



30 April 2021

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FAC ref: 433/20

Subject: Appeal in relation to afforestation licence CN84708

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 CN84708.

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 CN84708 was granted by the DAFM on 14 July 2020.

#### Hearing

An oral hearing of appeal 433/20 was conducted by the FAC on 20 April 2021.

#### Attendees:

<b>FAC Members:</b>	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
<b>Secretary to the FAC:</b>	Mr Michael Ryan
<b>DAFM representatives:</b>	Mr Michael O'Brien & Ms Mary Coogan
<b>Applicant representative:</b>	[REDACTED]

#### Decision

The 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 vary the decision to grant this licence (Reference CN84708).

The proposal comprises 4.83 ha of afforestation with 550m of stock fencing at Killeen, Co Kerry. The proposal includes for no drainage, ground preparation is by mounding, with slit planting used. There is provision for use of 350kg/ha of granulated rock phosphate fertiliser, and planned herbicide control is manual in years 1 and 2. The proposal is in 4 plots, planting of 3.26 ha (GPC 3) in plots 1, 3 and 4 is with Sitka spruce 85% and additional broadleaves 15%, and of 1.57 ha (GPC 9) in plot 2 with

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Pedunculate oak 40%, Hazel 20%, Birch 20% and additional broadleaves 20%. The lands are described as enclosed exposed land with a southern aspect, with a mineral soil, current vegetation is grass-rush and bracken-briar and elevations are 90m to 100m. The proposal site is stated to have adequate access. The proposal is within the Laune-Maine-Dingle Bay Catchment, the Laune\_SC\_020 sub-catchment, and the Gweestin\_030 river waterbody catchment which is allocated good WFD status per the EPA.

The application was desk and field assessed by the DAFM. The Inspector's certification states for 17.31 ha of afforestation in past 3 years within a 500m radius of the proposal, 9.45% forest cover in the townland and 0.3% forest cover on the underlying water-body. There were referrals of the application to An Taisce, to Kerry County Council and to the National Parks and Wildlife Services (NPWS). An Taisce was the sole respondent (08 October 2019) stating that their main concern was regards Castlemaine Harbour SAC and that an Appropriate Assessment (AA) should be carried out as the proposal is within the referral zone of the SAC, an area of major ecological importance, and set out particular concerns regards the Otter. There was also a referral to the DAFM Archaeologist with a response made that there are no features identified on site but there are a number immediate to the proposal and a number of conditions were recommended for the licence, including buffers and exclusion zones and the submission expressed a concern regards wet nature of proposal site.

The DAFM Inspector carried out an AA screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying the following 6 European sites within a 15km radius of the project lands: Castlemaine Harbour SAC, Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, Sheheree (Ardagh) Bog SAC, Slieve Mish Mountains SAC, Killarney National Park SPA, Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, and all Natura 2000 sites were screened out. Reasons included for screening out the SACs were the proposal being downstream from the Natura site, and a subsequent lack of hydrological connection; this reasoning did not arise for the Slieve Mish Mountains SAC. Also, for both the SACs and SPAs the unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site, and for the SPAs in particular the DAFM Birds Table was given as another factor.

The DAFM also carried out an in-combination assessment (done week of 10 July 2020), the assessment using the vicinity of the project area within the river sub-basin Gweestin\_030, identified 46 planning permissions (2015 to 2019) comprising mainly dwellings, building retentions, farm buildings including dairy milking facilities, and sports club facilities. The assessment shows An Bord Pleanála and EPA web sites were checked and no projects were identified. In respect of other forestry related projects there were 6 afforestation projects (2015 to 2020), 2 forest road projects (2015 to 2019), and 1 private felling licence (2019). This assessment states the proposal project lies in a rural landscape in the River Sub Basin Gweestin\_030 which has approximately 5% forest cover. At 4.83 ha the project is considered small in scale. Forestry activity including afforestation, forest roading and felling, have been either submitted and still under evaluation, licensed / approval in place or completed and approved in the River Sub Basin in the last 5 years and are listed above and stated to be subject to environmental protection measures. In conclusion the DAFM deemed 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, and the overall conclusion was that no Stage 2 AA was required.





The licence was issued with relatively standard conditions as well as the following additional conditions:

- GPC9 planting mixture must be pit planted and consist of the following, Sessile oak 30% and Scots pine 30% with Downy birch 15%, Rowan 15% and Holly 10%.
- GPC3 broadleaf component must consist of rows of Downy birch and Pedunculate oak planted along the edge of the plantation,
- Adhere to forestry, bio-diversity, water and environmental guidelines
- Adhere to forestry & archaeological guidelines
- All guidelines to apply

Additional Archaeological conditions were also applied and a related map was issued with the licence.

There is one appeal against the decision to award the licence CN84708 and the grounds are as follows:

- The decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive.
- The test for Appropriate Assessment 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 references the following case law;

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.

- 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.
- Regards the screening for Environmental Impact Assessment, 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 further submitted regards the duty of the FAC.

The DAFM responded as follows to the appeal that a field inspection was carried out on the 25 February 2020, the standard operating procedures were followed and the Forest Standards Manual obeyed. The species selection is in line with recommendations from the Land Types for Afforestation manual. All environmental requirements have been considered and identified with an AA screening. The DAFM deemed that there was no possibility that this project will have an effect on any Natura site within the 15km screening area, due to physical separation and the lack of any ecological pathway.

The FAC held an Oral Hearing on 20 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 referrals made to referral bodies and to the DAFM Archaeologist and confirmed there were replies from the archaeologist and from An Taisce. The proposal was desk and field inspected and was the subject of an AA screening in respect of Natura Sites, within a 15km radius, on its own and in-combination with other plans or projects, with all sites screened out for Stage 2 AA prior to the decision to grant the licence. The DAFM Inspector explained there was a lack of an ecological pathway, the proposal drains to the south, toward a farmyard, and away from the Castlemaine Harbour SAC. The DAFM stated that Qualifying Interests of the Killarney National Park SPA and the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA would not be impacted based on the distances set out in the DAFM's Bird's Table, the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC is in a separate sub-catchment, as is the Sheheree (Ardagh) Bog SAC and the Slieve Mish Mountains SAC. The DAFM Inspector stated the in-combination report was prepared centrally and was considered in the screening conclusion prior to the decision to grant the licence. The DAFM Inspector stated that the licence conditions take precedence over the planting schedule on the licence, this was in respect of the composition of the GPC9 planting. The applicant's representative confirmed that the decision to change from Pedunculate oak to Sessile oak was by the DAFM Inspector and based on site suitability. Regarding the Otter, the DAFM Inspector stated that the proposal was checked for relevant watercourses and for 20m to 30m of open scrub ground but this habitat was not present on site, that while there are drains on the site they are heavily vegetated and dry when inspected and all flow would be to the south. The DAFM Inspector stated the site was considered unsuited to the Merlin due to an absence of suitable habitat, that the species prefer the edges of mature forest such as tall conifer plantations and this did not exist on or beside the proposal. The DAFM Inspector stated a farm laneway existed for access and indicated its position at the east of the proposal. Regarding the planned fertiliser the applicant's representative confirmed there would be no fertiliser required on the GPC9 plot and this plot would be deer fenced whereas alder will be used on the other plots as the broadleaf content and this species is not palatable to deer.

In addressing the grounds of appeal that the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive, 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





Inspector had regard, amongst other points, to the proposal not being within an area sensitive to fisheries, not being within a Freshwater Pearl Mussel catchment, not being within a European or Nationally designated site, containing an archaeological site (clarified by the DAFM's Archaeologist to be external to the proposal), not being within a prime scenic area or within a high amenity landscape, the amount of forest cover in the townland and within a 5km radius now and 5 years ago, also the percentage forest cover on the underlying waterbody. 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 [IA 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 well sub-threshold for mandatory EIA, the evidence suggests a total area of 17.31 ha of afforestation in past 3 years within a 500m radius of the proposal, 9.45% forest cover in the townland and 0.3% forest cover on the underlying waterbody. The proposal is in a rural setting with agricultural grassland in the surrounds, is at a remove from public roads and not bounded by any dwellings. The Castlemaine Harbour SAC extends close to the north-western corner of the proposal, there are no EPA marked watercourses or mapped watercourses on the application maps or evident from the DAFM inspection. The Glanooragh River is c. 470m to the north and within the SAC and is part of the Gweestin\_030 river waterbody. The Dromdoohig Beg stream is c. 460m to the south and flows to the Glanooragh River. The OSi gradient mapping does not indicate the site is other than flat to moderate slope. Based on the evidence before the FAC the proposal site contains no aquatic zones or relevant watercourses and the planting is in any event subject to the forestry and archaeology guidelines and forest bio-diversity and water guidelines through condition 11 of the licence. As such, having regard to the nature and scale of the proposal, the absence of aquatic zones and the separation distances, the FAC concluded that the proposal would not have any impact on water quality. In addition, the FAC concluded there is no breach of the provisions of the EIA Directive in the decision to grant the licence.

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 2 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 week commencing 29 July 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 FAC notes the most proximate of the European sites is the Castlemaine Harbour SAC which borders the north-western tip of the proposal. There was referral by the DAFM of the application to the NPWS and no response received. The referral response from An Taisce had sought the Castlemaine Harbour SAC be screened in for Stage 2 AA on the basis of being within a referral zone. The FAC considers the basis for the screening in of any site is the likelihood of significant effect(s) from a proposal on its own or in combination with other plans or projects on a Natura 2000 site, having regard to the Qualifying Interests and Conservation Objectives for that site. The FAC notes the reasons for screening out of the SAC were (a) the position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection and (b) the unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site. The Qualifying Interests of the SAC comprise a number of features, habitats and flora as well as species such as salmon, lamprey and otter. An Taisce's response singled out the otter as a species of concern. However, the FAC having considered all of the evidence including the absence of a direct hydrological connection, the absence of riverbank and the absence of suitable cover habitat for the otter, is satisfied the AA screening conclusion is sound in this instance. The FAC is also satisfied with the screening out of the remaining sites within the 15km radius on the basis of no possibility of significant effects arising from the proposal on its own or in combination with other plans or projects on those European Sites.

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 wild bird species in their natural habitat, 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.

Regards the planting schedule at page 5 of the licence and the planting required for the GPC9 plot by condition 13 of the licence, and taking into consideration the DAFM Inspector's evidence at the hearing that the licence conditions take precedence over the planting schedule on the licence, the FAC has considered the matter. In this instance the licence states prior to the conditions that "this scheme is financed by the State, and payment of the grant, if financial approval is given is subject to the following conditions:" conditions 1 to 13. In these circumstances the FAC considers the DAFM made a serious error in not applying the conditions to the actual afforestation and works under the licence. Payment of grant is an entirely separate matter outside of the remit of the FAC. In addition, the licence refers to a prescription set out in Appendix A. However, no Appendix A is evidenced.

In the circumstances outlined above, and based on the evidence before it, the FAC concluded that the DAFM made a serious error in only applying the conditions of the licence to the payment of grant aid. The decision of the FAC is that the licence should be varied to state that the afforestation and works under this licence CN84708 are subject to the conditions of the licence.

Yours Sincerely



Pat Coman, on behalf of the FAC