



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

01 April 2021

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FAC ref: 148/2020

Subject: Appeal in relation to afforestation licence CN84813

Dear [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 licence CN84813.

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 CN84813 was granted by the Department on 26 February 2020.

Hearing

An oral hearing of appeal 148/2020 was conducted by the FAC on 30 March 2021.

Attendees:

FAC Members: Mr Des Johnson (Chairperson), Mr Luke Sweetman and Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Applicant representative: [REDACTED]

DAFM representatives: Mr David Ryan and Ms Mary Coogan

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the oral hearing and all other submissions before deciding to set aside and remit the decision to grant this licence (Reference CN84813).

Project site comprises 9.29 ha of afforestation at Davros, Co Mayo with 1300m sheep fencing. The proposal is in 2 plots (GPC3), involves a change of land use from agriculture to forestry, planting is to be 85% Sitka Spruce and 15% additional broadleaves. Application states enclosed land that is

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exposed/moderately exposed in grass/grass-rush. Elevations are 50-60m with neutral aspect. Site preparation is to comprise woody weed removal and mounding, planting is by slit method.

The DAFM Inspector's certification states the land is located within the Mayo CDP 2014-2020 LCA Policy Area 4 'drumlins and inland lowland'. Predominant soil type is podzols in nature, Gley soil. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). There were no referrals. The application was both desk and field assessed.

Plot 1 (7.54 ha) adjoins other forestry to south, otherwise surrounded by agricultural grassland. Plot 2 (1.75 ha) is surrounded by forestry to 3 sides and what appears cutaway peat to its south. Both plots are partially bordered by streams, plot 1 has a stream rising at its south and plot 2 has a stream at its east. The stream by plot 2 joins the Gortskehy (or Black) River, the stream rising by plot 1 is the Rathgranaher and flows to the Gortskehy south of the proposal. These waterways are part of the Black (Shrule)_O10 water-body for which the WFD status is 'good'. The proposal is in the Corrib catchment and the Black (Shrule)_O10 sub-catchment. Per the Geohive website the bedrock is limestone and calcareous shale, there are mapped enclosed depressions in the locality but none are showing as open and no sign of rock, and none are on the proposal site, there is a spring mapped c. 200m north of the plot 1 and a stream flows from there to east and to the stream along the edge of plot 2.

The Inspector's certification states the proposal along with adjoining afforestation amounts to 18.49 ha, and shows 43.56 ha of afforestation within 500m in the last 3 years. Also, Davros TD has 11.28% afforestation, there is 4.51% cover in a 5 km radius, and the underlying waterbody has 1.15% forest cover.

In processing the application the DAFM completed a Stage 1 Appropriate Assessment (AA) Screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying 16 Natura 2000 sites within 15km of the project lands; Greaghans Turlough SAC, Kilglassan/Caheravoostia Turlough Complex SAC, Ardkill Turlough SAC, Skealaghan Turlough SAC, Clyard Kettle-holes SAC, Carrowkeel Turlough SAC, Shrule Turlough SAC, Lough Corrib SAC, Mocarha Lough SAC, Kildun Souterrain SAC, Cloughmoyne SAC, Lough Carra/Mask Complex SAC, River Moy SAC, Lough Carra SPA and Lough Corrib SPA, and Lough Mask SPA. The stated reasons for screening out the sites included distance and/or the location of the proposal within a separate water-body catchment and with no upstream or hydrological connection. In addition, an in-combination assessment was completed 10 February 2020, based on content. Other projects include telecommunications mast retention, a water management unit (EPA) relating to the Corrib, as well as permissions for slatted shed extension and a dwelling. Regards other forestry related projects there were 11 afforestation (2013-2019) projects, 3 Forest Roads (2017, 2018 & 2020) projects, 2 private felling (2019) projects and 3 Coillte felling (2017 and 2019) projects. The overall screening conclusion was to screen out for Stage 2 AA and no AA required.

The licence was issued subject to standard conditions plus additional conditions; Adhere to environmental requirements for afforestation & All guidelines to apply.

There is one appeal against the decision to grant the licence, the grounds are summarised as follows;

- The Appropriate Assessment Screening does not comply with the requirements of the law, the Inspector states "potential negative consequences, both immediate & into the future,"



the fact that there are potential negative consequences, means that there may be an effect. This cannot be screened out

- The word Significant in the Habitats Directive when referring to screening is defined in the judgement of Finlay Geoghegan in J. Kelly -v- An Bord Pleanála & others 2013 802 JR 25/07/2014. Refers to paragraph 26 and the therein referred to Advocate General Sharpston in Case C-258/11 Sweetman at paragraphs 47-49.
- The obligations to keep associated records, are set out in the 2011 Regulations
 - 61. (1) A public authority shall retain all records of or in relation to— (a) the conclusions of any screening for Appropriate Assessment pursuant to the Habitats Directive and the reasons therefore, (b) the conclusions of any Appropriate Assessment pursuant to the Habitats Directive and the reasons therefore, (c) the decision to agree or to disagree with any plan or project which was the subject matter of a screening for Appropriate Assessment and, if applicable, an Appropriate Assessment pursuant to the Habitats Directive and the reasons therefore, (d) information submitted by an applicant for consent pursuant to Regulation 42, (e) the considerations of overriding public interest and the processes of Regulation 43, (f) any consent to which these Regulations relate,

Therefore, it is necessary for FAC to make these records available to me with the decision to enable me to make an informed decision as to whether or not to review that decision.

- It is necessary at the minimum, where a waterbody is concerned, to examine the catchment map and to state which catchment the development is in.
- It is necessary at the minimum, where a Turlough is concerned to show evidence that there is no groundwater connectivity with the development lands.
- 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 (Case C-323/17). Also, 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. The likely effects of all aspects of the operation must be considered and screened in combination with other forestry operations and other forest management activities which are completed, commenced, permitted or proposed and other developments that could act in combination.

The appellant provided a link to a EU Commission notice Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". Brussels, 21.11.2018 C(2018) 7621 final. The appellant also provided content of the Appendix 1 - General observations from the National Parks and Wildlife Service of the Department of Culture, Heritage and the Gaeltacht in relation to forestry application referrals.

The appellant also set out regards the FAC, points which are not considered grounds of appeal against the decision to issue licence CN84813.

In response, the DAFM stated that the application was screened for AA using the Standard Operating Procedure of 05 Nov 2019, the Bird Foraging Table of 06 Jan 2020, the Habitat Table of 18 Dec 2019 and the Species Table of 30 Jan 2020. An AA was deemed not required.

The FAC held an Oral Hearing on 30 March 2021. The parties were invited to attend in person or to join remotely. The DAFM and the Applicant's representative participated remotely. The Appellant did not participate. The DAFM set out the processing undergone in issuing the licence, that were no referrals to any referral bodies as none were triggered. The DAFM stated the proposal was initially screened in for AA and following referral to the DAFM's Ecology Unit was returned due to work pressure and rescreened by the Inspector. The conclusion was to screen out the proposal from AA. Regards the Turlough SAC sites all relevant watercourses to the proposal flow away from them. The proposal is in the Corrib_030 WFD catchment and is hydrologically connected and while confident the screening conclusion is correct the DAFM stated that the reasoning for screening out the Corrib SAC was incorrect. The DAFM sought that the proposal be remitted to facilitate a correct screening. The FAC queried the Inspector's 'yes' reply to the question at 2.5 of the certification "is the area within 3km upstream of an NHA, pNHA, SAC, SPA or National Park". The DAFM responded that the reply was based on a Turlough SAC being within 3km of the proposal but was without any upstream connectivity. The DAFM confirmed there was a double entry of each Natura site on the AA screening and only sixteen European sites were involved not thirty-two. The FAC enquired on Karst limestone features and the DAFM replied that there are not such features within the site, that both the EPA and Geohive information had been assessed, there are such features outside of 200m from the proposal, the bedrock is limestone, and this was also assessed at the field inspection where surface water features were also checked for. A neighbouring felling licence application TFL00415919 (17.89 ha), adjacent to plot 2, was enquired upon and the DAFM stated this remains under consideration and no licence is yet granted. The applicant's representative outlined the background to the application, the applicant is a farmer in the area and has another plot of forestry close by, planted in 2010 (identified at the hearing as south of plot 1), and is adapting his farm to suit his ability to farm. In reply to the FAC the applicant's representative would agree with a remitting of the application to screening as suggested by the DAFM. In reply to the FAC on fertiliser and herbicides, the applicant's representative confirmed there would be no fertiliser or herbicide applications and only manual cleaning would be conducted.

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 AA screening in relation to 16 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site.

The appellant emphasises wording used by the DAFM at the AA screening on the IFORIS certification page for each European Site of "*potential negative consequences, both immediate & into the future*". The FAC notes that the DAFM Inspector listed a number of criteria considered at the section and included the above as one with others as follows;

- The nature, size and location of the project
- Potential pathways
- The sensitivity of ecological receptors
- Possible in-combination effects – no in combination effects arise....

The FAC is satisfied having regard to wording and context the foregoing is a listing of items considered for and not a finding in itself.



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The FAC has noted that the reasoning in the AA screening by the DAFM in screening out the Corrib SAC is given as; *"the location of the project area within a separate water-body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection. Other factors 9km distant."* This was confirmed as erroneous by the DAFM at the hearing and while the DAFM expressed confidence the screening outcome would be the same, the FAC having regard to the circumstances of the case – especially an apparent direct downstream connection to the Lough Corrib SAC at Shrule, a distance of c. 12km and within the same Black (Shrule)_O10 water-body – considers this is a significant and serious error in the AA screening undertaken.

The FAC, having regard to the bedrock, the ground water-body and the nature of the proposal and the proximity of Turlough SACs such as Greaghans Turlough SAC at c. 1180m, Kilglassan/Cahevavostia Turlough Complex SAC at c. 2200m and Ardkill Turlough SAC at c. 2630 (distances from centre of plot 1), while noting the DAFM's evidence at the hearing, considers there is inadequate assessment in the written certifications and reports for the proposal regards any likelihood of impact(s) on ground-water and Turlough SACs. Per EPA website the proposal is apparently within the Clare-Corrib groundwater body and does not share that water-body with the nearby turlough SACs which are apparently in the Cong-Robe groundwater body.

In the above circumstances of a significant and serious error, 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, as well as further consideration regards groundwater, before making a new decision in respect of the licence.

Yours Sincerely

Pat Coman, on behalf of the FAC

