



21 April 2021

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FAC ref: 387/20

Subject: Appeal in relation to afforestation licence CN85802

Dear Mr [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of afforestation licence CN85802.

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

Licence CN85802 was granted by the DAFM on 16 June 2020.

Hearing

An oral hearing of appeal 387/20 was conducted by the FAC on 01 April 2021.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
DAFM representatives:	Mr Eugene Curran & Ms Mary Coogan

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the oral hearing and all other submissions before deciding to set aside and to remit the decision to grant this licence (Reference CN85802).

The proposal is for 5.83 ha of afforestation and 1200m of deer fencing at Ballahacommene, Co Kerry. The proposal is in 1 plot (GPC9) Native Woodland Establishment and involves a change of land use from agriculture to forestry. Planting is to be 3.5 ha of Sessile oak, 1.17 ha of Birch, 0.58 ha of Scots

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pine and 0.58 ha additional broadleaves. The proposal includes a boundary setback, and a firebreak area between the proposal and a full forest boundary along the west. The application states the site comprises enclosed land that is exposed in grass/ bracken-briar / furze. Site preparation is to comprise woody weed removal and inverted mounding; planting is by slit method. No fertiliser and no drainage are planned.

The application was both desk and field assessed by the DAFM. The Inspector's certification states the predominant soil type underlying the project area is podzols in nature. The slope is predominantly steep (15%-30%). The project area is not crossed by or adjoining an aquatic zone(s). Vegetation type comprises grass-rush. There were no referrals indicated on the Inspector's certification or on the Statement of Facts from the DAFM. IFORIS certification included an assessment to determine EIA requirement and concluded none is required. There is pedestrian access marked on the application bio-map through the proposal – dotted line S to N - and site access is indicated from the south along a laneway to the same point as the pedestrian access. There are a number of commercial quarries open in the vicinity. The nearest stream rises some 550m southeast across the N72, the stream then flows c.980m to the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC. No on-site watercourses are identified in the application, or by the DAFM Inspector or evident on Geohive or on OS 6" maps. The proposal is in the Laune-Maine-Dingle Bay catchment and the Flesk(Kerry)_SC_020 sub-catchment, and within the Scartaglen ground waterbody for which the status is 'good' per EPA website. The Certification states 5.83 ha of afforestation within 500m during the last 3 years, Ballahacommane townland has 14.68% afforestation and there is 15.58% forest cover within a 5 km radius and the underlying waterbody has 2.64% forest cover.

The DAFM Inspector carried out an Appropriate Assessment (AA) screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying Natura 2000 sites within 15km of the project lands and all 7 Natura sites were screened out for Stage 2 AA, these were as follows; Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, Sheheree (Ardagh) Bog SAC, Castlemaine Harbour SAC, Blackwater River (Cork/Waterford) SAC, Old Domestic Building, Curraglass Wood SAC, Killarney National Park SPA and the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. Screen out reasons included that the proposal is located within a separate waterbody catchment to that of the Natura site, with no upstream connection and a lack of hydrological connection. Also, the absence of any habitats within the proposal that are listed as Qualifying Interests of the Natura site and the absence of a significant relevant watercourse within or adjoining the site. Also, mandatory adherence to standard safeguards integral to the project as set out in the application and published in Forest Service Guidelines, requirements and procedures in particular.

An in-combination assessment was completed on 21 May 2020 and listed 107 planning permission applications 'in the general vicinity of the project,' most of which relate to dwellings and farm buildings from 2015-2019 with some retention applications, also a sand pit (2019) project that included an EIAR. 3 An Bord Pleanála refusals were also listed, and an EPA licensed waste facility. Other forestry related projects comprised 13 afforestation projects (2015-2020) of which 3 are noted as completed and 3 others as either not approved yet or withdrawn, 7 Forest Roads (2017 onward), and 8 private felling projects 2018-2020 of which 5 were with the DAFM Ecologist. These plans and projects are together referred to as a number of developments in the River Sub-Basins Woodford (Flesk)_010 and Flesk (Kerry)_050.



The licence was issued with the following additional environmental and silvicultural conditions:

- Plant Scots pine and birch at the higher elevations. Do not plant willow,
- Adhere to forestry & landscape guidelines,
- All guidelines to apply.

There is one appeal against the decision to award the licence CN85802, the following are the grounds raised: It was the duty of the Minister to carry out an AA screening and an EIA screening according to the law. It was not done. The appellant submits the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive. The appellant stated the test for AA Screening in Irish and EU law is that it is, merely necessary to determine that there may be such an effect, rather than to state that it will not have a significant effect. If the development which is within 15km of a Natura 2000 site - it has been screened in. The appellant provided the following with reference to case C-323/17:

Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

The court also states in the Judgement the following:

36 That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

38 In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.

The appellant contends that if it is said to be in a different catchment, the screening must state the catchment that the application is in. It is also necessary to realise that Birds can fly they do not all rely on watercourses to move. A map showing the SACs and SPAs and the site of the proposed development should be attached. The appellant states that regards screening for EIA, it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha. Also it is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development, which includes thinning and clearfell. The appellant also sets out regards certain matters relating to the FAC and these are not considered grounds of appeal against the decision to grant the licence CN85802.

The DAFM replied that there are no hydrological connections and there is no obvious threat to the environment. This is a native woodland establishment application and it will enhance the environment.

The FAC held an Oral Hearing on 01 April 2021. The parties were invited to attend in person or to join remotely. The applicant and the appellant did not participate. The DAFM representatives participated remotely. The FAC sat remotely at this hearing. At the hearing the DAFM described the processes involved in considering the application, that there were no referrals triggered, there was one submission received, and the proposal was the subject of an AA screening on its own and in combination with other plans or projects prior to the decision to grant the licence in respect of 7 Natura Sites within a 15km radius, and all sites were screened out for Stage 2 AA. The DAFM confirmed the application was desk and ground inspected prior to any decision to issue the licence, that the site has no relevant watercourses and no hydrological connectivity to any of the Natura sites. The proposal comprises GPC9 planting which is native woodland and is undertaken with the environment very much in mind. The DAFM Inspector described the Native tree species involved in the approval and stated they would be beneficial to the landscape, and that there was no fertiliser or herbicide involved. The Inspector explained the additional condition not to plant Willow was to avoid the species out-competing the other native tree species. The DAFM stated there is existing conifer woodland to the west but none at the north, south or east. The Inspector confirmed the site slopes down from the northern end, is sheltered from the west, the ground inspection included a check for watercourses and there are none, there would be no mounding involved and slit planting done manually using spade to soil would be used. In response to the FAC in respect of the reasoning within the AA screening regards mandatory adherence to standard safeguards integral to the project as set out in the application and published in Forest Service Guidelines, requirements and procedures in particular, the Inspector stated these were not mitigations in the AA screening as the site is dry and were not in fact factors in the decision to screen out for AA.

In addressing the grounds of appeal, the FAC considered, in the first instance the requirements regard the EIA Directive. The proposal was the subject of an assessment to determine EIA requirement by the DAFM on the IFORIS certification system as evidenced. The EU 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. Neither afforestation nor deforestation (nor clear-felling) 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). The Irish Regulations, 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 parameters where the Minister considers such development would be likely to have significant effects on the environment. The application is sub-threshold for mandatory EIA, the evidence suggests a total area of 5.83 ha is afforested within a 500m radius within the last 3 years, there is in addition existing older forestry to the immediate west, but there is also open area and grassland in the remaining surrounds. The location is rural with a few private houses and farmyards in the immediate vicinity. There is a significant quarry c.500m to west but with existing forestry in between and another to the south c. 700m with farmland and public road and housing in between. The proposal is not within or adjacent to any nationally designated site and is not within a prime scenic area. The Flesk[Kerry]_050 river waterbody is assigned a WFD status of 'good'. In addition, the licence is issued subject to compliance with the DAFM guidelines and requirements for landscape, harvesting, water quality, bio-diversity and



archaeology. Based on the foregoing, the FAC is satisfied that EIA is not required in this case and, concurs with the conclusion of the DAFM in this regard.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to 7 Natura 2000 sites as evidenced on the IFORIS certification pages with all European sites screened out for Stage 2 AA and an in-combination screening is also evidenced as compiled 21 May 2020, and for each site the DAFM concluded *"AA Screening has been carried out in accordance with S.I.477 of 2011 (as amended) and S.I.191 of 2017 (as amended). The project is not directly connected with or necessary to the management of any European Site. Furthermore, DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on this European site"*.

The DAFM certification at 2.4 states the proposed native woodland is not within an NPWS referral zone, while the certifying Inspector at the Environmental Considerations Report section on the IFORIS certification stated the proposal is within a 3km referral zone of an SAC. ~~S~~ such referral is apparently at the discretion of the DAFM Inspector. Also, at point 2.5 of the certification the proposal is confirmed to be within 3 km upstream of an NHA, pNHA, SAC or SPA. The FAC notes per the EPA website mapping tool, that the nearest Natura site is the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC at c. 1.2 km, all other Natura sites are beyond 4 km from the proposal.

In the AA screening, the DAFM reasons for screening out all 7 of the Natura sites included that the proposal is located within a separate waterbody catchment to that of the Natura site, with no upstream connection and a lack of hydrological connection, and the mandatory adherence to standard safeguards integral to the project as set out in the application and published in Forest Service Guidelines, requirements and procedures in particular.

At the hearing the FAC sought to clarify what if any mitigation was offered by the standard guidelines in respect of the Natura sites that were the subject of the AA screening. The DAFM confirmed the guidelines were not factors in the decision to screen out for Stage 2 AA.

The FAC having regard to the application maps, the certifications by the DAFM, the evidence at the oral hearing, the publicly available mapping datasets on the EPA website and on Geohive.ie, is satisfied there are no relevant watercourses on the proposal site. However, the proposal is fully within the Laune-Maine-Dingle Bay catchment and the Flesk(Kerry)_SC_020 sub-catchment, and shares these with the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC. The nearest marked EPA watercourse is c. 400m to the southeast and just across the N72. The watercourse, which is part of the Flesk[Kerry]_050 river waterbody, flows 903m to the SAC from there. The Qualifying Interests of the SAC include the sensitive Freshwater Pearl Mussel. In consideration of these facts, and

having regard to the number of plans and projects identified in the vicinity of the proposal on the in-combination assessment and to the precautionary principle, the FAC concluded that the reasoning for the screening out of the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC is significantly in error in that the proposal should have been considered as being within the same catchment and sub-catchment as the SAC.

Regards the contention the licence is contrary to the Birds Directive. No specific evidence has been submitted in respect of the presence of Annex IV species or other bird species, or reasons why the proposed development would threaten their protection. In these circumstances, the FAC concludes there is no related reason on which to affect the decision.

In the above circumstances of a significant and serious error, and having regard to the precautionary principle, the FAC concluded that the decision of DAFM should be set aside and remitted to the Minister to carry out an AA screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites, in combination with other plans and projects, and an AA should same be required, before making a new decision in respect of the licence.

Yours Sincerely



Pat Coman, on behalf of the FAC