



Llywodraeth Cymru
Welsh Government

Agriculture (Wales) Bill

Forestry Provision - Amendments to the Forestry Act 1967

Principles of Implementation

Version	Date published	Section changed	Reason for change
V5 final	28 Sept 2022		
V6	29 November 2022	Development of guidance by NRW: paras 4 & 6	Minor correction – approaches paper already received
V7			To reflect final amendments to the Bill as made an Act

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 (“the 1967 Act”) inserted by the Agriculture (Wales) Act 2023 (“the 2023 Act”).

This non-statutory guidance has been updated following amendments to the forestry provisions of the 2023 Act due to its passage through the Senedd, and is, therefore, being re-issued to NRW. It should be read in conjunction with the amendments to the 1967 Act as set out in the 2023 Act and Explanatory Memorandum.

Powers

The Agriculture (Wales) Act 2023 – includes the following Forestry Provision, summarised as follows:

- Amend the existing Forestry Act 1967 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 1967 Act 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 if 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 were 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 will 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 1967 Act;
- 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 that 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 which may lead to a need 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 Northern Ireland have taken similar powers. 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 penalty for felling without a licence (as provided for in section 17 of the 1967 Act) has been increased to an unlimited fine, by virtue of provision in section 42 of the 2023 Act. This addresses 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 of the 1967 Act. It is intended to act as a more significant deterrent against unauthorised felling, providing the courts with the flexibility to impose 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, will not have been carried out with the authority of a felling licence and so would likely constitute an offence under section 17. This will also apply where trees are felled despite a felling licence being amended, suspended or revoked under a notice given under section 24C(3) or 24E(2) of the amended 1967 Act.

A new offence has been added to the 1967 Act at new section 24C(10) to enable NRW to take enforcement action where “the person responsible” fails to take steps required by a notice served under section 24C(3) e.g. remedial steps to address a breach of condition. This has an unlimited fine in line with the existing section 24 of the Act. A similar offence has been provided for at new section 24D(5) in relation to new owners where a section 24C(3) notice served on a previous owner requires steps to be taken that have not been implemented before the transfer of ownership. NRW must serve a further notice on the new owner in line with new section 24D. This ensures a new owner is aware of steps required to be taken and has the opportunity to undertake those steps, before becoming criminally liable for failing to take those steps.

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 in turn 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 then proposals to amend the 1967 Act. Stakeholders raised concerns about the implementation of powers by NRW.

Welsh Government are of the view 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 formed the basis of NRW's "approaches" paper which set out an outline of how NRW intended to implement these powers as a precursor to full internal and external guidance.

This non-statutory guidance, as now amended, 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 come into force on 1 April 2024.

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 external applicant guidance and an understanding of internal guidance before becoming operational. Any significant future changes are to be notified for discussion with Welsh Government before becoming operational. In both instances, this is for information purposes to allow Welsh Government time for comment where necessary. NRW are committed to a review of the powers, approach and process at 12 months and as part of the Post Implementation Review at 3 years in conjunction with Welsh Government.

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

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

Principle 1 - 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 2 - 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, and in accordance with Public Law Principles, the Regulators’ 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.

Provisions relating to power to add Environmental Conditions

The amendments to section 10 of the 1967 Act 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 3 - The 1967 Act, 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 4 - 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.

Principle 5 - NRW should apply environmental conditions where appropriate to protect a particular species, habitat or to address other environmental concerns or sensitivities that have been raised during the application process. The powers to apply environmental conditions should only be used where they are appropriate and proportionate to the activity for which a felling licence is being sought, and worded so they are enforceable and relevant.

Principle 6 – NRW should develop an implementation approach based 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 7 - 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.

Provisions relating to power to amend/suspend/revoke licences

Amendment by mutual agreement

Section.10 of the 1967 Act has been amended to enable NRW and the felling licence holder to agree to amend the felling licence at any time. Provision is also made at new section 10A where a felling licence to be amended by agreement relates to trees subject to a Tree Preservation Order.

The ability to amend a felling licence by mutual agreement with the licence holder can help address changes in objectives, breaches of conditions where agreement can be reached or where additional information has come to light since the licence was granted. It enables a lighter touch approach to implementing these powers *where possible*, potentially saving resources associated with enforcement notices and potential appeals. Recourse to serving notices will remain in instances where agreement is not possible or appropriate.

Principle 8 – Welsh Government encourage NRW to try to use the provision under section 10(3A) in the first instance to amend the felling licence through mutual agreement with the felling licence holder where consistent with NRW regulatory principles and Regulators’ Code. The use of the enforcement provisions should be used where agreement is not possible or appropriate.

Principle 9 - NRW should consider and develop appropriate internal and external guidance on requests for amendments made by either NRW or the felling licence holder.

Provisions relating to Environmental harm

A new section 24C has been added to the 1967 Act to provide for circumstances where environmental conditions are breached, and gives NRW powers to vary, remove or add new conditions, or suspend or revoke a felling licence already granted. A new section 24E has also been added to the 1967 Act to 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 10 - NRW should consider and develop appropriate internal and external guidance on when powers to amend, suspend or revoke a felling licence will be applied.

Principle 11 – NRW should require, through the use of appropriate conditions, that the felling licence holder 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 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 (See *Principle 4*).

Principle 12 – 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 13 – Where amendment by mutual agreement is not possible, NRW should continue to work with felling licence holders to address environmental harm through powers to serve notices to amend felling licences, in order to avoid the use of powers to suspend or revoke, wherever possible.

Principle 14 - 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 15 – 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 16 – 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 a suspension as soon as possible unless there are clear justifications for keeping it in place for the duration of the notice.

Principle 17 - Where a licence is revoked, NRW must set out clear reasons why this was the only course of action available to prevent environmental harm.

Provisions relating to Tree Preservation Orders (TPOs)

New sections 10A and 24F have been inserted into the 1967 Act to provide that, unless emergency criteria apply, NRW must notify the “TPO” local authority where amendments to a felling licence by mutual agreement, or a notice under s.24C(3) or s.24E(2) relate to trees subject to a TPO. Where a “TPO” local authority objects to the agreement or notice, and the Welsh Ministers uphold that objection, the Welsh Ministers must refuse to grant consent for the giving of the notice or agreed amendment. Where the Welsh Ministers uphold only part of that objection, Welsh Ministers must still refuse to grant consent to the giving of the whole notice or agreed amendment. However Welsh Ministers will endeavour to set out the part to be removed from a revised notice or agreed amendment to enable the remainder of the notice to be re-issued.

Principle 18 – The Welsh Government intends that where an objection by a TPO local authority 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 decision. When the Welsh Ministers make their decision, they will endeavour to make it clear which aspect of the appeal has been upheld and which part has not been upheld in order to assist this process.

Principle 19 – NRW should consider developing internal guidance to address instances where a notice relates to both trees which are subject to a TPO and those which are not, or where only part of a notice relates to emergency criteria.

Provisions relating to Appeals

The 2023 Act sets out provision, by virtue of new sections 26A and B to the 1967 Act to ensure that the correct person, where aggrieved, has grounds to bring an appeal against the different notices relating to amendment, suspension or revocation arising from the new powers.

While section 16 of the 1967 Act 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 new sections 26A or 26B may relate to only one part of a notice. New section 26C(6) allows for the Welsh Ministers to make a direction in relation for suspension notices, but for all other notices, the Minister only has the ability to confirm or cancel the whole notice about which the appeal has been brought.

Principle 20 – 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 Welsh Ministers make such a decision they will endeavour to make it clear which aspect of the appeal has been upheld and which part has not to assist this process.

Provisions relating to Compensation

Amendments to the 1967 Act allow compensation for depreciation in timber value due to the serving of a notice under new section 24E(2) 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. This mirrors existing compensation provision for refusal of a felling licence already within the 1967 Act.

Provision is also made at new sections 26D, 26E and 26F to allow that compensation may be payable where a notice served to amend, suspend or revoke a licence is later cancelled as a result of a successful appeal. Compensation may include depreciation in timber value and/or expenses reasonably incurred, depending on the type of notice cancelled. Compensation is recoverable from NRW.

Principle 21 – NRW should work with felling licence holders, utilising the ability to mutually agree amendments to conditions and felling licences as set out at section 10(3A), to reduce the potential for compensation and appeals. (See *Principle 8*)

Principle 22 - NRW should engage with felling licence holders and ensure it is able to set out full justification when serving a notice under the new sections 24C, 24D or 24E to mitigate the risk of a successful appeal and related compensation.

The Forestry (Felling of Trees) Regulations 1979 (“the 1979 Regulations”) are currently silent on the time period in which compensation claims should be paid arising from section 11 of the 1967 Act. The amendments to the 1967 Act arising from the 2023 Act do not include a prescribed period in which NRW should deal with compensation claims, therefore no related amendment has been proposed to be made to the 1979 Regulations.

Principle 23 – NRW should endeavour to pay a valid compensation claim within 30 days of receipt. Where a claim is complex, NRW should try to resolve the issue(s) and pay the claim within 6 months of receipt of a valid claim. In the interests of transparency, NRW should develop appropriate internal and external guidance on the timeframe, what is considered to be “reasonable expenses”, the evidence required to accompany the relevant Form and the procedure for dealing with compensation claims under the new powers.

Provisions relating to Commencement of Notices

The original section 25(2) of the Forestry Act 1967 sets out that notices served under section 24 are not operable 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 of time.

New section 26C(2) inserted into the 1967 Act sets out that notices served under sections 24C(3), 24D(2) or 24E(2) do not take effect until the prescribed period for

appeals has elapsed. However under new section 26C(3) a notice may take effect immediately where NRW considers provision in the notice is necessary to respond to an imminent risk of serious harm, or suspends a felling licence.

It is less likely that such emergency powers would apply to a notice served under section 24D(2) where land has changed hands since a previous section 24C(3) notice was served. However it is still possible that an emergency situation could arise as a result of the steps of the original 24C(3) notice not being undertaken. Depending on the circumstances, it may be possible to address emergencies arising as a result of non-compliance with a s.24C(3) notice where land has subsequently changed hands, through other provisions such as new section 24C(9) or potentially existing section 48 which provides a general power of entry to allow NRW to exercise its functions under the 1967 Act.

If section 26C(3) is applied too readily in relation to notices served under new sections 24C,D or E, with NRW determining that the emergency criteria apply and the notice can take effect immediately, this could increase the potential for compensation claims if appeals submitted in the prescribed period after the notices have commenced, are successful.

NRW should ensure that where they do invoke the emergency criteria, and intend to rely on the power under section 26C(3) that their decision to do so is fully justified and recorded.

Principle 24 - NRW should consider and develop appropriate internal and external guidance on instances where they might judge the reasons in new section 26C(3) apply and in which they would rely on these emergency criteria, providing that the prescribed period would not apply. This would ensure reliance on the emergency criteria is fully justified and avoid unnecessary potential appeals and associated compensation.

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