



23 April 2021

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FAC ref: 052/20

Subject: Appeal in relation to afforestation licence CN83326

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 afforestation licence CN83326.

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 CN83326 was granted by the DAFM on 20 January 2020.

Hearing

An oral hearing of appeal 052/20 was conducted by the FAC on 15 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 Seppi Hona & Ms Mary Coogan

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 affirm the decision to grant this licence (Reference CN83326).

The proposal is for 2.12 ha of afforestation and 675m of stock-rabbit fencing at Lemongrove or Rathcam, Co Westmeath. The proposal is in one plot (GPC9) and is a native woodland establishment involving a change of land use from agriculture to forestry. Planting is to be 1.8 ha of Sessile oak and 0.32 ha additional broadleaves. Ground preparation is to comprise ripping and pit planting using angle notch method. No fertiliser, drainage or herbicides are planned.

An Coiste um Achomhairc
Foraoiseachta
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The application was desk 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 moderate (0%-15%). The project area is crossed by / adjoins an aquatic zone(s). Vegetation type is not stated. There were no referrals of the application by the DAFM to any referral bodies. IFORIS certification included an assessment to determine EIA requirement and concluded none is required. The Inspector's certification states there is 10.28 ha of afforestation within a 500m radius during the last 3 years, and the underlying waterbody has 1.78% forest cover. The FAC notes the proposal is bounded by the Windmill or Black Island stream (EPA), which rises just north of the proposal, and is within the Milltownpass_010 river waterbody for which the status is 'poor' per EPA website. The proposal is within the Boyne Catchment and the Yellow[Castlejordan]_SC_010 sub-catchment.

An initial Appropriate Assessment (AA) screening (June 2019) was confined to a 3km radius of the proposal with no European site arising. The DAFM Inspector subsequently carried out an AA screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying 11 Natura 2000 sites within 15km of the project lands. These were Lough Ennell SAC c. 6.5km, Wooddown Bog SAC c. 8.2 km, Mount Hevey Bog SAC c. 11.7 km, Lough Owel SAC c. 12.6 km, Raheenmore Bog SAC c. 12.8 km, River Boyne and River Blackwater SAC c. 13.2 km, Split Hills and Long Hill Esker SAC c. 13.5 km, Scragh Bog SAC c. 14.4 km, Lough Ennell SPA c. 6.8 km, Lough Owel SPA c. 12.6 km, and the River Boyne and River Blackwater SPA c. 13.8 km. All the Natura 2000 sites were screened out for Stage 2 AA for reasons of the proposal being downstream, and a lack of hydrological connection. The DAFM also undertook an in-combination assessment (done 15 January 2020) focusing on the town-land Lemongrove or Rathcam, there were no County Council planning permissions, An Bord Pleanála showed a refusal for construction of 12 no. wind turbines and associated site works. EPA emission points and sewage treatment points were considered. Forestry related projects comprised 6 afforestation projects (2013 to 2016), 2 forest road projects (2014 – 2019), 2 private felling licences (2017-2019), and 2 Coillte felling licences (2017). The DAFM concluded that the project, when considered in-combination with other plans or projects, would not give rise to the possibility of a significant effect on any Natura sites, and the overall conclusion was to screen out and no Stage 2 AA required.

The licence was issued with relatively standard conditions and valid for 3 years from issue.

There is one appeal against the decision to award the licence CN83326, the following are the grounds raised:

- The AA Screening carried out by the Minister does not comply with the law.
- 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 of 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 AA 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 AA. 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.

- The appellant submitted that to comply with the Directive, Regulations and the Judgements of the CJEU and the High Court 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.
- The appellant submitted that to comply with the Directive, Regulations and the Judgements of the CJEU and the High Court it is necessary at the minimum, where a Turlough is concerned to show evidence that there is no groundwater connectivity with the development lands.
- The CJEU judgement in Case C-323/17 People Over Wind and Peter Sweetman v Coillte Teoranta 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. 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 AA.
- The appellant submitted an NPWS related appendix and stated that for example, 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 referred to 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 submitted grounds regards obligations on the FAC to keep records associated to an AA, and that that the FAC must comply fully with the 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 DAFM responded to the appeal stating that this is a Native Woodland Scheme project with ripping as cultivation and does not include any drainage, stocking is with native species at standard spacing, and no fertiliser or chemical is being applied. While there is a watercourse along the western boundary there is no hydrological connection to this project. As the project is outside of the commuting range of the Qualifying Interests of associated Natura sites, no effect is expected.

The FAC held an Oral Hearing on 15 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 made to referral bodies, there was one submission received. The DAFM confirmed the application was desk inspected using the application documents, the bio-map and fencing-map, and the IFORIS mapping layers. The proposal was the subject of an AA screening on its own and in-combination with other plans or projects in respect of 11 Natura Sites within a 15km radius, and all sites were screened out for Stage 2 AA prior to the decision to grant the licence. There was no hydrological connectivity to any of the Natura sites. The DAFM inspector stated that there would be no drains involved in the GPC9 project due to the use of ripping as ground preparation at 2m spacing and as a result no direct connection from the planted area to the watercourse. The DAFM stated there was also a 10m standard setback from the watercourse and there would be no effect on water quality from the proposal. In reply to the FAC the DAFM stated there was no evidence of a turlough and no turlough related SAC or SPA arose. The DAFM described the access as set out in the application bio-map as across the applicant's lands and that no roadway would be required for this native woodland proposal.

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 well sub-threshold for mandatory EIA, the evidence suggests a total area of 10.28 ha is afforested within a 500m radius within the last 3 years, there is agricultural grassland in the surrounds, some small forestry plots mostly of native woodland, in rural setting with a few private houses and farmyards. The proposal is not within or adjacent to any nationally designated site and is not within a high amenity landscape. In addition, the licence is issued subject to compliance with the DAFM guidelines and requirements for landscape, harvesting, water quality, bio-diversity and archaeology. Milltownpass Bog NHA is c. 1.3km east of the proposal but has no hydrological connection. The Windmill or Black Island stream is part of the Milltownpass_010 river waterbody which is afforded a 'poor' status and on which the FAC is satisfied having regard to the nature and scale of the proposal there will no effect. 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 11 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 15 January 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 proposal is bounded by the Windmill or Black Island stream, rises just north of the proposal (EPA mapping) which has a downstream connection to the River Boyne and River Blackwater SAC and the River Boyne and River Blackwater SPA at c. 30km. Both of these Natura 2000 sites were screened out as having no hydrological connectivity to the proposal site, which the stream bounds. However, while this is considered an error the FAC considers there is no discernible possible effect from the proposal at this distance and considers the AA screening conclusion is sound in this instance.

In respect of the grounds raised in the appeal concerning turloughs, no particular turlough(s) were identified by the appellant, the FAC notes the bedrock of the proposal area is dark limestone and shale, Lucan formation (GSI) and there are no groundwater flooding events mapped or turloughs identified (GSI) in the vicinity of the proposal. Nothing further arises.

In the circumstances outlined above, and based on the evidence before it, the FAC concluded that the DAFM did not make a serious or significant error or series of errors in their decision to issue afforestation licence CN83326 and did so in compliance with fair procedures. In deciding to affirm the decision in respect of afforestation licence CN83326, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours Sincerely

Pat Coman, on behalf of the FAC

