

The muirburn licensing scheme and the new muirburn code – will more of Scotland be burnt to bits?

Description



Muirburn, Choinneachain Hill, above Loch Turret, North West of Crieff during the very dry spell this S

Over the last six weeks or so I have written several posts about how Scotland is being burned to bits by land-managers, many of whom carry on with muirburn whatever the fire risk. The muirburn

provisions of the Wildlife Management and Muirburn (Scotland) Act were intended by the Scottish Parliament to change that for the better, partly by shifting the dates of the muirburn “season” but mainly by introducing a statutory muirburn licensing scheme which sets out the purposes for which muirburn can be used and the framework for doing so through a new Muirburn Code.

The most important change introduced by the licensing scheme is it will make it unlawful to burn on peatland over 40cms deep for grazing or grouse moor management purposes and anyone doing so risk a fine of up to £5k . In England the UK Government is currently consulting on banning burning on peat 30cms deep ([see here](#)) – the difference illustrates how decisions about what it is acceptable to burn are being decided not by science but by the power of vested interests. Ignoring the science of how peatlands develop and their importance for carbon capture (matters I will return to in future posts) land managers in Scotland will still be able to apply for a license to burn peatland to prevent wildfires, restore nature or for research purposes.

A second change, implementing a recommendation of the the Deer Working Group, is it will no longer be lawful to burn vegetation to improve grazing for deer anywhere. That is likely to be very difficult to enforce as all a stalking estate will need to do is rent a small flock of sheep and they can then apply for a muirburn license to improve grazing for livestock!

Once a land manager has established that they wish to use muirburn for lawful purposes and have set out the boundary of the area/s to be covered by the license, the detail about exactly where, when and how the muirburn is to be conducted will be all covered by a new Muirburn Code approved by Scottish Ministers. I have referred to NatureScot’s draft of the new Code ([see here](#)) several times in recent weeks, particularly over its failure say muirburn must cease at times of high fire risk, but had also identified a number of places where the draft new Code appeared to be weaker than the current one.

In preparing my submission to NatureScot’s consultation on the draft new Code ([see here](#)), which closed on Monday, I went through both codes systematically. That comparison confirms that the draft new Code is significantly weaker than the current code. I have also, however, identified two further serious weaknesses in the Code which are worth highlighting here for anyone who does not want to read my full response.

The purpose and status of the Code

The Act, as correctly stated by NatureScot in the draft Code, has a “key role in muirburn licensing” and requires (Clause 18) Scottish Ministers “to prepare a Code in relation to how to make muirburn safely and appropriately” and that anyone making muirburn (Clause 15) must “have regard to the Muirburn Code”. Adherence to the Code is therefore part of the muirburn license.

Unfortunately, the draft Code fails to explain that Clause 12 of the Act “criminalises the making of muirburn where it is not done in accordance with the terms of a muirburn licence that has effect at the time” (wording from Explanatory Notes to the Act). Instead, the draft Code states “non-adherence to the requirements set out in the Code can result in a licensing sanction”. That wording clearly undermines the intentions of the Act.

Those policy intentions in the Act originated with the Werritty Review into grouse moor management. This recommended “that the Scottish Government should increase regulatory control relating to the Muirburn Code” as part of muirburn licensing – a recommendation which was accepted by Scottish

Ministers. However, the Act also repeals Section 52 ([see here](#)) of the Hill Farming Act 1946, which created four criminal offences in relation to muirburn, because these would be superseded by the new licensing scheme when this comes into effect. Those four provisions are contained in the revised Code under the lists of what license holders “MUST” and “MUST NOT” do. At the very least breaching these four aspects of the new Code should NOW be treated as a criminal offence by NatureScot under the licensing scheme, as provided for under Clause 12, rather than possibly incurring a “licensing sanction” if regulatory control over muirburn is not to be weakened.

If NatureScot’s intention is that ALL breaches of the current MUST and MUST NOT provisions in the draft new Code are to be treated as criminal offences that would most welcome and would mean it represented a considerable improvement on the current voluntary Muirburn Code. However, nowhere in the draft Code is this stated and its tone suggests suggests it represents a weakening of the law and guidance as it currently stands.

The protection of woodland – the land & burning activities covered by the Muirburn Code

One of the four criminal offences removed by the repeal of S52 of the Hill Farming Act is causing “damage to any woodlands on or adjoining the land or any adjoining lands, woodlands, march fences or other subjects”. This has been replaced by the following which is much weaker:

Native Woodland

Moorlands and heaths are characterised as open habitats, but they can include areas of native woodlands and trees e.g. along river edges or on steep slopes. Areas of native woodlands or trees and shrubs need to be considered when carrying out muirburn.

Woodland, woodland edges and native trees and shrubs

Actions which must be followed

- Do not burn native woodland and shrubs including juniper bushes as they are part of an Ancient woodland habitat.

Best practice – Actions which should be followed

- Leave a protective buffer of at least 10m around native woodland trees and shrubs.

The offence of damaging woodland has been replaced by the statement that woodland, trees and shrubs “need to be considered”, a statement without any force. The statement below under “Actions which must be followed” is meaningless as drafted: if the intention was to say don’t burn native

woodland IF (not “as”) it is” part of an Annex 1 Habitat” it is unclear what this refers to since “Annex 1” to the Code is about peat depths.

While the Code does state that “You must not fell (intentionally kill a tree) unless it is exempt (as set out in The Forestry (Exemptions) (Scotland) Amendment Regulations 2021)” that is about trees and not the same as protecting woodland. In addition the statement that you must not “undertake burning which leads to deforestation” is again not the same as protecting woodland habitats. It is quite possible to burn woodland and prevent it from regenerating without killing trees and “deforesting” an area (as is evidenced by recent muirburn on Morar [\(see here\)](#)).

It is acknowledged that part of the problem here is that while the Act requires those who want to undertake “muirburn” to apply for a licence (and demarcate the area they want to burn on a map) and refers to “moorland” it does not define either term. Instead the Act states “references to the making of muirburn include references to the setting of fire to, or the burning of, any heath or muir”. Heath and muir are terms that date back almost 100 years to the Heather Burning (Scotland) Act 1926 [\(see here\)](#) and don’t appear to have been defined in law. It is not clear therefore exactly which habitats are covered by the new Act. The first words in the revised code are not helpful in that respect stating “Moorlands are globally scarce, valued habitats”. This suggests that the Code is mainly about grouse moors when the policy memorandum to the Act, clause 13 and later sections of the Code make it clear it does cover burning on grassland as well as moorland.

Burning in woodland, however, unlike burning on peatland (defined as peat over 40cms deep) is apparently not covered by the Act but covered by other laws relating to trees and forestry. This makes it all the more important that the Code clearly describes the law on burning of trees and woodland and the licensing consequences if muirburn carried out under the muirburn licensing scheme damages woodland, neither of which it does at present.

As well as the importance of protecting woodland, whether native trees or commercial forestry, the new Code also needs to cover natural regeneration of woodland, which currently appears to fall into a grey area. Woodland would naturally regenerate over much moorland and grassland in Scotland if it was not for overgrazing and muirburn which kills off saplings as they become established. The Code is silent about at what stage saplings should be treated as trees, which it would be an offence to kill through the Forestry (Exemptions) (Scotland) Amendment Regulations 2021, but also about the interface between muirburn and other forestry policy. For example, current forestry policy is that there should be a 100m regeneration zone around each of the sites listed in the Caledonian Pinewood Inventory and a 500m expansion zone beyond. That directly conflicts with the advice in the revised code (which should be a **MUST** not a **SHOULD**) to leave a 10m buffer around woodland.

What needs to happen to improve the Muirburn Code?

Few people seem to have realised just how weak the draft new Muirburn Code is – or if they have, they have not said so publicly.

It is good therefore to see that the Cairngorms National Park Authority in their response have called for a ban on muirburn in times of high fire risk, following my criticisms that they have been creating one set

of rules on fires for landowners and one for the public ([see here](#)). While the other points they make are all helpful, the limited nature of their response to the consultation is worrying. It includes nothing, for example, about the need to protect the current 100m regeneration zones and 500m expansion zones around areas of Caledonian Pine Forest from burning.

It is not just other public authorities which should be concerned about the draft Code but the local communities and visitors to the countryside whose interests (and health) are affected by muirburn. Members of the local community on Bute, for example, have informed me that the fires there – which appear to have been caused by muirburn – destroyed an area of community woodland (and part of another Site of Special Scientific Interest).

Unfortunately, the senior management and board at NatureScot appear to lack the political will to tackle the issues that affect the public interest and instead are in hock to landowning interests. I doubt that any representations made by the general public to NatureScot will change that and the main purpose of my own submission was to raise awareness about how weak the proposed Code really is.

What is now needed is that those concerned and affected by muirburn start using the media and lobbying their political representatives, as effectively as landowning interests behind the scenes lobby NatureScot and Scotland's civil servants, to put the case for a much stronger muirburn code. A complete ban on muirburn at times of high fire risk, which is easy for anyone to understand, is a good place to start.

It should, however, also be in the interests of all involved in the forest industry and native woodland, an alternative lobby, to demand much greater protection for woodland. Part of that should involve the voluntary organisations concerned with woodland, like the Woodland Trust and Trees for Life, which have been silent up till now, speaking out. If you are a member of any such organisations, please ask them to do so.

Category

1. Cairngorms
2. Other parts Scotland

Tags

1. CNPA
2. forestry
3. grouse moors
4. landed estates
5. muirburn
6. NatureScot
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