



Llywodraeth Cymru  
Welsh Government

## ***Agriculture (Wales) Bill***

### ***Forestry Provision - Amendments to the Forestry Act 1967***

Principles of Implementation

<b>Version</b>	<b>Date published</b>	<b>Section changed</b>	<b>Reason for change</b>
V5 final	28 Sept 2022		
V6	29 November 2022	Development of guidance by NRW: paras 4 & 6	Minor correction – approaches paper already received

## Introduction

This non-statutory guidance sets out how Welsh Government expects Natural Resources Wales (NRW) to exercise the more comprehensive suite of powers and functions to regulate felling being conferred on them through amendments to the Forestry Act 1967 enacted through the Agriculture (Wales) Bill 2022.

## Powers

The Agriculture (Wales) Bill 2022 – includes the following Forestry Provision, summarised as follows:

- Amend the existing Forestry Act 1967 (as amended) to enable environmental conditions to be added to felling licences, and to allow licences to be amended, suspended and revoked once granted.

### Why these amendments are required:

The Forestry Act 1967 currently does not allow conditions to be added to felling licences to ensure the integrity of protected sites, protected species or other sensitive elements of the environment. This *could* lead to NRW granting a felling licence that may negatively impact the environment and could contravene other environmental legislation such as the Conservation of Habitats and Species Regulations 2017.

NRW currently has no powers to amend, suspend or revoke a licence it has granted in the event that something about that licenced activity becomes unacceptable. This can arise where change of ownership results in a change of objectives, or disease affects species choice in restocking. However, it can also be due to additional constraints identified after the licence was granted such as the presence of protected species that have been overlooked. Additionally, it could be related to environmental harm arising during felling operations.

### Intended effect

These powers are being sought to prevent felling that would contradict other environmental legislation and enable NRW to better manage licenced felling that would otherwise cause environmental harm. The effect of this is primarily to safeguard habitats and species and provide protection from environmental harm, although it would also enable felling licences to be amended for other reasons such as a change in owner objectives. It also:

- enables such “environmental” conditions to be enforceable under the Forestry Act 1967;
- helps the 1967 Act align with other environmental legislation such as the Conservation of Habitats and Species Regulations 2017; and
- enables NRW to meet its other duties such as its SMNR (sustainable management of natural resources) duty contained in section 5 of the

Environment (Wales) Act 2016 and its biodiversity and resilience of ecosystems duty contained in section 6 of the same Act.

- Enables forestry permitting to be brought in line with NRW's other regulatory regimes. This applies to the power to amend, suspend and revoke as well as the power to add conditions to felling licences.

Given their nature, felling operations carry a risk of environmental harm and may mean having to accept a level of environmental disturbance in acknowledgement of the practical aspects of woodland management. In applying these new powers, NRW should apply its SMNR duty under the Environment (Wales) Act 2016 to ensure that forests and woodlands can continue to provide a range of ecosystem benefits which include timber production as well as the conservation and enhancement of protected species and habitats.

Scotland and NI have taken similar powers and the England Trees strategy outlines that new statutory duties and powers for the Forestry Commission will be considered, to better reflect the social and environmental value of woodlands.

The associated penalty for felling without a licence (as provided for in section 17 of the Forestry Act 1967) has been increased to an unlimited fine to address the existing discrepancy between the penalty for felling without the authority of a felling licence and failing to comply with a notice under section 24 the Forestry Act 1967. It should also act as a better deterrent against unauthorised felling, giving the courts the flexibility of higher fines where appropriate. This is relevant to the new powers in that any felling that has taken place in contravention of environmental conditions relating directly to felling i.e. areas felled or timing of felling operations, is not being carried out with the authority of a felling licence and so could constitute an offence under section 17. This would also apply where trees are felled despite a felling licence being suspended or revoked under a notice given under section 24C or 24D of the amended Forestry Act 1967.

A new offence has been added at s.24C to enable NRW to take enforcement action where "the person responsible" fails to take steps required by a notice served under s.24C e.g. remedial steps to address a breach of condition. This has an unlimited fine in line with the existing s.24 of the Act.

### **Development of Guidance by NRW**

Overuse of the new powers has the potential to make felling licences too burdensome to be operated practically or financially which could impact on woodland management. This would be detrimental to the operation of the forestry sector and Welsh Government's objective of bringing more woodlands into management.

Welsh Government and NRW have engaged with a group of key stakeholders consisting of forestry, land management and conservation representatives, established for the purpose of providing input into the development and impact of the provision to amend the Forestry Act 1967. Stakeholders raised concerns about the implementation of powers by NRW.

These concerns must be addressed by NRW through the development of clear guidance for felling licence applicants and internal guidance for NRW to ensure a consistent and proportionate approach is taken with regards the exercise of the new powers. Applicants and felling licence holders need to be clear on when these powers will be used and what is required. NRW should continue to engage the Stakeholder group as appropriate in the development of the guidance.

This non-statutory guidance paper forms the basis of NRW's "approaches" paper which sets out an outline of how NRW intends to implement these powers as a precursor to full internal and external guidance.

This non-statutory guidance should also form the principles of how NRW will develop full internal and external applicant guidance on how they will apply these powers, which are intended to take effect in Autumn 2023.

NRW has given Welsh Government sight of their "approaches" paper so that Welsh Government can ensure that the legislation will deliver its intended effect. NRW should also give Welsh Government sight of the full internal and external applicant guidance and significant future changes, for information purposes and allowing time for comment where necessary.

Guidance (both internal and external) should include clarity on the extent and source of appropriate supporting information to be submitted with felling licence applications, ensuring it is proportionate and necessary to the approval process.

NRW should ensure that all stakeholders, felling licence applicants and all relevant NRW staff are aware of the guidance and new powers before they come into force.

NRW's implementation of the powers should be reviewed within 3 years of commencement of these powers and as necessary after that, as part of the Welsh Government's Post Implementation Review. NRW and Welsh Government should agree collection of relevant data in order to monitor the impact of these powers.

## **Implementation of Powers – General**

Both the "approaches" paper and the internal/external guidance should take the following principles into account:

*Principle* - These powers i.e. to add environmental conditions and to amend/suspend/revoke a felling licence already granted, are to be used for felling licences granted *after* these powers come into force. The requirements cannot be retrospectively applied.

*Principle* - It is intended that these powers are used where there is a clear need to do so for environmental reasons. NRW should consider whether the use of these powers is necessary; relevant; enforceable; precise; and reasonable in all other respects, coupled to its requirement to act in accordance with Public Law, the

Regulator's Code and NRW's Regulatory Service Standards and Regulatory Principles. This should be in line with all of NRW's statutory duties including:

- its balancing duty under section 1(3A) Forestry Act 1967
- its General Purpose (Sustainable Management of Natural Resources) duty under the Environment (Wales) Act 2016
- its biodiversity and reliance of ecosystems duty under the Environment (Wales) Act 2016
- its duties as a UK Conservation Body under the Natural Environment and Rural Communities Act 2006.

### Power to add Environmental Conditions

The amendments to section 10 of the Forestry Act 1967 enable environmental conditions to be added to felling licences in addition to the current conditions relating to restocking and maintenance. Applying appropriate conditions serves to flag specific issues to the felling licence holder and clarifies what NRW requires to address those issues. It also enables NRW to enforce those conditions through the felling licence regime if not complied with.

*Principle* - The Forestry Act 1967 under which felling licences are granted requires cross compliance with all other relevant legislation including protected species and environment licencing. This is reiterated under the UK Forestry Standard (UKFS). The use of conditions should not seek to duplicate or replace these requirements: felling licence holders should continue to comply with both, although a condition could be used to highlight a particular sensitivity or potential harm, or necessary action to take.

*Principle* - NRW should apply environmental conditions where appropriate to protect a particular species, habitat or other environmental concerns or sensitivities that have been raised during the application process. These should be applied where they are appropriate and proportionate to the activity being applied for, and worded so they are enforceable and relevant.

*Principle* – NRW should develop an implementation approach based on around 3 'tiers' of conditions depending on necessity and related to the sensitivity of the site and potential risk of environmental harm. This tier system should provide a transparent and consistent approach to the application of environmental conditions, within NRW's General Purpose in relation to SMNR.

*Principle* - NRW must discuss the environmental conditions they intend to add to a felling licence with the applicant and take into account any views or alternative proposals the applicant makes.

## Power to amend/suspend/revoke licences

### *Amendment by mutual agreement*

Section.10 of the Forestry Act 1967 has also been amended to enable NRW and the felling licence holder to agree to amend the felling licence at any time. The ability to amend a felling licence in mutual agreement with the licence holder should help address changes in objectives or where additional information has come to light since the licence was granted.

*Principle* – Welsh Government encourage NRW to use the provision under s.10 to amend the felling licence through mutual agreement with the felling licence holder where consistent with NRW regulatory principles and regulators code, using the enforcement provisions available as a last resort.

*Principle* - NRW should consider and develop appropriate internal and external guidance on requests for amendments

### *Environmental harm*

Section 24 of the Forestry Act 1967 has been amended to provide for circumstances where environmental conditions are breached, and gives NRW powers to vary, omit or add new conditions, or suspend or revoke a felling licence already granted. Amendments also provide for circumstances where environmental conditions have not been breached, but NRW considers that felling is or is likely to cause *significant* harm to the environment. In these circumstances it gives powers to NRW to amend, suspend or revoke a felling licence already granted.

*Principle* - NRW should consider and develop appropriate internal and external guidance on when powers to amend, suspend or revoke a felling licence will be considered.

*Principle* – NRW should require through the use of appropriate conditions that the felling licence holder should take all reasonable endeavours to ensure that all sensitivities on the basis of known proximity and habitat suitability are considered from the outset and further considered before operations start and whilst operations are ongoing. This should be consistent with NRW regulatory principles, regulators code and be appropriate and proportionate. NRW should be careful to avoid allowing this requirement to become too onerous.

*Principle* – where a notice is served due to a breach of condition, Welsh Government expects that any steps specified by NRW to be taken to remedy the breach of condition are clearly set out, reasonable, proportionate and provide a clear link between the breach and the steps specified.

*Principle* - NRW should work with felling licence holders to agree variation of conditions or amendment of felling licences to address environmental harm in order to avoid suspension or revocation wherever possible.

*Principle* - Suspension or revocation should only be used in *exceptional circumstances* where amendment of conditions or the felling licence would not address the issue; or cannot be agreed; or where there are no other options available.

*Principle* – Suspension is a temporary state and requires an end date. The length of time that a felling licence is suspended must be proportionate to the reason for suspension and any remedial action required. It is not anticipated that suspension will be a long term measure unless exceptional circumstances are present.

*Principle* – Welsh Government would expect that where a felling licence holder complies with the steps and/or conditions set out in a notice, that NRW take steps to lift the suspension as soon as possible unless there are clear justifications for keeping it in place for the duration of the notice.

*Principle* - Where a licence is revoked, NRW must set out clear reasons why this was the only course of action available to prevent environmental harm.

### Compensation

As part of the new powers, the proposed amendments to the Forestry Act will allow compensation to be made available where a felling licence is amended, suspended or revoked due to environmental harm arising through no fault of the licence holder. Additionally compensation is to be made available where a notice is served relating to a breach of conditions, but is later cancelled as a result of a successful appeal.

Where steps have been carried out as an immediate requirement of a notice due to a breach of felling licence conditions which has later been cancelled at appeal, compensation will be based on the *actual* costs of having undertaken those steps. In all other cases, compensation will be based on the loss in value of the growing timber resulting from amending, suspending or revoking the felling licence. This reflects existing compensation provision for refusal of a felling licence already within the Forestry Act 1967. The principles set out above will contribute to reducing the likelihood of instances of appeal and compensation.

*Principle* – NRW should work with felling licence holders, utilising the ability to agree amendments to conditions, to reduce the potential for compensation and appeals.

### Appeals

The new powers have necessitated an expansion of grounds for appeal under s.25 of the Forestry Act 1967 relating to the wider conditions now able to be added to felling licences as well as the different stages of enforcing those conditions or dealing with unexpected sensitivities leading to significant environmental harm. While s.16 of the Act still enables Ministers to confirm, reverse or modify the decision of NRW being appealed in relation to conditions or refusal, it is now possible that an appeal under s.25 may relate to only one part of a notice. S.25 has been amended to allow for provision in relation for suspension notices, but for other notices, the Minister only has the ability to confirm or cancel the whole notice.

*Principle* – The Welsh Government intends that where an appeal relating to only part of a notice results in the cancellation of the whole notice, that NRW re-issue a modified notice in line with the results of the appeal. When the Minister makes his/her decision, he/she will endeavour to make it clear which aspect of the appeal has been upheld and which part has not in order to assist this process.

#### *Commencement of Notices*

The original section 25 (2) of the Forestry Act 1967 sets out that notices served under s.24 are inoperative until the expiration of the prescribed period for the purposes of appeal i.e 3 months. While this is operable in relation to restocking, it would not be practical for all notices served for non-compliance with environmental conditions or unexpected environmental harm to be delayed for this period. The amended section 25(2) provides that this prescribed period will not apply to notices that suspend a felling licence or vary it in response to an imminent and serious risk of harm.

*Principle* - NRW should consider and develop appropriate internal and external guidance on instances where the prescribed period does not apply taking into account provision for appeal and compensation associated with the new powers.

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