



**An Coiste um Achomhairc
Foraoiseachta**

Forestry Appeals Committee

26 June 2020

[REDACTED]
[REDACTED]
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Our ref: FAC 424/2019

Subject: Appeal in relation to afforestation licence CN84571

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 CN84571.

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 CN84571 was granted by the Department on 17 December 2019.

Hearing

A hearing of appeal 424/2019 was conducted by the FAC on 16 June 2020.

FAC Members:

Mr Des Johnson (Chairperson), Mr Vincent Upton, Mr Pat Coman
and Mr Jim Byrne

Decision

Having regard to all the information before it the FAC has decided to cancel the decision of the Minister in respect of licence CN84571 for the reasons set out below.

The proposal comprises 0.50 ha of afforestation and in Cashel, Co. Mayo comprising 85% Sitka Spruce and additional broadleaves. The soils are stated to be brown podzols. The proposal includes mounding, slit planting and 250 kg granulated rock phosphate in year three. The site stands at an elevation of 30 - 40m, and is currently in agricultural use, with the vegetation consisting of grass and rush. There is a small roadway/laneway leading to the north eastern corner of the proposal.

There are 8 SAC located within 15 km of the proposal, the closest being the River Moy SAC at a distance of 2.5 km. The application makes provision for a 10m setback for a river/stream on the site. This stream joins a tributary of the Glenmullynaha river which flows to the Moy SAC and subsequently the Moy.

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The licence was granted with the following conditions:

Adhere to Environmental and Silvicultural conditions

Adhere to Environmental Requirements for Afforestation

All guidelines to apply

There is a single appeal against the licence approval. The grounds of appeal are:

The Forest Service in its Screening for Appropriate Assessment found that there were Natura sites within the 15km zone of impact. That is a trigger for the requirement for Appropriate Assessment as the development may have an effect. Therefore, there may be an impact.

The Inspector answered the following questions.

Q3. As District Inspector, have you reviewed all referral responses and submissions received in relation to this project and this AA screening process?

Q4. Is there sufficient information within the application and available from elsewhere to form sound judgement as to whether or not the project is likely to have a significant effect on a Natura site?

To which the inspector answered yes but the inspector fails to show any evidence on which this answer is based. The inspector finds that the Natura site(s) is in a different catchment but fails to state which catchment that the development is in, or state why it may not have an effect;

In these circumstances the only legal answer is that the application must be screened in for Appropriate Assessment.

The judgement in Case C-323/17 states;

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.

It is my submission that: safeguards Published in the Forest Service guidelines, requirements & procedures are in fact measures intended to avoid or reduce the harmful effects of the plan or project on that site. Any decision must comply with this "Commission notice" which interprets the relevant judgements of the CJEU.

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 Irish Courts have interpreted the requirements for Appropriate Assessment Screening in the judgement Kelly -v- An Bord Pleanala & others 2013 802 JR 25/07/2014 of Finlay Geoghegan J. which states;

26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.1777U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C-258/11 Sweetman at paras 47-49:

"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an



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appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.

In response to the appeal the DAFM stated;

AA screening: The only Natura site on which the project could possibly have an effect was the River Moy SAC 002298. On review of all available information and datasets, this site was subsequently screened out due to:

- o The nature of the project, in particular small scale afforestation of 0.5ha*
- o The nature of the project area, in particular, flat stable soil*
- o Mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures, in particular Environmental Requirements for Afforestation*
- o Other factors, 2.4km distant*

Q3. No referrals were required, the submission received was examined, therefore the answer is 'Yes'

Q4. The application was deemed complete and valid, including a request for further information, therefore the answer is 'Yes'

Catchments: The available data sets were used to determine the application area is in a separate catchment to all of the Natura sites within 15km except for the River Moy SAC. As stated the reason there can be no effect on these Natura sites is due to: 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. Significant distance (7km, 10km, 12km, 13km, 13km, 14km, 15km, 15km) to the Natura sites with Peatland, Aquatic, Woodland, Butterfly and Grassland Qualifying Interests/Species with no Hydrological connection.

Prior to making its decision and following an examination of the information furnished by the Applicant and the Department and taking into account the increased setback provided in the application, and the screening conducted by the Department which confirms that standard conditions were used as mitigation in respect of European sites, the FAC concluded in the first instance that conducting its own screening for appropriate assessment on the application would be impaired. This conclusion takes account of the increased setback and the statement by the Department that standard conditions were required in this instance in order to mitigate likely significant effects, and the fact that the Department took those same standard conditions into account as mitigation when screening. The FAC considers the DAFM screening could not be upheld to ascertain as to whether or not the project would likely have a significant effect either alone or individually in combination with other plans or projects on any Natura site in the vicinity.

The FAC concluded based on all available information and taking into account the identified mitigation at the screening stage, the hydrological connection and distance to the SAC, that the likelihood of significant effects on the River Moy SAC resulting from the proposed afforestation could not be discounted and applied the Precautionary Principle. In such circumstances the FAC made a decision to cancel the licence.

Yours sincerely,


Jim Byrne, on behalf of the Forestry Appeals Committee