is recent afforestation just south of project site which itself is close to previous afforestation and mature forestry. The proposal site is bounded along the northern edge by an EPA identified watercourse.

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Licence conditions include that no soil cultivation is permitted within aquatic setbacks, no mound drains are to be installed directly down-slope, High Status Water Objective catchment 20m aquatic setbacks are mandatory and adherence to forestry biodiversity and water quality Guidelines.

There is one appeal before the committee and the grounds include that based on the information supplied it was not possible to make a decision which was in compliance with the requirements of the Habitats and EIA directives, and having regard to the following European Court of Justice Rulings; C-258/11, C-164/17, C-323/17 and C-461/17.

In response to the appeal the Department of Agriculture Food and the Marine submitted as follows: This application was approved by way of desk audit only on the 08/04/2019 following a request for further information regarding a problem with the fencing map. The site is in a High-Status Water Objective Body. The conditions for approval reflect this i.e. "As the site is in a High-Status Water Objective catchment, 20m aquatic setbacks are mandatory." The site was earmarked for re-inspection at first instalment. The site is not overlapping or within 3kms upstream from any Natura 2000 or any other habitat or wildlife designations.

The FAC subsequently sought and received additional information from the Department of Agriculture Food and the Marine which included that when the Forest Service first assessed the likely effects of this proposed development on the local receiving environment it did take into consideration standards of good forest practice, and more specifically when applying the procedure then in use to carry out an Appropriate Assessment Stage 1 screening in respect of the proposed development, it also took those same standards of good forest practice into its consideration as mitigation measures in terms of their potential to avoid or reduce the likely effects of the proposed development on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. In the reply the Department also set out for Natura sites and listed certain planning permissions/planning applications from County Council planning and An Bord Pleanála, as well as EPA developments, the Clare County Development Plan and other forestry related projects. In what was provided the Department concluded that the proposed development, considered in combination with other plans and projects would not give rise to significant effects on any Natura 2000 sites.

On the basis of the evidence before it, the FAC considered the project is not necessary for or connected with the management of any Natura 2000 site. There are a number of European sites within a 15km radius of the site; Danes Hole, Poulnalecka SAC at 4km, the Lower River Shannon SAC at 6.3km, the Ratty River SAC at 5.8km, the Glenomra Wood SAC at 6.7km, the Kilkishen House SAC at 7.3km, the Slieve Bernagh Bog SAC at 9km, the Poulmagordon Cave SAC at 13.3km, the Lough Gash Turlough SAC at 14.3km, the River Shannon and River Fergus SPA at 8.3km and the Slieve Aughty Mountains SPA at 14.7km. In addition, hydrological connectivity exists to the Lower River Shannon SAC at 17.5km and the River Shannon and River Fergus SPA at 26.1km (EPA mapping).

The FAC sought and received a report by an independent consultant in relation to this proposal and, in particular, a Stage 1 screening for Appropriate Assessment in accordance with the provisions of Article 6(3) of the Habitats Directive (92/43/EEC). The report, dated 21st April 2020, was considered by the FAC in coming to its decision and a copy of the report is contained in the public file. The



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report identifies the Natura 2000 sites located, at least in part, within 15 kilometres of the project lands, along with their qualifying interests and conservation objectives. The report concludes that while on an individual basis the proposed project is unlikely to generate a need for progression to Stage 2 of the Appropriate Assessment process, there is concern regard to cumulation with other projects, and any potential for significant impacts/effects on surrounding European sites, particularly those SAC's and SPA's which have qualifying interests associated with habitats and species dependant on assured water flow and water quality, for example the Lower River Shannon SAC and the River Shannon and River Fergus SPA which have a hydrological connection with the project site. The report also included it was inappropriate that the site-specific conditions attached to the licence be taken into consideration when determining cumulative impacts.

The FAC is satisfied that the screening procedure detailed in the consultant's report is in accordance with the requirements of the Habitats Directive. While the report concludes that, based on the information available that a stage 2 Appropriate Assessment as referred to in Article 6(3) of the EU Habitats Directive is required, the FAC is of the view that such a conclusion should be dependent on more detailed screening in the first instance particularly with regard to any possibility of in combination effects on a European site. The FAC is also of the view there is insufficient information available to the committee on which to base such a detailed screening. In these circumstances, the FAC concurs with the report that it is not possible to conclude, that there is no likelihood the proposed development would have a significant effect on the objectives of the hydrologically connected European sites, and in applying the precautionary principle our decision is to cancel the licence in this instance.

Finally, and with regard to the EIA Directive, while the project is sub-threshold and a mandatory EIA does not arise, the report referred to above sets out a need for more detailed EIA screening than that evidenced as undertaken by the Department of Agriculture Food and the Marine, especially with regards to cumulative aspects and water quality. The FAC agrees with this finding.

Yours sincerely,

Pat Coman, on behalf of the Forestry Appeals Committee



APPLICATION FOR TECHNICAL APPROVAL FOR AN AFFORESTATION LICENCE

(FAC 119/2019)

██████████

CONTRACT NO.

TOWN LAND.

COUNTY.

██████████

CN83106

DERRYNAVEAGH

CLARE

██████████

██████████

██████████

██████████

Proposal:	Afforestation
Species:	Sitka spruce Broadleaf (not identified)
Ground preparation method:	Mounding
Planting Method:	Angle Notch
Fertiliser :	Zero
Weed Control:	Unknown..
Access:	The Application states that a road access is provided: Google Maps show that the road appears to be an agricultural lane running from the S.E corner of the proposed site in a north easterly direction to the local county road. (R471)
Setback.	The Licence requires a mandatory 20m. aquatic setback
 SITE	
Area:	2.89 ha.
Soil Type:	Mineral
Geology:	Unknown
Elevation:	50.0 to 50.0 (m) ?
Existing land use:	Agricultural
Vegetation	Grass/rush

Boundaries:

Google Maps show indistinct site boundaries other than an agricultural lane adjoining part of the southern site boundary and tree lines on the western boundary. EPA maps show a watercourse running along part of the northern and northeastern site boundaries

Adjoining land uses:

The site is adjoined to the south by significant swathes of afforestation; those afforested lands encircle Lough Coolmeen on all sides other than on its northern shore where it is encircled by agricultural land. Lough Coolmeen lies less than 500 m S.W of the proposed site.

Aquatic Zone:

The site is stated to lie within a High Status Water Objective Catchment.

SURROUNDING ENVIRONMENT

Existing Land Uses:

A mix of agricultural land and afforestation

Settlement Pattern.

One off rural dwellings and farmhouses; the nearest settlement is Sixmilebridge approx 9 kms to the west.

Other Forestry in Area.

Significant swathes encircle Lough Coolmeen on all but its northern shore. The wider area is also characterised by significant tracts of afforestation to the north and south of the R471. Applications for afforestation, felling licences, and forest roads are detailed in the Forest Service's response to the F.A.C.

Proposed Development in the Area.

Those consist mainly of small domestic developments which are detailed in the Forest Service's response to the F.A.C.

LICENCE DETAILS

[REDACTED]
Date of Licence Application:

[REDACTED]
Initial submission on 10.1.2019
Further subsequent submissions
Re Site area and fencing revisions

Date of Licence Issue:

25.4.2019

General Licence Conditions.

- End date work completion
- Compliance with Operational Proposals and Specifications
- Compliance with Dept. Guidelines
- Compliance with Ecological Survey and Management Plan
- Licence issued subject to terms and conditions of Forestry Standards and procedures Manual.

Specific Licence Conditions

- Mandatory 20m aquatic setbacks
- No soil cultivation within aquatic setbacks
- No mound drains to be installed directly down slope
- Adherence to forestry biodiversity and water quality Guidelines

REFERRALS

None. However the Inspector appeared to have consulted Clare Co Co and A.B.P planning websites, the EPA website, Clare Co Dev Plan 2017-2023, and DAFM's IFORIS Map Viewer.

GROUNDS OF APPEAL

Appeal first submitted on the 28.02.2019

1. On the basis of information submitted it is not possible to grant a Licence which would be in compliance with the E.I.A and Habitats Directives having regard to judgements of the CJRU in the following cases: C-258/11, C-164/17, C- 323/17, C-461/17

2. There has not been any assessment of cumulative effects.

DAFM SCREENING .

A Screening conclusion dated 6.3.2019 stated that

- The project is greater than 3 kms from any Natura site and does not overlap any FPM catchment.
- There isn't any factor which overrides the protection provided by this physical separation.
- There is no possibility that this project will have a significant effect on any Natura site due to physical separation and the lack of any ecological pathway. Any safeguards within the project, or any conditions attached to any approval issued are unrelated to the protection of any Natura site.
- Appropriate Assessment is not therefore required.

DAFM STATEMENT TO FORESTRY APPEALS COMMITTEE

Re Appropriate Assessment the statement concluded that A.A was not required as there was no possibility that the project would have any significant effect on any Natura site . It was therefore recommended that the application for a Licence be approved subject to

- Soil cultivation not being permitted within the aquatic setbacks
- Mandatory 20m aquatic setbacks (Site located within a High Status Water Objective Catchment)
- Mound drains not to be installed directly down slope
- Adherence to Forestry Biodiversity and Forestry and Water Quality Guidelines
- Site does not overlap or (lie) within 3kms upstream from any Natura 2000 (site) or any other habitat or wildlife designations.

NATURA 2000 SITES

The northern boundary of the site is defined/adjoined by a stream/river which flows eastwards to form a confluence with O'Neills River, thence flowing in a south easterly direction to join the Blackwater. That Blackwater River flows onwards in a southerly direction into the Shannon Basin just north of Limerick.

The following SPA and SAC sites are closest to the proposed project location:

Danes Hole, Poulnalecka SAC;

This SAC lies almost 4.5 kms due north of the project site ;it is separated from the site by the heavily forested and steep slopes of Knockanuarha Hill.

The Qualifying interests for the site are

- The Lesser Horseshoe Bat
- The caves in which they roost

- Old Sessile Oak Woods

The foraging range for the bats would appear to be just over 2 kms in radius.

The Conservation Objectives for the site are to restore the favourable conservation conditions for the bats and to maintain the favourable conservation condition of the oak woods.

Ratty River Cave SAC

This site lies 5.5 kms approx N.W of the project site.

The qualifying interests for the site are :

- The Lesser Horseshoe Bat and

- the caves in which they roost.

The bats would appear to have a foraging range of approx. 3 kms.

The Conservation Objectives for the site are to restore the favourable conservation conditions for the bats

Lower River Shannon SAC

This site which is semi circular in shape lies approx 9 kms as the crow flies between its nearest point to the project location.

The site is characterised by over 20 Qualifying Interests which include a range of habitats including “inter alia” sandbanks, coastal lagoons and salt meadows; the species include “inter alia” the Freshwater Pearl Mussel, bottle nose dolphin, salmon and otter.

The Conservation Objectives for the site are to “restore the favourable conservation conditions for the species listed and to maintain the favourable conservation conditions for the listed habitats.

Glenomra Woods SAC.

This site lies approx 10 kms to the N.E of the proposed project location.

Its Qualifying Interest is Old Sessile Oak Woods

The Qualifying Conservation Objective is to maintain the favourable conservation condition of the Sessile Oak Woods.

Slieve Bernagh Bog

This site lies approx 11 kms to the N.E of the project location and is separated from it by the steep slopes of Knockanuarha Hill.

The Qualifying Interests for the site are:

North Atlantic Wet Heaths

European Dry Heaths

Blanket Bogs

The Conservation Objective for the site is to restore the favourable conservation conditions for the above heaths and bog.

Kilkishen House SAC

This site lies approx 14 kms to the N.W of the proposed project location.

The Qualifying Interest for the site is the Lesser Horseshoe Bat

The Conservation Objective for the site is to restore the favourable conservation conditions for the bats

Lough Gash Turlough

The Turlough lies near Newmarket on Fergus approx 14 kms west of the proposed project location.

The Qualifying Interest for the site is Turloughs and Rivers with muddy banks containing defined species of vegetation

The Qualifying Conservation Objective is to maintain the favourable conservation condition of the Turloughs and Rivers with muddy banks containing defined species of vegetation.

River Shannon and River Fergus Estuaries SPA.

The nearest point of the above SPA to the project location is approx 9 kms as the crow flies.

The Qualifying Interests for the site are 20 species of birds and also wetland habitats

The Qualifying Conservation Objective is to maintain the favourable conservation condition of the identified birds and wetlands

EIA PRELIMINARY EXAMINATION/SCREENING

Article 13(2)(a) of the the 2017 Forestry Reg's requires that an EIA be carried out in respect of an application for a licence for afforestation *which would involve an area of 50 ha. or more.* The proposed afforestation area in the current case is 2.89 ha and therefore falls below the mandatory criteria.

Article 13(2) (c) of the same Reg's however requires that an EIA be carried out in respect of an application for a licence for afforestation *which while it does not exceed an area of 50 ha would be likely to have significant effects on the environment taking into account the criteria set out at Schedule 3 of the 2017 Reg's.* (Annex III of the EIA Directive) Those criteria are identified as: 1.Characteristics of projects, 2.Locations of projects, and 3.Type and Characteristics of Potential Impacts.

Having regard to:

- the project location within a High Status Water Objective catchment,
- The project location within an area identified by the EPA as one where forestry poses a significant pressure for "At Risk Water Bodies" (Cf Catchment News bulletin of Sept 03, 2019 : EPA Catchments Unit)
- The contribution of the project to the already significant acreage of land already under afforestation from both public and private schemes within the Shannon IRBD (87,000 and 93,000 ha respectively)
- The extensive range of afforestation and associated projects as revealed by the IFORIS Map Viewer which are already licensed within the Derrynaveagh area (Cf Forest Service Appeal Response to the FAC.)

I consider that the project, despite its modest scale, should be screened/assessed for the purposes of EIA under the criteria set out at *Schedule 3 of the 2017 Reg's.* (Annex III of the EIA Directive) particularly in regard to the following sub paras:

1. Characteristics of projects

- (a) the size and design of the whole project
- (b) cumulation with other existing and/or approved projects
- (e) pollution and nuisances

2 .Location of projects - environmental sensitivity of geographical areas likely to be affected by projects

- (a) existing and approved land use

3. Type and Characteristics of the Potential Impact

- (g) the cumulation of the impact with the impact of other existing and/or approved projects

Despite the modest scale of the project it cannot be concluded in the absence of any preliminary examination or screening under the criteria set out @ 1, 2, and 3 above, that the proposed afforestation would not, particularly in conjunction with other existing afforestation and associated projects/land uses in the area, be likely to have a significant effect on the environment. Although in the case of sub threshold development, mitigation measures can be used to screen out a requirement for EIA, I consider that any determination regarding the nature and extent of such mitigation measures should only be made after the potential impacts/effects of the proposed development have first been identified and assessed under the criteria 1-3 listed above. That does not appear to have happened in the current case.

APPROPRIATE ASSESSMENT

The purpose of A.A is to assess in a focused and detailed manner, the impact of the proposed afforestation on the integrity of the identified SAC,s and SPA.

The A.A process consists of a series of sequential steps which are set out below - Screening, Stage 1(a) and 1 (b) and Stage 2, Appropriate Assessment

Screening, Stage 1(a)

The issue here is whether the project is directly connected with or necessary to the management of the European site(s).

In the current case the project is not directly connected with or necessary to the management of a European site(s). Screening therefore proceeds to Stage 1(b) below

Stage 1(b)

The first issue for determination here is whether the project is likely, on an **individual basis**, to have a significant effect on any Natura 2000 site having regard to the conservation objectives of that site

The nearest SAC's to the proposed project are Danes Hole @ Poulnalecka and Ratty River Cave. For both sites the Qualifying Interest is the Lesser Horseshoe Bat habitat; the SAC @ Kilkishen House is also a Lesser Horseshoe Bat habitat. A NPWS Conservation Objectives Supporting Document (2018) on the Lesser Horseshoe Bat noted that

- the weighted average maximum foraging distance was 2.02 km.
- that a 2.5 km zone was an appropriate distance to foraging areas for the purpose of the current SSCO targets.

It is unlikely therefore that the proposed project, which lies in excess of 2.5 kms distance from those SAC's where the Lesser Horseshoe Bat habitats are a qualifying interest, will have any effect/impact on those SAC's not only in terms of foraging but also in terms of connectivity and roosting.

The largest and most extensive Natura sites within 15 kms of the project location, in terms of qualifying interests, are the Lr. River Shannon SAC and the River Shannon and River Fergus SPA; the boundaries of both sites are almost consonant; those Natura sites lie some 9 kms as the crow flies south of the project site. I note that the project site itself is adjoined along some 160 m on its northern boundary by a stream or local watercourse which ultimately forms one of a number of tributaries of the Blackwater river; the Blackwater then flows into the Shannon Basin near Limerick University. I estimate that the total length of river channel between the project site and the outfall into the Shannon is just in excess of 15 kms.

The remaining SAC's listed under Natura 2000 sites in this report, lie between 10 and 14 kms approx from the project location.

Given therefore

- the modest scale of the proposed project,
- The limited length of the northern site boundary which is adjoined by the local watercourse.
- The separation distance between the site and the associated river outfall into the Lr. Shannon SAC and SPA.
- The separation distance between the site and the remaining SAC's listed above as Natura 2000 sites, particularly those sites where the horseshoe bat habitat is the qualifying interest
- The absence of any hydrological connection between the project site and the listed Natura 2000 sites - other than the Lr. River Shannon SAC and SPA

I consider that the proposed project is unlikely on an individual basis to have a significant effect/impact on the above listed European sites in view of those sites' conservation objectives.

The 2nd issue here for determination is whether the project is likely to have a significant effect **in combination with other plans and projects** on the Natura 2000 sites, again having regard to their conservation objectives.

Again I note that

(i) although the proposed project is modest in scale, it is incremental in nature and will contribute to an enlargement of the existing area of afforestation around all but the northern shore of Coolmeen Lough.
(ii) It will also, again on an incremental basis, contribute to the number of afforestation projects which have been identified by the Forest Service (cf appeal response to the FAC) as having been licensed or are awaiting licences. On a localised basis alone that number is significant.
(iii) The EPA has identified Forestry as the fourth most prevalent significant pressure on "At Risk Water Bodies". Figure 1 illustrated in the document "Significant Pressures: Forestry" published by the EPA Catchments Unit in September 2019, shows the project site located within/adjacent to an area where surface water bodies are under significant pressure, from forestry, either alone or in combination with other pressures. Those surface water bodies appear to include the Lr. River Shannon SAC.
Having regard to (i) - (iii) above I am not assured that a Stage 1 (b) robust Appropriate Assessment has been carried out in regard to the effects/impacts of the proposed project in combination with other plans and projects on the Lr River Shannon SAC. And SPA
Pertinent also to the above is the fact that conditions attached to the Licence could be categorised as site specific mitigation measures - I refer to:

- mandatory 20m aquatic setbacks
- No soil cultivation within aquatic setbacks
- No mound drains to be installed directly down slope.

While it is unlikely that the above conditions could be described as mitigation measures aimed at avoiding or reducing significant adverse effects on European sites - were the project to be considered on an individual basis - that is not necessarily the case were the significant effects of the project to be considered on a cumulative basis..

CONCLUSION

In regard to the proposed project generating a requirement for an EIAR, I consider that on an individual basis the proposed project

(i) given its modest scale - which falls significantly below the class threshold as set out in the Directive, and
(ii) the mitigation measures proposed in the form of site specific conditions,
an EIAR is unlikely to be warranted.

However when the proposed project is assessed on a cumulative basis, I consider that adequate screening in that regard has not been undertaken, given the intensity of afforestation projects within both the local area and wider area, and the pressure on water bodies which has been identified as arising from forestry schemes and projects both private and public. I therefore consider that further transparent and detailed screening for EIA need to be carried out .

In the matter of AA, on an individual basis (Screening Stage 1a)the proposed project is unlikely to generate a need for progression to Stage 2 of the AA process, for the reasons I have already noted. However in cumulation with other projects, I am not reassured that a robust assessment has been carried out in regard to potential and significant impacts/effects on surrounding European sites - particularly SAC's and SPA's which have qualifying interests associated with habitats and species dependant on assured water flow and water quality, the Lr Shannon SAC and Shannon and Fergus SPA's which have a hydrological connection with the project site being cases in point. In that regard I note that the Forest Service response to the FAC, includes a large volume of Co. Development Plan information but fails to show any methodology or analysis by which that information, or parts thereof, have been processed to assist in reaching the conclusion that in cumulation with other projects the proposed project is unlikely to have any potential significant effects/impacts on the Lr Shannon SAC and the River Shannon and Fergus SPA. Furthermore I consider it inappropriate that the Site Specific conditions I have identified as being attached to the Licence taken into consideration when determining cumulative impacts.

I therefore conclude that there has been an inadequate analysis of information at Stage 1 (b) Screening to determine whether the project is likely to have a significant effect **in combination with other plans and projects** on a European site(s) in view of that site's conservation objectives. Given the inadequacy of the analysis I consider that the determination in regard to that matter must be uncertain. I further conclude that that uncertainty can only be resolved by submission of a NIS containing targeted professional scientific

examination of evidence and data, preferably including input from NPWS. That will indicate as to whether or not it is necessary to move to the next stage of Appropriate Assessment prior to any decision being reached as to whether or not to grant a Licence.

Mary Cunneen
21.4.2020