

Section 22: Power to suspend statutory requirements for experimental schemes: Case Studies

The following are some potential examples of how the suspension power provided in section 22 of the Environment (Wales) Bill may be used. These are merely illustrative examples and not proposals for suspension.

The detail of any proposal would need to be worked through, for example to avoid unintended consequences in relation to other permitting or licensing regimes (including of course where those are implementing European obligations in Wales (e.g. licensing of activities by NRW under the Conservation of Habitats and Species Regulations 2010)).

A. FORESTRY ACT 1967

1. Section 1(3A) – Balancing Duty

1.1 Achieving a ‘Reasonable Balance’ in relation to the exercise of forestry functions

This case study provides an example of how a temporary suspension of section 1(3A) could enable an experimental scheme. Section 1(3A) provides:

In discharging their functions. . . the [appropriate forestry authority] shall, so far as may be consistent with the proper discharge of those functions, endeavour to achieve a reasonable balance between—

(a) the development of afforestation, the management of forests and the production and supply of timber [, the production and supply of timber and, in Scotland, the delivery of the climate change targets], and

(b) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest.

The appropriate forestry authority in Wales is Natural Resources Wales (NRW).

This subsection requires NRW to discharge its functions while endeavouring ‘to achieve a reasonable balance’ between the afforestation and the management of forests for the production and supply of timber, and the ‘conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest’.

An experimental scheme would enable NRW on behalf of Welsh Ministers, to test the suspension of the ‘balancing duty’ in order to trial a different approach to managing Welsh Government Forestry Estate in line with the sustainable management of natural resources.

1.2 Reasons:

While the balancing duty suggests that a trade-off is required between economic and conservation considerations in relation to the Welsh Government Woodland Estate, it does not recognise the value of ecosystem services. Therefore the duty may act as a blockage to NRW fully undertaking its role in relation to the sustainable management of natural resources and in applying the principles in the exercise of their functions.

1.3 Scheme:

An experimental scheme could involve, for example, temporarily suspending the section 1(3A) to enable NRW to continue its ongoing work on recreation, education and community engagement on the forestry estate, which would aim to maximise the multiple benefits of the woodland estate for society, the economy and the environment. A scheme of this kind would inform how NRW's forestry functions could be best extended to reduce the risk of challenge that may come with the balancing duty as currently worded.

In addition, the balancing duty may not enable targeted action in relation to carbon storage.

For example in relation to Scotland, this part of the Forestry Act enables afforestation to 'deliver climate change targets'. There is no equivalent provision for England or Wales. This may be an important tool in relation to the new targets provided in Part 2 of the Bill.

1.4 Potential conflicts with NRW's new purpose:

- Considering multiple benefits provided by ecosystems;
- Take account of the benefits and intrinsic value of natural resources and ecosystems;
- Take account of the short, medium and long-term consequences of actions.

2. Section 9(1) – Felling Licences

This case study provides an example of how a temporary suspension of section 9(1) may assist an experimental scheme. Section 9(1) states:

A felling licence granted by the [appropriate forestry authority] shall be required for the felling of growing trees, except in a case where by or under the following provisions of this Part of this Act this subsection is expressed not to apply.

The appropriate forestry authority in Wales is NRW.

2.1 The current situation

NRW uses the UK Forestry Standard as the basis against which forestry proposals, including felling licences are approved. Felling licences are issued for both felling and thinning of trees. For the former, NRW are able to apply restocking conditions which ensure that woodland cover is maintained. These conditions are prescribed

within the Act. Under the legislation NRW has powers to enforce restocking conditions where the licence is not complied with.

The UK Forestry Standard sets out the UK Government's approach to sustainable forestry and delivers a balance between the interests of forestry as a commercial business on one hand, and safeguarding environmental and other public benefits on the other hand.

Many woodlands in Wales are certified under the UK Woodland Assurance Standard (UKWAS). UKWAS exists to provide a practical basis for certification schemes to operate in the UK. The UKWAS standard is essentially an audit protocol or check-list, and it is endorsed by both the major international certification schemes, FSC and PEFC.

The UKWAS check-list is derived from two principal sources: the requirements of the UKFS, (which are necessary for forestry proposals to be approved in any case), and the requirements of the international certification schemes.

2.2 The Suspension Power

The suspension power could be used to explore how an 'earned recognition' exemption from some felling licences as required by Forestry Act 1967 might be desirable.

2.3 Potential Schemes

Thinning licences

Certified woodlands in Wales must meet UKFS, so an assessment of proposals by NRW and the need for it to issue a felling licence for thinning operations may be an additional burden in some situations where woodlands are certified and therefore being managed to UKFS standards.

An experimental power would enable NRW on behalf of the Welsh Ministers, to test an exemption for thinning in certified woodlands, with a records management system to monitor activity.

Clear Felling licence conditions

All certified woodlands must have management planning documentation which meets the requirements set out in UKWAS, and therefore the principles of FSC and/or PEFC. These will specify how the woodland management across the whole woodland meets the standards of sustainable forest management and therefore requires the woodland to be restocked or regenerated in accordance with those principles. One restriction of felling licences is that restocking conditions are set at a "licence by licence" scale, and therefore apply UKFS at that scale rather than at the forest scale. Also there are burdens on both NRW and owners in relation to time taken to ensure that the owner agrees with the conditions.

Under an experimental power, NRW would be able to test on behalf of Welsh Ministers, allowing conditions for felling licences in certified woodlands to be adapted to simply state 'restocking as per the FCS/PEFC approved management planning documentation'. NRW would still issue the licence, due to the checks required in UKFS such as acidification implications but could

take a light touch to restocking proposals. The requirement for the owner to agree the proposals could be removed, as he/she would be a party to the approved management plan.

2.4 Delivering sustainable management of natural resources

Lifting regulatory burdens on persons managing forestry sustainably in accordance with UKFS and UKWAS;

Promoting sustainable forest management by incentivising compliance with UKFS and UKWAS certification;

Improving regulating services provided by ecosystems;

Improving supporting services provided by ecosystems;

Improving provisioning and cultural services provided by ecosystems

B. LAND DRAINAGE ACT 1991

3. Section 23 – Consent Requirements

This case study provides an example of how a temporary suspension of section 23(1) may assist an experimental scheme. Section 23(1) states:

No person shall—

(a) erect any mill dam, weir or other like obstruction to the flow of any ordinary watercourse or raise or otherwise alter any such obstruction; or

(b) erect a culvert in an ordinary watercourse, or

(c) alter a culvert in a manner that would be likely to affect the flow of an ordinary watercourse,

without the consent in writing of the drainage board concerned.

3.1 Operation of section 23

Each consent is assessed on the impact the obstruction may have on the watercourse and the impact further down the watercourse, where there are a number of obstructions e.g. grip blocks, as each obstruction may be in different part of the watercourse, the impact of the one obstruction at one point in a watercourse may be very different to the impact of another obstruction at another point in the watercourse.

Under the LDA, a contravention of the requirement for consent is classed as a nuisance. Section 24(1) states:

If any obstruction is erected or raised or otherwise altered, or any culvert is erected or altered, in contravention of section 23 above, it shall constitute a nuisance in respect of which the drainage board concerned may serve upon such person as is specified in subsection (2) below a notice requiring him to abate the nuisance within a period to be specified in the notice."

An IDB (where the land is within an internal drainage district) or local authority where it is not in an IDD may issue a notice to a person to stop the nuisance within

specified period of time (s24(1), LDA 1991). If a person does not comply with the notice or acts in contravention of the notice, the drainage board may remove the works and recover the costs of the removal (s24(4), LDA 1991). Further they may be liable to a fine (s24(3)).

Under the LDA a drainage board is:

a) in relation to a watercourse in an internal drainage district – it is the IDB – for the majority of IDD, NRW are therefore the drainage board for all of the IDDs in Wales;

b) in relation to a watercourse in an area outside and IDD – it is the lead local flood authority (i.e. the local authority) as defined in s6 of the Flood and Water Management Act 2010.

3.2 Potential Scheme in relation to grip blocking

Grip blocking is the practice of creating small dams across a ditch or “grip” to retain water in areas of previously drained land, usually peat-bogs. It is an important tool in facilitating the rewetting of upland areas for peat restoration, carbon storage and slowing down the release water into ordinary and main river system.

To identify situations where the application of best practice can be applied in relation to the use of grip blocks without the need of a consent. To assess what best practice approaches are appropriate and effective. This would be where NRW are the party undertaking the scheme on the land that they either own or manage.

3.3 Suspension power

The power could be used to remove the requirement for consent for the installation of grip blocking under an experimental scheme where NRW is the applicant. This would ensure that NRW were not therefore subject to a contravention under section 24.

3.4 Assisting sustainable management of natural resources

Improving regulating services provided by ecosystems, in particular peatbogs to provide carbon storage;

Improving regulating services provided by ecosystems, in particular in relation to assisting flood alleviation;

Improving supporting and cultural services provided by ecosystems, in particular rewetting of upland areas.