

Regulation of felling and restocking: consultation

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Introduction and background

This consultation seeks views on the proposals for regulating felling and restocking in Scotland from 1 April 2019.

Forestry contributes almost £1 billion per year to the Scottish economy and supports more than 25,000 full-time equivalent jobs.¹ Forests and woodland cover 18% of the land area of Scotland (approximately 1.4 million hectares). This represents 45% of the UK's forests.

Around one third of Scotland's woodland cover is on the Scottish Ministers' national forest estate. The remaining two thirds of woodland cover is land owned privately and by communities, third sector organisations and local authorities.²

Well-managed forests help the economy by providing timber and supporting tourism and other associated business opportunities. Woodlands and forests are also dynamic ecosystems that can help mitigate climate change, alleviate flooding, stabilise the soil and provide a home for wildlife. As part of a 'natural health service', woodlands are treasured spaces, providing physical and mental health benefits to improve the lives of people and communities.

The Forestry and Land Management (Scotland) Act 2018 ('the 2018 Act') is part of a continuing commitment to forestry by the Scottish Government. One of its objectives is to modernise the legislative framework for regulating forestry, reflecting the modern policy environment and introducing a regulatory regime that is more flexible, agile and better able to adapt to changes. The 2018 Act itself supports this approach by leaving much of the detail of the regulatory regime to secondary legislation, in this case Regulations, making it easier to adapt to changing circumstances than the current regime.

This consultation is part of the Scottish Government's long running programme of engagement on the operation of the regulatory regime set out in the 2018 Act.

Change in the law

Forestry is currently regulated in Scotland by the Forestry Commissioners, according to rules set out in the Forestry Act 1967 ('the 1967 Act') and the Forestry (Exceptions from Restriction of Felling) Regulations 1979 ('the 1979 Regulations').

The Scottish Parliament recently passed the Forestry and Land Management (Scotland) Act 2018 which, amongst others things, provided for a regulatory regime including enabling powers to set out in Regulations the technical detail of how the regime will work. It also tied the regulatory function to the duty placed on the new regulator to promote sustainable forest management.

¹ 'The economic contribution of the forestry sector in Scotland' (November 2015), pp.4–5 (<http://scotland.forestry.gov.uk/supporting/forest-industries/economic-contribution-report>).

² 'Forestry Statistics 2017' (September 2017), Table 1.1, p.6 (<https://www.forestresearch.gov.uk/tools-and-resources/statistics/forestry-statistics/forestry-statistics-2017/>).

Change in the regulator

Forestry Commission Scotland (FCS) currently carries out the role of forestry regulator on behalf of the Forestry Commissioners, while Forest Enterprise Scotland (FES), an agency of the Forestry Commissioners, manages land on behalf of Scottish Ministers', known as the national forest estate.

When the 2018 Act comes into force, forestry functions in Scotland will become the responsibility of the Scottish Ministers and two new agencies of the Scottish Government will be created to discharge those functions:

- Scottish Forestry will be created from FCS: forestry policy, regulatory, support and grant functions.
- Forestry and Land Scotland will be created from FES: management of the current national forest estate, with flexibility to take on management of other peoples' land, by agreement.

Change in processes

At a national scale Scotland is committed to expanding its woodland resource, and for many years there has been a strong presumption in favour of protecting woodlands through a combination of policy and regulatory mechanisms. The primary driver for the regulation of felling will continue to be to maintain an appropriate level of woodland cover through avoiding inappropriate woodland removal and, in addition, to strengthen sustainable forest management practices. The aim of the regulatory regime is therefore to allow appropriate woodland felling, with suitable restocking, supporting the important economic activities of felling operations and helping sustainable harvesting operations to run efficiently.

The 2018 Act, like the Forestry Act 1967 ('the 1967 Act') that came before it, controls felling and restocking based on an offence of unauthorised felling. Any felling of trees in Scotland must therefore either be carried out:

- in accordance with a permission or direction from the regulator; or
- in a way that has been made exempt from requiring permission.

The starting point for the development of the proposals is to remain as close as possible to the current position and to make changes only where they will make the processes more transparent, simpler or reduce the potential for inappropriate deforestation. There will be no gap between the current regime and the new regime. We are separately considering arrangements for transition from one to the other, for example how existing licences will be brought over to the new regime. We will keep stakeholders informed of this work.

It is worth noting that the 2018 Act also changes the terminology and refers to **permissions, rather than licences** under the 1967 Act, so that is the term used throughout this consultation.

Regulation of the Scottish Ministers' forest estate

The Forestry Act 1967 does not bind the Crown, so the Scottish Ministers' National Forest Estate is not subject to regulation under that Act. During consultation and engagement for the 2018 Act, the case was made for a level playing-field between state- and non-state forestry. The 2018 Act binds the Crown, meaning that Scottish Ministers' forestry holdings are not exempt from the new regulatory framework. Forestry and Land Scotland (FLS), as a forest manager, will be subject to the same regulatory framework as other forestry managers.

Exemptions to the requirement to have a permission to fell trees

Key points of our proposal

- Simplified exemption for small trees: 8cm diameter.
- Five cubic meters per quarter exemption maintained but no longer applies to small native woodlands.
- Dead trees are exempt but windblow clearance would now require felling permission.

Exemptions describe situations, or types of felling, for which you do not require permission from the forestry regulator. This is to ensure that the regulator is primarily involved in regulation of felling which could lead to the long-term reduction of woodland cover in Scotland through deforestation.

The proposals set out below would be the situations, or types of felling, for which you would not need a permission from the Scottish Ministers and are primarily based on the current list of exemptions from felling licence requirements under the Forestry Act 1967.

We are proposing changes where discussions with stakeholders have indicated that improvements can be made, or where the way in which the 2018 Act is drafted requires some adjustments. Each proposal is described in terms of whether we are proposing a change.

Small trees

The 1967 Act exempts the felling of trees

- with a diameter not exceeding 8 centimetres;
- in the case of coppice or underwood, with a diameter not exceeding 15 centimetres; or
- a diameter not exceeding 10 centimetres and the felling is carried out in order to improve the growth of other trees.

It specifies that the diameter is measured over the bark at a point 1.3 meters above the ground level.

Our proposal is that an exemption is created for the felling of trees of a diameter of 8 centimetres or smaller. That diameter should be measured over the bark at 1.3 meters above the base of the tree, where the base of a tree is ground level when the tree is standing.

This would continue to allow the felling, coppicing and thinning of small or young trees up to 8cm in diameter without the need for a permission. Our proposal is not to reproduce the further 10cm exemption 'to improve the growth of other trees' or the 15cm exemption for coppice or underwood as both those activities will be captured by the 8cm exemption. Reducing to only one diameter threshold simplifies understanding for all parties. Further, we believe that a separate coppice threshold is not really relevant in Scottish conditions.

Places

The 1967 Act exempts the felling of fruit trees or trees standing or growing on land comprised in an orchard, garden, churchyard or public open space.

Trees growing in these situations do not, generally, constitute a woodland. They may be subject to other protections, such as Tree Preservation Orders, and exempting them from felling regulation does not affect that protection.

Our proposal is that trees in the following places are exempt:

- Orchards
- Gardens
- Churchyards (including those that are deconsecrated)
- Burial grounds
- Public open spaces

Public open spaces will be defined as those that are:

- expressly designed for use by the public; and
- are open, in the sense that if they contain trees they are not at a density that makes them a woodland.

This could include open areas within public gardens, parks, urban greenspace and trees that form part of the built environment (e.g. those lining streets).

This essentially maintains the current exemption. We are proposing to clarify the term 'public open space' as we have heard from stakeholders that this would be helpful. We are proposing to include burial grounds specifically as they are currently only partially catered for by virtue of churchyards being listed.

Topping and lopping, trimming or laying hedges

The 1967 Act exempts the topping or lopping of trees and the trimming or laying of hedges. These activities are not, for the most part, caught by felling as defined in the 2018 Act as they are unlikely to kill the trees. Where they will kill trees a permission will be required.

Our proposal is therefore not to maintain these exemptions as they are not necessary.

Volume

The 1967 Act exempts felling where:

- (i) the aggregate cubic content of the trees which are felled does not exceed five cubic metres in any quarter; and
- (ii) the aggregate cubic content of the trees which are sold by that person does not exceed two cubic metres in any quarter.

Section 9(6) of the 1967 Act defines a quarter as the period of three months beginning with the 1st January, 1st April, 1st July or 1st October in any year.

The exemption is in place to allow low level removal so that the owners of small woodlands can use their resource (e.g. for firewood). It also allows for some management to take place and for the benefits associated with this to be realised without interaction with the regulator as, if good practice is followed, it does not reduce woodland cover.

Our proposal is to maintain the effect of (i) so that felling that does not exceed five cubic metres in any quarter be exempt. For the purposes of this exemption, a quarter is a fixed period in the calendar defined as three months beginning with the 1 January, 1 April, 1 July or 1 October.

We do not propose to maintain a separate limit, (ii) above, for the proportion of those felled trees can be sold as we do not believe that the restriction delivers a tangible benefit in terms of maintaining woodland cover.

We propose however that this exemption will not apply to felling in woodland between 0.1 ha and 0.5 ha and where 50% of the canopy is comprised of the following species:

- Alnus glutinosa* common alder
- Malus sylvestris ssp sylvestris* crab apple
- Fraxinus excelsior* ash
- Populus tremula* aspen
- Betula pubescens* downy birch
- Betula pendula* silver birch
- Prunus padus* bird cherry
- Prunus avium* gean (wild cherry)
- Ulmus glabra* wych elm
- Quercus robur pedunculata* oak
- Quercus petraea* sessile oak
- Sorbus aucuparia* rowan
- Salix caprea* goat willow
- Prunus spinosa* blackthorn
- Sambucus nigra* elder
- Crataegus monogyna* common hawthorn
- Corylus avellana* hazel
- Ilex aquifolium* holly
- Euonymus europaeus* spindle
- Taxus baccata* yew
- Juniperus communis juniper*
- Salix pentandra* bay willow
- Salix aurita* eared willow
- Salix cinerea* grey willow (sallow)
- Salix phylicifolia* tea-leaved willow
- Salix myrsinifolia* dark-leaved willow
- Salix purpurea* purple willow

This is in order to protect woodlands of high environmental value which are likely to be most at risk of being gradually removed by consecutive five cubic meter fells.

Danger or nuisance

The 1967 Act exempts felling for the prevention of danger or the prevention or abatement of a nuisance.

Our proposal is to create an exemption for the felling of any trees that pose an immediate danger to people or property, including infrastructure. This exemption would avoid delays in felling where there is an urgent need.

We do not propose to maintain an exemption for nuisance trees, such as trees which are overhanging a driveway, trees which are causing leaves to block gutters, or trees whose roots are damaging pavements, as they are unlikely to require urgent action, meaning that a person could reasonably apply for a permission from the Scottish Ministers.

Compliance with Acts of Parliament

The 1967 Act exempts felling which is in compliance with any obligation imposed by or under an Act of Parliament. It ensures that people who are required to fell in order to comply with another law, are able to do so without first seeking permission from the Scottish Ministers.

Our proposal is to maintain this exemption.

Aerodromes

The 1979 Regulations exempt felling where the Secretary of State for Defence or the Secretary of State for Trade has certified that the tree obstructs the approach of aircraft to, or their departure from, any aerodrome or hinders the safe and efficient use of air navigational or aircraft landing installations. Aerodromes are defined as any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft.

Our proposal is to create an exemption for the felling of any tree that:

- obstructs the approach of aircraft to, or their departure from, any aerodrome; or
- hinders the safe and efficient use of air navigational or aircraft landing installations.

Aerodromes are defined as any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft.

This would maintain the ability to fell without permission, but removes the need for the obstruction to be certified first.

Infrastructure

There are several exemptions relating to the building or maintenance of infrastructure in the 1967 Act.

The 1967 Act exempts felling which is carried out by, or at the request of, an electricity operator, because the tree is or will be in such close proximity to an electric line or electrical plant which is kept installed or is being or is to be installed by the operator as:

- to obstruct or interfere with the installation, maintenance or working of the line or plant; or
- to constitute an unacceptable source of danger (whether to children or to other persons).

Our proposal is to maintain this exemption.

The 1979 Regulations exempt felling by 'statutory undertakers' of trees on land in their occupation which obstruct the construction of any works required for the purposes of the undertaking of those undertakers or of trees which interfere with the maintenance or operation of any works vested in those undertakers. Statutory undertakers are defined as persons authorised by any enactment to carry out any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, power or lighthouse undertaking, or any undertaking for the supply of hydraulic power or water, and public gas transporters within the meaning of Part I of the Gas Act 1986.

Our proposal is to maintain this exemption.

The 1979 Regulations also exempt felling by, or at the request of, a water authority established under the Water Act 1973, or an internal drainage board for the purposes of the Land Drainage Act 1976, where the tree interferes or would interfere with the exercise of any functions of that authority or board.

Our proposal is to maintain this exemption.

We have been made aware of concerns relating to the consistent interpretation of the infrastructure exemptions and will be working with interested parties to review the existing guidance, with a view to improving or supplementing it.

Planning

The 1967 Act exempts felling which is immediately required for the purpose of carrying out development authorised by planning permission granted, or deemed to be granted, under the Town and Country Planning (Scotland) Act 1997.

Scottish Planning Policy states that the planning system should protect and enhance ancient woodland as an important and irreplaceable resource together with other native or long established woods, hedgerows and individual trees. It is expected to be reviewed in parallel with preparation for National Planning Framework 4, which is expected to commence in 2018 with a view to adoption in 2020.

The Scottish Government's policy on The Control of Woodland Removal, which places a strong presumption against the removal of any woodland including ancient woodland, is how these principles are articulated. It sets out that approval for woodland removal should be conditional on achieving significant net public benefits and this is reinforced in Scottish Planning Policy.

Therefore in light of this our proposal is to maintain this exemption.

Dutch Elm disease

The 1979 Regulations exempt felling of any tree of the genus *Ulmus* which is affected by the disease in elms caused by the fungus *Ceratocystis ulmi* and commonly known as Dutch elm disease to such an extent that the greater part of the crown of the tree is dead.

Our proposal is to maintain this exemption.

Dedication agreements

A dedication agreement is an agreement, between a landowner and the Forestry Commissioners, that the land it applies to will be managed for forestry purposes.

The 1979 Regulations exempt felling on land which is subject to a dedication agreement and:

- the agreement is registered in the Land Register or General Register of Sasines and binding on the owner of the land; or
- the land is owned by the person who entered into the agreement.

The 2018 Act does not provide for new dedication agreements to be entered into, however under section 80 existing agreements will remain in place after the 1967 Act is repealed.

Therefore our proposal is to maintain this exemption for existing dedication agreements.

Dead trees

The 1967 Act requirement for a licence only extends to the felling of *growing trees*. This means that no licence is required to cover the felling of trees that have been uprooted or those that are dead. The 2018 Act relies on the ordinary meaning of felling (with the addition of intentionally killing a tree, for example by ringing or poisoning) which means that, if there is no exemption, cutting down dead trees will require a 2018 Act permission.

Our proposal is that an exemption is created for the felling of dead trees. This is new and a direct result of the way that the 2018 Act defines felling. To ensure no inappropriate deforestation occurs the clearance of trees that are seriously compromised but still alive would require a felling permission. This includes those that are partially uprooted or have suffered damage as a result of wind, those that

are diseased but not yet dead, been damaged by fire, or been damaged by a person (for example by machinery being used in the area

Questions

1. Do you agree with the proposed exemptions?

If no:

2. Would you like to see any of the proposed exemptions removed from the proposals?

If yes: Which ones and why?

3. Would you like to see adjustments made to any of the proposed exemptions?

If yes: What adjustments and why?

4. Would you like to see any other exemptions added to the proposals?

If yes: What additions and why?

Felling: Applications, issuing permissions, compensation, felling directions

Key points of our proposal

- Conditions on permissions will be grounded in sustainable forest management and impacts on communities and individuals; the environment, biodiversity or species; or retaining or increasing woodland cover.
- New compensation process for refusal.

Effective and proportionate regulation of forestry is required to maintain appropriate woodland cover and to ensure sustainable management of Scotland's forests. While the Forestry Act 1967 had a focus on timber production, the 2018 Act takes a broader view. Discussions with stakeholders prior to the 2018 Act indicated support for changing the focus of felling and restocking regulation to sustainable forest management principles.

Stakeholders have told us they are largely happy with the current approach to the regulation of felling, therefore our approach throughout the development of these proposals is based on current practice, unless there is an opportunity to improve the speed of processing or reduce the complexity of the process.

Registration

The most notable difference between the 2018 Act and the 1967 Act relating to felling and restocking is that the new Act sets out the Scottish Ministers' ability to register a notice to comply with continuing conditions on felling permissions (on either the Land Register of Scotland or the General Register of Sasines). The purpose of registration is to allow any prospective new owner of land to assess any associated restocking obligations and ensure that any sustainable forestry management obligations automatically pass to future owners.

The 2018 Act allows the registration of conditions either at the point that felling is carried out or at any point during the life of the permission. We propose to use conditions on permissions to ensure that the Scottish Ministers have all of the information required to make a decision on registration on a case by case basis. This could include conditions which state that the Scottish Ministers must be informed when felling has been carried out or of imminent changes of ownership.

Applying for a permission

Current

The 1967 Forestry Act stipulates that the felling of growing trees requires a licence except where exemptions apply (see exemptions section). It also stipulates that an application for a felling licence can be submitted by those *having such an estate or interest in the land on which the trees are growing as enables him, with or without the consent of any other person, to fell the trees.*

There are two mechanisms for obtaining a felling licence from FCS, through the submission of either:

- a completed felling licence application form; or
- following the agreement of a Long Term Forest Plan.

Long Term Forest Plans tend to follow the format laid out in the FCS Long Term Forest Plan Applicant's Guidance document³. Felling Licence applications are submitted on a prescribed form with signed maps which must adhere to the minimum standards set out in the 1967 Act. A decision on the application must be made by FCS within three months of receipt of the application form. All felling proposals (except for thinning) are placed on the public register⁴ and sent out to relevant consultees for a period of 28 days.

Proposed

The 2018 Act stipulates that the felling of a tree requires felling permission from Scottish Ministers except where exemptions apply (see exemptions section). This includes felling a tree which is on Scottish Ministers' forestry estate (which will be managed by Forestry and Land Scotland). It also stipulates that applications for felling permission may be submitted either by an owner or by an occupier of the land who has the written permission of the owner.

Our proposal is that all applications for a permission continue to include, as a minimum, the following information. This will be specified in Regulations as required information:

- Applicant name, address and phone number and, if different, owner name and address.
- Maps of the areas to be felled with each site clearly identified.
- For each site, the type of operation proposed, chosen from one of the following: clear felling, thinning, selective felling, coppicing, felling of individual trees.
- For any site where the type of operation is thinning, the pre and post thinning stocking density.
- For each site, the species to be felled, whether by naming all the main species (where 'main species' are those covering 20% or more of the area to be felled) or by specifying that the area comprises 'mixed broadleaves' or 'mixed conifers'.
- For the whole application, the size of area which is to be felled for each species identified.
- For each site, the timescale for felling.
- For each site the proposed:
 - type of restocking (chosen from one of the following: replant the area, restock by natural regeneration, plant an alternative area, restock with coppice regrowth, restock with individual trees), which species and proportion of each species, and stocking density; or
 - if no restocking is proposed, the reasons for not restocking the site.
- For each site, whether there is a Tree Preservation Order in place or whether the site forms part of, or includes, a Conservation Area.

³ <https://scotland.forestry.gov.uk/images/corporate/pdf/lftp-applicants-guidance.pdf>

⁴ Register of felling licences and Forestry Grant Scheme
<https://scotland.forestry.gov.uk/supporting/grants-and-regulations/public-registers/felling-licences-forestry-grant-scheme>

Application forms will be provided by the Scottish Ministers. This will ensure that any applicant can be confident, when they have completed the form, that their application complies with the minimum information requirements. Forms may ask for additional information such as woodland name, number of trees to be felled, an estimate of volume of timber and age of trees which will help to guide applicants towards providing supporting information that will help the Scottish Ministers come to swift decisions.

In addition to Long Term Forest Plan and felling permission applications we intend to develop a system of management plans for smaller scale woodlands that could encompass permissions for felling required for thinning operations.

The layout of the forms is not included as part of this consultation process but we would like to seek your opinions on the information which we will ask you to submit to us.

The process itself will remain largely unchanged:

- Timescales for each stage of the process will be set out in a customer's charter.
- Mapping standards will be set out in guidance.
- A member of Scottish Forestry staff, normally a woodland officer, may visit the site(s) in order to assess the application. (In cases where site visits are necessary but cannot be agreed, the Scottish Ministers will not be able to make decision and therefore may reject the application.)
- Applications will continue to be subject to consultation with appropriate stakeholders such as Scottish Natural Heritage, Historic Environment Scotland, local authorities, neighbours, the local community and other interested parties. Guidance will be developed which sets out the circumstances where consultation will not be undertaken, such as for thinning proposals or where it is expedient to undertake the work without the consultation process, such as after a catastrophic wind blow event.
- In order to facilitate consultation, applications will continue to be placed on a public register for 28 days.

Issuing a permission

Current

A decision on whether an application is granted or refused is notified in writing to the applicant by FCS. If an application is refused, compensation can be applied for (see compensation section).

At the point of approval FCS sets a timescale for which the licence is valid. This is based on the information given in the application. Each case will be considered according to the type of operation. For larger projects, where a forest plan is prepared, for example, in practice this is generally 10 years.

The 1967 Act stipulates that licences will be granted unconditionally, except where it is expedient to set conditions:

- in the interests of good forestry or agriculture or the amenities of the district;
- for the purposes of complying with Forestry Commissioners' duty of promoting the establishment and maintenance of adequate reserves of growing trees; or
- for the purpose of conserving or enhancing the flora, fauna, or geographical or physiographical features or the natural beauty or amenity of any land.

It further limits the use of conditions by requiring that any that are set under the first two purposes are:

- set after consultation with the applicant; and
- expedient for securing restocking (or stocking of other land) and the maintenance of those trees for a period not exceeding 10 years.

FCS sets the restocking period using the information provided by the applicant and with the aim of ensuring that restocking is carried out as soon as practically possible after felling. Almost all licences for clear and selective felling are currently issued with restocking conditions.

Proposed

The 2018 Act stipulates that the Scottish Ministers, when making a decision on an application, must take into account their duty to promote sustainable forest management.

Our proposal is that Regulations will additionally specify that:

- Decisions on applications will be notified in writing to the applicant, using the contact details provided on the application form. This will ensure that a clear record of decisions is available to the applicant.
- If the application has been refused, the reasons for refusal will be included in the notification. This will ensure that decisions are communicated in a transparent manner and allow applicants to address those reasons or challenge decisions.
- Following a refusal, a further application in relation to the same site will not be considered unless either:
 - the reasons for refusal have been addressed; or
 - circumstances have materially changed.

This will ensure that vexatious multiple applications cannot be made, but will allow legitimate subsequent applications to be made where barriers to permission being granted are no longer in place.

Compensation is available where an application has been refused (for more details please see the compensation section).

Timescales associated with the process are not set out within Regulations, these will be set out in a customer charter.

The 2018 Act also states that conditions can set out how, when and who can carry out felling and steps that must be taken after felling is carried out. Our proposal is

that conditions will be set in relation to the impacts of the felling and subsequent management of the site(s) on:

- communities or individuals;
- the environment, biodiversity or species; or
- retaining or increasing woodland cover.

These could include, for example, conditions relating to:

- restocking (ground preparation, protection, densities, species, and timescales);
- maintenance operations;
- compliance with sustainable forest management;
- reporting to the Scottish Ministers when certain activities have taken place (felling, planting); or
- notifying the Scottish Ministers of an intended change in ownership.

Conditions, and the timescales within which they must be completed, will be set on a case by case basis. To ensure consistent application guidance will set out:

- how conditions should be determined;
- how timescales will be determined;
- model conditions for any that are frequently required; and
- under what circumstances conditions may be varied or revoked.

Conditions will continue to be discussed with applicants before being set, as is current practice.

Compensation for refusal of permission

The 1967 Act provides for compensation, relating to deterioration in timber, where a felling licence has been refused. The 2018 Act provides that compensation may be available to those who have suffered a loss as a result of a refusal of permission to fell.

Our proposal is that Regulations further stipulate that:

- Only an applicant, or if different, an owner can apply for compensation (but not both).
- Where a person is not asking for a review of the decision, an application for compensation must be made within 12 months of the date of the refusal, using a form provided by Scottish Minister.
- Where a person has asked for a review of the decision, an application for compensation must be made within 12 months of the date that the person was notified of the outcome of the subsequent appeal, using a form provided by the Scottish Ministers.
- In the case of compensation where a refusal is overturned (for example following a successful review), compensation will only be available for losses incurred between the date of the refusal and the date on which the refusal was overturned.
- All applications will include, as a minimum, the applicant's name and address, the location of the trees that the application relates to, and proof of costs incurred and/or the method used to calculate the loss of value in the trees.

Questions

5. Do you agree with the proposals?

If no:

6. Would you like to see anything removed from the proposals?

If yes: What and why?

7. Would you like to see adjustments made to the proposals?

If yes: What adjustments and why?

8. Would you like to see anything added to the proposals?

If yes: What additions and why?

Felling directions

Key points of our proposal

- Conditions on felling directions will be grounded in sustainable forest management and impacts on communities and individuals; the environment, biodiversity or species; or retaining or increasing woodland cover.
- Felling directions will not be possible in certain places such as gardens and orchards.

The 1967 Act contains provisions for Forestry Commissioners to give directions to fell trees to the owners of those trees. Directions can be made if the Forestry Commissioners consider it expedient in the interests of good forestry, or for purposes connected with their duty of promoting the establishment and maintenance of adequate reserves of trees, that felling should take place, either to:

- prevent deterioration or further deterioration in the quality of the timber they will produce; or
- in order to improve the growth of other trees.

The deadline for the felling must not be any less than two years from when the direction takes effect.

Directions may not be given in the case of:

- fruit trees or trees standing or growing on land comprised in an orchard, garden, churchyard or public open space;
- trees on land which is subject to a forestry dedication covenant or agreement; or
- trees which are being managed to the satisfaction of the appropriate forestry authority in accordance with a plan of operations or other working plan approved by them.

The 2018 Act gives the Scottish Ministers powers to give felling directions if it appears that felling of trees is required to:

- prevent deterioration or further deterioration in the quality of timber comprised in the trees;
- improve the growth of other trees; or
- prevent or reduce harm caused by the presence of trees.

Our proposal is that Regulations will specify that felling directions may not be given in certain places. Those places are:

- Orchards
- Gardens
- Churchyards (including those that are deconsecrated)
- Burial grounds
- Public open spaces

This is in line with the proposed 'place exemption' described in the exemptions section.

Our proposal is that Regulations specify that a felling direction will always:

- be notified in writing to the owner of the land;
- provide reasons why Scottish Ministers are giving the felling direction;
- specify the location of the trees to be felled; and
- specify the latest date by which the felling must take place.

Our proposal is that conditions will be set in relation to the impacts of the felling and subsequent management of the site(s) on:

- communities or individuals;
- the environment, biodiversity or species; or
- retaining or increasing woodland cover.

These could include, for example, conditions relating to:

- compliance with sustainable forest management;
- restocking (ground preparation, protection, densities, species and timescales); or
- maintenance operations.

Conditions, and the timescales within which they must be completed, will be set on a case by case basis. In order to ensure consistent application of the ability to set conditions, guidance will set out:

- how conditions should be determined;
- how timescales will be determined;
- model conditions for any that are frequently required; and
- under what circumstances conditions may be varied or revoked.

Questions

9. Do you agree with the proposals?

If no:

10. Would you like to see anything removed from the proposals?

If yes: What and why?

11. Would you like to see adjustments made to the proposals?

If yes: What adjustments and why?

12. Would you like to see anything added to the proposals?

If yes: What additions and why?

Appeals

Key points of our proposal

- New two step appeals process for decisions made under the 2018 Act (felling and restocking).
- Step 1 is an internal review, within Scottish Forestry.
- Step 2 is an appeal to the Scottish Government Planning and Environmental Appeals Division (DPEA), in line with planning appeals.

1967 Act licences, restocking notices, felling directions, haulage orders, and enforcement notices can all be challenged through a system of referrals to the Scottish Ministers and the use of committees charged with making recommendations. The detail of the process for each type of appeal is slightly different and is therefore confusing and difficult to follow. The proposals set out below are designed to make the appeals process more transparent and easier to follow for all parties.

The 2018 Act, in order to ensure that those affected by decisions taken by the Scottish Ministers can challenge those decisions, states that appeals may be made against decisions to:

- refuse an application for felling permission;
- grant an application for felling permission with conditions;
- vary, suspend or revoke a felling permission;
- give a felling direction (including any condition imposed on it);
- give a restocking direction (including any condition imposed on it);
- refuse to vary or revoke a condition imposed on felling permission;
- refuse to vary or revoke a felling direction;
- refuse to vary or revoke a restocking direction;
- refuse to agree to the variation or discharge of a registered notice to comply;
- give a remedial notice (including any condition imposed on it);
- refuse to vary or revoke a remedial notice; or
- refuse to agree to the variation or discharge of a registered remedial notice.

A two step system of review and appeals is proposed.

- Step 1 will be an internal review within Scottish Forestry to be carried out by a Conservancy ('the referral Conservancy') that is not the Conservancy that took the original decision ('the host Conservancy').
- Step 2 will be an appeal to the Planning and Environment Appeals Division (DPEA) Reporters, making use of existing expertise in managing appeals.

The effect of requesting a review or, subsequently, an appeal will depend on what type of decision is being challenged. This will be set out in Regulations and is summarised below.

Decision	Effect
Refuse permission	Refusal stands until overturned.
Conditions on permission	Permission suspended until challenge resolved.
Variation/ suspension/ revocation of permission	Decision, and permission, stands until overturned.
Felling direction	Direction is suspended until challenge resolved.
Restocking direction	Direction is suspended until challenge resolved.
Refuse to vary / revoke permission conditions	Refusal stands until overturned.
Refuse to vary/ revoke felling direction	Refusal stands until overturned.
Refuse to vary/ revoke restocking direction	Refusal stands until overturned.
Refuse to agree variation/ discharge of registered notice to comply	Refusal stands until overturned.
Serving remedial notice	Notice is suspended until challenge resolved.
Refuse to vary/ revoke remedial notice	Refusal stands until overturned.
Refuse to agree variation/ discharge of registered remedial notice	Refusal stands until overturned.

The outcome of reviews or appeals will be able to uphold, reverse or modify the original decision. At the point where the outcome is communicated, the effect of the outcome will also be communicated. For example, details of any modifications required.

Those who can request a review or launch an appeal will be those who have been notified of the decision, so for example the person who applied for a permission or the person who has been given a direction. They are referred to in this section as 'the appellant'.

Step 1: internal review

Our proposal is that Regulations specify the following:

- The review must be requested within 40 working days of the decision being notified, by completing a form provided by the Scottish Ministers.
- The review may include meetings between Scottish Forestry staff and the appellant, site visits and/or external input. Any external input must only be sought after agreement between Scottish Forestry staff and the appellant on what information is being sought, and from whom.
- The outcome of the review must be communicated to the appellant in writing.

Guidance will be available to aid in the completion of the form to request a review, and forms will be tailored to suit each decision that can be challenged.

Targets will be set for each stage of a review so that appellants are clear as to what they can expect. For example, it is planned that the host Conservancy will transfer the case file to the referral Conservancy, copying all documentation to the person who has requested the review, within 10 working days. The target for completing a review will be 20 working days from the date that the Scottish Ministers receive the request, except in exceptional circumstances (for example where access to a site has not been possible).

Step 2: Appeal to the DPEA

Our proposal is that Regulations specify the following:

- Appeal must be requested within 40 working days of the notification of the outcome of step 1, by completing a form provided by the Scottish Ministers.
- In certain circumstances Scottish Forestry will refer the request for a review straight to the DPEA instead of carrying out a review.
- The outcome of the review must be communicated to the appellant in writing.

Guidance will be available to aid in the completion of the form to request an appeal, and forms will be tailored to suit each decision that can be challenged.

Our proposal is that a Reporter will be appointed in the same way as they are for Planning appeals and will have the same processes available to them.

This means that the majority of appeals will be considered and decided by the Reporter, on behalf of the Scottish Ministers. These are often referred to as 'delegated' appeals. A small number of appeals are 'recalled' by the Scottish Ministers who, in those cases, make the final decision themselves. In these cases the Reporter will go through the same process(es) but will make a recommendation to Ministers rather than making a decision themselves. Ministers do not have to agree with the Reporter's recommendation. It is proposed that Scottish Forestry's future Corporate Services Team manages the process for recalled appeals since they will not have had any involvement in the decisions being challenged.

Some appeals can be determined using only the information provided by the appellant and the original decision maker, however it is sometimes necessary to obtain some further information on a particular matter. Where this happens, the Reporter may choose to carry out one or more of these further procedures:

- Inspection of the site
- Further written submissions
- Hearing session
- Inquiry session

The Reporter will choose the most effective and efficient method for obtaining the information needed. Hearing or inquiry sessions will involve people presenting their case in person in front of the Reporter. Hearing sessions take the form of structured meetings, while inquiry sessions are normally more formal events similar in nature to cases in the law courts. The Reporter will always ensure that everyone is aware of what is expected of them.

While ultimately it is the Reporter's role to decide whether (and, if so, what) further procedure is needed to inform the decision on an appeal, both the appellant and Scottish Forestry will be entitled to express an opinion on which procedure (or combination of procedures) they think there should be.

More information on how the Reporters operate is available on their website⁵.

Questions

13. Do you agree with the proposals?

If no:

14. Would you like to see anything removed from the proposals?

If yes: What and why?

15. Would you like to see adjustments made to the proposals?

If yes: What adjustments and why?

16. Would you like to see anything added to the proposals?

If yes: What additions and why?

⁵ <https://beta.gov.scot/publications/planning-appeals-guide/>

Compliance

Key points of our proposal

- Conditions on remedial notices and restocking directions will be grounded in sustainable forest management and impacts on communities and individuals; the environment, biodiversity or species; or retaining or increasing woodland cover.
- Restocking directions will include the reasons why the restocking direction is being given.
- Temporary Stop Notice compensation will be available for losses between the day the notice is served and the day it is revoked.

Remedial notices

The 1967 Act contains no provisions for issuing remedial notices. Instead, if restocking associated with a felling licence or felling associated with a felling direction has not been completed and the deadline for the completion passed, including any extended deadline, Forestry Commission Scotland will issue an 'Enforcement Notice'. This is a notice which details actions which must be completed and their associated deadlines. Failure to comply with an Enforcement Notice is an offence.

The 2018 Act lays out that a remedial notice requires the person to whom it is served to take steps or stop activities within a timescale specified in the notice. The Scottish Ministers may give a person a remedial notice if it appears to them that the person has failed or is failing to comply with:

- a condition on felling permission;
- a felling direction (including any condition imposed on it);
- a restocking direction (including any condition imposed on it); or
- a registered remedial notice.

Not complying with a condition attached to a felling permission, felling direction or restocking direction is an offence. Serving a remedial notice does not affect whether a prosecution is pursued. A person commits a further offence if they fail to comply with the remedial notice, including any conditions attached to it. If a person fails to comply with the notice, the Scottish Ministers may enter the land to which the notice relates and take the steps or stop the activity set out in the notice. As with permissions and directions themselves, remedial notices and their conditions can be registered in the Land Register of Scotland or the General Register of Sasines.

Our proposal is that conditions will be set in relation to the impacts of the felling and subsequent management of the site(s) on:

- communities or individuals;
- the environment, biodiversity or species; or
- retaining or increasing woodland cover.

These could include, for example, conditions relating to:

- restocking (ground preparation, protection, densities, species, and timescales);
- maintenance operations;
- compliance with sustainable forest management;
- reporting to the Scottish Ministers when certain activities have taken place (felling, planting); or
- notifying the Scottish Ministers of an intended change in ownership.

Conditions, and the timescales within which they must be completed, will be set on a case by case basis. In order to ensure consistent application of the ability to set conditions, guidance will set out:

- how conditions should be determined;
- how timescales will be determined;
- model conditions for any that are frequently required; and
- under what circumstances conditions may be varied or revoked.

Restocking directions

The 1967 Act gives powers to Forestry Commissioners to issue a restocking notice to someone who has been convicted of felling trees without a licence. A restocking notice requires the restocking of the land that has been illegally felled, or planting elsewhere to compensate for the woodland loss.

The 2018 Act gives the Scottish Ministers powers to issue a restocking direction where it appears to them that felling has been carried out and it was not:

- covered by an exemption;
- in accordance with a permission (or conditions have not been complied with);
- in accordance with a direction (felling or restocking); or
- in accordance with a remedial notice.

The issuing of a restocking direction does not rely on there having been a conviction.

A restocking direction can require a land owner to restock the land on which the felling took place (or that the conditions related to) or other land. It is an offence not to comply with a restocking direction.

Our proposal is that Regulations specify that a restocking direction will always:

- be notified in writing to the owner of the land;
- provide the reasons why the Scottish Ministers have concluded that the felling falls into one of the circumstances where a restocking direction can be given;
- specify the location to which the direction relates;
- specify the number of trees to be planted;
- specify the species of trees to be planted; and
- specify actions that must be taken and the dates by which the actions must be completed.

Our proposal is that conditions will be set in relation to the impacts on:

- communities or individuals;
- the environment, biodiversity or species; or
- retaining or increasing woodland cover.

These could include, for example, conditions relating to:

- ground preparation;
- protection;
- restocking (densities, species and timescales);
- maintenance operations;
- reporting to the Scottish Ministers when certain activities have taken place (felling, planting);
- notifying the Scottish Ministers of an intended change in ownership;
- compliance with sustainable forest management; and
- ecological protection, e.g. timescale for felling that ensures the bird breeding season is avoided or specifying exclusion zone.

Conditions, and the timescales within which they must be completed, will be set on a case by case basis. In order to ensure consistent application of the ability to set conditions, guidance will set out:

- how conditions should be determined;
- how timescales will be determined;
- model conditions for any that are frequently required; and
- under what circumstances conditions may be varied or revoked.

Compensation for Temporary Stop Notices

Temporary Stop Notices (TSNs) are new. They will allow the Scottish Ministers to require felling to stop on any site where they believe that felling is taking place unlawfully, allowing investigations to begin safely on site. The 2018 Act provides that compensation may be available to those who have suffered a loss as a result of a TSN, where the felling was in fact being carried out lawfully and the TSN was revoked.

Our proposal is that Regulations further stipulate that:

- Compensation will be available for losses incurred between the date of effect of the TSN and the date it was revoked.
- Applications for compensation will be made within 12 months of the date the TSN was revoked and using a form provided by the Scottish Ministers.
- All applications will include, as a minimum, the applicant's name and address, the location of the trees that the application relates to, and proof of costs incurred and/or the method used to calculate the loss of value in the trees.

Questions

17. Do you agree with the proposals?

If no:

18. Would you like to see anything removed from the proposals?

If yes: What and why?

19. Would you like to see adjustments made to the proposals?

If yes: What adjustments and why?

20. Would you like to see anything added to the proposals?

If yes: What additions and why?

Impact Assessments

We are required to carry out a number of impact assessments for proposals of this type. These are outlined below and, where a partial assessment is being provided for your comments these are provided as separate documents.

Business and Regulatory Impact Assessment

Presented alongside this consultation is a partial Business and Regulatory Impact Assessment (BRIA) based on our proposals. This document captures the views that we have gathered so far on the potential impacts of our proposals.

A final BRIA, taking into account any information gathered as part of this consultation exercise, will be published after the consultation analysis is complete.

Children's Right and Wellbeing Impact Assessment

As part of our commitment to respect, protect and fulfil the rights of children under the UN Convention on the Rights of the Child we assess proposed legislation and policy for the possible direct and indirect impacts on the rights and wellbeing of all children and young people, no matter what their individual backgrounds and circumstances, and any necessary mitigation.

Our assessment is that no aspect of these Regulations will affect children and young people.

Data Protection Impact Assessment

Presented alongside this consultation is a partial Data Protection Impact Assessment (DPIA) based on our proposals. This document captures the safeguards that will be in place to protect personal data gathered by Scottish Ministers in discharging their functions as the forestry regulator. It considers the processes as a whole, rather than focussing on changes being made as a result of the new Regulations, but it does not specifically assess any IT systems as those will be assessed by their own specific DPIAs. A final DPIA, taking into account any information gathered as part of this consultation exercise, will be published after the consultation analysis is complete.

Equalities Impact Assessment

We are committed to promoting equality and removing or minimising disadvantage which may be experienced by different groups of people. We have a duty to consider the impact of proposals like these on people who may be differently affected in relation to the protected characteristics under the Equality Act 2010. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We have considered the impacts of our proposals on these characteristics and have concluded that no EQIA is required.

Fairer Scotland Duty Assessment

We are required to actively consider whether we can narrow inequalities of outcome caused by socio-economic disadvantage when making strategic decisions. We have considered these proposals in the context of this 'Fairer Scotland Duty' and have concluded that they are not within the scope as they do not, individually or cumulatively, constitute strategic decisions.

Strategic Environmental Assessment

Presented alongside this consultation is a Strategic Environmental Assessment (SEA) Environmental Report. This has been prepared in accordance with the requirements of the Environmental Assessment (Scotland) Act 2005. SEAs help us to consider the potential impact of plans and programmes on the environment and therefore avoid or reduce significant adverse effects on it and look for opportunities to enhance it.

Questions

21. Do you agree with the impact assessments?

If no:

22. What do you disagree with and what do you think should be in its place?

Responding to this Consultation

We are inviting responses to this consultation by Sunday 14 October 2018.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/forestry/fellingandrestocking>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of Sunday 14 October 2018.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

futureforestry@gov.scot

Or

Forestry Devolution Team, Natural Resources Division
Scottish Government
3 G South
Victoria Quay
Edinburgh
EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to

futureforestry@gov.scot

Or

Forestry Devolution Team, Natural Resources Division
Scottish Government
3 G South
Victoria Quay
Edinburgh
EH6 6QQ

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Regulation of felling and restocking: consultation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



Scottish Government
Riaghaltas na h-Alba
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