



WILDLIFE AND NATURAL ENVIRONMENT BILL

CONSULTATION RESPONSE

Draft

MUIRBURN

Background

Muirburn is the act of prescribed burning of vegetation on open semi-natural habitats such as heath or moor (muir is the Scottish word for moor) and includes the burning of plants such as gorse, heather and grass. Muirburn is carried out throughout the Scottish uplands by land managers such as hill farmers, crofters, estate managers and gamekeepers, although it can be carried out on any land regardless of altitude. It is an important land management tool used to stimulate fresh food sources on rough grassland or managed moorland for livestock, game and wildlife. It also plays an important role in managing the risk of wildfires by preventing the build up of older vegetation which can act as a source of fuel. More recently, prescribed burning has been used as a tool to manage habitats for conservation objectives and there is interest in exploring its role in pest and disease control.

Current legislative framework

The Hill Farming Act 1946

The making of muirburn is regulated by the Hill Farming Act 1946. Offences include:

- * burning outwith the prescribed muirburn season
- * beginning muirburn at night (between one hour after sunset and one hour before sunrise)
- * causing damage to woodland or neighbouring land by not taking due care or providing insufficient staff and equipment
- * failing to give neighbours or the proprietor of the land 24 hours notice of the intention to carry out muirburn

The Climate Change (Scotland) Bill

The Climate Change (Scotland) Bill, introduced in the Scottish Parliament in December 2008, proposes the insertion of a new provision in the Hill Farming Act creating an enabling power for the Scottish Ministers to vary the permitted muirburn dates in response to climate change. This will enable land managers to adapt to climate change in the event that changing weather patterns have an adverse effect on the ability to carry out muirburn effectively.

Newtonrigg, Holywood, DUMFRIES DG2 0RA

Scottish Charity No: SC010204

President: Professor R H Marrs BA PhD DSc
Chairman: M C Hay MA
Director: S P R Thorp BSc(Hons) CEnv MRICS

Tel / Fax : 01387 723201
Email: info@heathertrust.co.uk
Web: www.heathertrust.co.uk

The Muirburn Code

Under cross compliance legislation, land managers must also follow the best practice guidance in the Muirburn Code in order to claim Single Farm Payment.

Rationale for considering legislative reform

Last year the Scottish Government consulted on the muirburn provision in the Climate Change (Scotland) Bill. Responses to the consultation suggested that the laws regarding muirburn in the Hill Farming Act need to be reviewed to reflect changes in the objectives and practice of prescribed burning since the Act was introduced in 1946. Many of the suggested changes were outwith the scope of the Climate Change (Scotland) Bill and could not be progressed at that time. The Wildlife and Natural Environment Bill now presents the opportunity to address these issues, and others, in order to update muirburn legislation so that it is fit for purpose in the 21st century.

Scottish Government objectives

In reviewing muirburn legislation, the Scottish Government's overall objective is to encourage and facilitate well managed muirburn, in order to maximize the associated environmental and economic benefits, while minimizing irresponsible or damaging burning practice.

Muirburn is a tool used to manage habitats for economically important species, including game and livestock, and as such contributes to the Scottish rural economy. It is estimated that shooting and stalking of all types in Scotland involve 1.5 million gun days per year, generating £240 million. By increasing grazing capacity, muirburn also improves agricultural productivity, particularly in areas of North and West Scotland.

Well managed muirburn may under certain circumstances contribute to meeting Scottish Government objectives for reducing CO₂ emissions. Scottish peat holds approximately three thousand million tonnes of stored carbon. Wildfires in rank vegetation can reach sufficient intensity to release this stored carbon through ignition of peat and post-fire erosion. Although some wildfires may be caused by escaped muirburn, a significant number result from visitor carelessness (e.g. discarded cigarettes, barbecues etc.) or deliberate arson. The risk of wildfire is significantly increased where effective management of vegetation has not been carried out, because of the accumulation of plant fuel material. Muirburn can be an important element of such management. By reducing the risk of serious wildfires, muirburn also contributes to preserving human safety and property in remote areas.

The Scottish Government also wishes to encourage environmentally responsible burning by ensuring that impacts on nesting birds, where there is evidence of this, are avoided, and by preventing burning activities which risk damage to soils.

Finally, we wish to facilitate the use of muirburn for other beneficial purposes, such as habitat restoration, pest control and research, and the use of suppression burning to control wildfires.

OPTIONS FOR LEGISLATIVE REFORM

The need for increased flexibility in muirburn regulation

The current position

Currently, muirburn is permitted only within the season defined under the Hill Farming Act. This extends from 1st October until 15th April. This period may be extended, with the landowner's permission, until 30th April at altitudes below 450m and until 15th May above 450m. It is an offence to make muirburn outwith the prescribed season.

Proposals for reform

Increased flexibility in the regulation of muirburn dates has been advocated for the following reasons:

- * there is interest in using prescribed burning for new purposes, including habitat restoration and conservation management, which would require the ability to burn out of season

- * the ability to burn out of season may allow muirburn to be used to control environmentally and economically damaging pests

- * the ability to burn out of season would allow for more research, for instance into the effectiveness of prescribed burning in controlling diseases such as *Phytophthora ramorum/kernoviae*, or into the environmental impact of burning at different times of year

- * land managers report that a shortage of suitable burning days, often caused by wet spring weather, makes it difficult to carry out the required amount of muirburn within the currently-defined season

Increased flexibility in the regulation of muirburn dates could be achieved by introducing a system of out of season licensing for muirburn and an enabling power for Scottish Ministers to vary the permitted muirburn season (for reasons other than to adapt to climate change 6), as described below:

Licensing out of season muirburn

A provision could be inserted into the Hill Farming Act allowing Scottish Ministers to issue licences for prescribed burning outwith the permitted muirburn season.

Licences would be issued for specific purposes, such as

- * habitat restoration or conservation management
- * pest/disease control
- * research

Licence applications would be assessed on the basis of agreed criteria, such as whether burning is for a permitted purpose, and legally binding conditions could be attached to the licence.

Q67A. What are your views on the proposal that Scottish Ministers be given powers to issue licences for prescribed burning outwith the specified season?

The proposal is supported, provided that the powers are not used to shorten the burning season. There are already enough difficulties getting an agreed area of muirburn carried out within the current season. Climate change (warmer, wetter winters) is likely to make this more difficult, rather than easier.

The Heather Trust would support an expansion of the season into September (see Question 70) and there would be no objection to removing the right to burn in May, providing an ability to burn under licence is retained (see Question 72).

Q67B. For what permitted purposes do you think these licences should be issued? Please tick at least one.

- habitat restoration or conservation management
- pest/disease control
- research
- other - please explain
There may be occasions where it would be appropriate to grant a muirburn licence to allow a burning plan to be implemented out of season where this was deemed to be in the public interest. For example: to complete an important project, for safety, or in conjunction with wildfire risk reduction.

Q68A. What criteria should be used to assess licence applications? Please tick at least one.

- evidence of need for out of season burning
- training/experience of personnel
- available equipment
- provision of a burning plan
- other - please explain

It has not been stated who will approve licences. The Heather Trust would not support the approval of licences becoming a 'tick box' exercise. It is considered essential that licences are approved by someone with practical experience of muirburn.

The criteria for granting a licence should be set out in any revision of the Muirburn Code so that anyone applying for a licence is aware of the criteria, and the licence can require that any approved muirburn be carried out in accordance with the provisions of the Code.

Q68B. What conditions should be attached to licences?

All burning should take place in accordance with the Muirburn Code.

Muirburn should only be carried out for the purposes stated on the licence and the approval should be time limited.

Variation of the permitted muirburn season

A provision of the Bill could create a power for Scottish Ministers to vary, through secondary legislation, the permitted dates for muirburn (for reasons other than to adapt to climate change). In order to provide assurance to land managers that the season will not be shortened, it could be specified that the total number of burning days must not be reduced.

This power could be used, for instance, to extend the beginning of the muirburn season into September if it was considered that this would assist land managers in completing muirburn programmes. It is acknowledged that many land managers are busy with stalking activities during September, but the ability to burn at this time may be helpful in some instances. Any decision to allow burning in September would need to be based on evidence that this will not have adverse environmental consequences, such as an increased risk of wildfire. Introducing a system of out season licensing would allow research into the impacts of September burning in order to inform this decision.

Q69A. What are your views on the proposal that Scottish Ministers be given powers to vary the permissible dates for muirburn for reasons other than to adapt to climate change?

The proposal is supported.

The Heather Trust does not believe that there is sufficient evidence to show that climate change has introduced changes that require a change to the dates of the muirburn season, but as covered elsewhere in this Consultation, there are other reasons for introducing flexibility into the dates of the muirburn season.

Q69B. For what reason do you think the dates should be varied? Please tick at least one.

- habitat restoration or conservation management
- pest/disease control
- research
- other - please explain
When it is deemed to be beneficial.

There may be some instances where it would be more appropriate to allow burning under licence rather than amending dates. The interaction between the proposed licence system and an ability to change the dates of the season will need to be considered and made clear.

Q70. Would varying the permitted dates to allow prescribed burning in September be beneficial? Please explain your answer.

This proposal is supported subject to careful consideration of the potential impacts on other flora and fauna. Benefits of burning in September are considered to be:

- Reduce pressure on the end of the muirburn season to get the planned area burnt;
- Reduce the impact of muirburn on the bird nesting season in the spring;
- Often the weather and condition of the heather can be better for burning in the autumn; &
- On farms, there will be no conflict with lambing and therefore labour is more likely to be available.

Possible disadvantages include:

- September burning may not benefit estates with stalking & grouse enterprises that are active in September; &
- Investigation would be required into impact September burning might have on other flora & fauna.

Because of the variation in local conditions over Scotland, it has been argued that regulating muirburn on a national level is unlikely to be effective, and that greater account should be taken of regional variation. One way to achieve this would be to create a power for Scottish Ministers to vary the permitted muirburn dates on a geographical basis, so that different dates apply in different areas of Scotland. Further analysis would be needed to inform how such a system should work. However, an enabling power could allow time for details to be specified under secondary legislation.

Q71. If a power to vary the muirburn season is created, what are your views on the proposal that Scottish Ministers should be able to vary the permissible dates on a geographical basis to take account of regional variation?

This approach is supported. There are often muirburn seasons when the conditions in parts of the country are completely different and it makes sense to be able to adapt the muirburn season, if necessary, to the prevailing conditions.

Proposals need to be drawn up to agree how this could work in practice. The obvious boundaries to use would be watersheds. In some areas these coincide with regional & administrative boundaries but some land management units cross such boundaries and these might need to be considered separately.

As stated previously, the Heather Trust would not support any reduction in the length of the existing seasons.

Removal of the ability to burn after 30th April

The current position

Currently, the muirburn season extends from 1st October until 15th April. This period may be extended, with the landowner's permission, until 30th April at altitudes below 450m and until 15th May above 450m.

Proposals for reform

There is evidence that many moorland birds are nesting in May and that muirburn at this time is likely to result in the destruction of nests. The law on muirburn could be amended to remove the ability to burn after 30th April at altitudes above 450m. Burning at this altitude between 30th April and 15th May could instead be permitted under licence, provided that the criteria for assessing applications were met. The Scottish Government understands that currently, little burning takes place after 30th April and that removing the ability to burn without a licence at this time is unlikely to affect the majority of practitioners.

Q72. In order to reduce impacts on nesting birds, should it be specified that muirburn is not permitted (unless under licence) after 30th April? Please explain your answer.

The Heather Trust agrees that little muirburn takes place after 30th April. We believe that there may be instances when burning in May could be justified but the Trust would be content to see this take place under agreed licensing arrangements.

Prohibition of burning at night

The current position

Under the Hill Farming Act, it is an offence to commence muirburn at night, between one hour after sunset and one hour before sunrise. The creation of suppression fires (or backburning) is an important tool used to control the spread of wildfires. However, it is not currently lawful to start a suppression fire at night, and this may hinder efforts to control fires in some scenarios.

Proposals for reform

The law on muirburn could be changed to provide that it is an offence to commence muirburn between one hour after sunset and one hour before sunrise except when commencing suppression fires.

Q73. What are your views on the proposal to permit the lighting of suppression fires at night, to assist in the control of wildfires?

This proposal is supported.

The use of suppression fires is a valid form of wildfire control. The more favourable conditions for firefighting that can occur at night (reduced wind speeds, lower moisture levels and reduced temperatures) can provide an opportunity to gain control of a wildfire.

Wildfires can occur at any time of the year and therefore, if the use of suppression fires is supported, consideration should be given to introducing the ability to set a suppression fire at any time.

Authorisation issues will need to be considered.

Neighbour notification

The current position

Under section 25(c) of the Hill Farming Act, practitioners must give the landlord or neighbouring land owners at least 24 hours written notice of their intention to make muirburn, and the approximate location and size of the burn.

Proposals for reform

In order to reduce unnecessary bureaucracy before burning, the legal requirement for neighbour notification could be removed.

Because the ability to carry out muirburn depends on unpredictable weather conditions, it may not be possible for land managers to know even hours in advance if they will burn, and if so,

the location and extent of the burn. Obeying the current provision may therefore impair the flexibility to burn in appropriate conditions.

In addition, not all neighbours may have an interest in being notified, others may be absentees or unknown, meaning that the requirement to notify may not strike the right balance between flexibility for land managers and fair notice to those who may benefit from advance notice of a burn.

It would still be an offence to cause a nuisance or health hazard because of smoke, or to cause careless damage to adjoining land or woodland.

Q74. What are your views on the proposal to remove the legal requirement to give neighbours at least 24 hours written notice of the intention to make muirburn, and the approximate location and size of the burn?

This proposal is supported.

Should the Muirburn Code be reviewed, it would make sense to include guidance that neighbours are informed before muirburn is carried out close to a sensitive boundary, but this should no longer be a requirement.

Protection of soils under the Hill Farming Act

The current position

Scotland is dominated by organic soils and peat, which hold 50% of the UK's stored carbon. The majority of the land on which muirburn is carried out lies on top of these soils. It can be argued that under certain circumstances managed muirburn may help to limit the release of this stored carbon by preventing the build up of fuel material and hence reducing the risk of damaging wildfires.

However, poorly managed muirburn has the potential to release stored carbon through direct combustion of peat, soil exposure and erosion. There is currently no legal protection for soils from inappropriate muirburn practice.

Proposals for reform

In England, the Heather and Grass etc. Burning (England) Regulations 2007 introduced new restrictions on burning practices which risk soil exposure and erosion. These Regulations make it an offence (in the absence of a licence) to:

- * burn an area larger than 10ha
- * burn an area larger than 0.5ha on rocky areas or on slopes over 45 degrees
- * expose (by burning) bare soil along the banks of watercourses where the bare soil extends more than 25 metres along the bank and is at least a metre wide at all points

* leave soil smouldering for more than 48 hours.

The new English regulations allow licences to be issued for such activities where necessary for the conservation, enhancement or management of the natural environment for the benefit of present or future generations.

In order to protect Scotland's soils, the Scottish Ministers could be given a new power to restrict through secondary legislation the types of burning practice which risk soil exposure and erosion. This power would allow time for further analysis and discussion in order to determine the details of any restrictions appropriate for Scotland. In the event that such restrictions were issued, there could be provision for issuing licences to permit such activities in certain circumstances.

Q75. What are your views on the proposal that Scottish Ministers be given powers to restrict certain types of burning practice which risk soil exposure and erosion?

The proposal to include measures to protect soils is supported, in principle. It would be very difficult to introduce regulations to cover soil protection. The preferred approach would be to introduce soil (and carbon) conservation measures into the Muirburn Code, that would provide practitioners with appropriate guidance.

This is a complicated area and the terms to be included in the guidance would need to be defined. For example: what is meant by 'rocky area', or 'bare soil'.

The need for a future review of the Muirburn Code

The Muirburn Code provides guidance for those making muirburn, sets out the types and areas of land which are suitable for making muirburn and identifies those areas which are unsuitable, such as exposed peat hags and gullies. The Code is supported by ' Prescribed Burning on Moorland. A Supplement to The Muirburn Code: A Guide to Best Practice', a technical support document.

Land managers must follow the latest edition of the Muirburn Code in order to claim Single Farm Payment, under cross compliance (GAEC) requirements. While the Code itself is not legally binding, it is an integral part of the regulatory framework and complements legislation. The Scottish Government's preferred approach is to regulate through legislation as a last resort when it is not possible to address issues through the Muirburn Code and cross-compliance, or where this has not proved effective.

A number of stakeholders have commented that the existing Code is out of date and needs to be modernised, for example to

- * include increased reference to soil, peat and wildlife protection
- * be more user friendly
- * remove inconsistencies

- * bring the Code up to date in the light of practical experience and new research findings
- * reflect any changes to muirburn legislation

Q76A. What are your views on the need to review the Muirburn Code, or the associated supplement on best practice?

The Heather Trust would like to see the Code and Supplement revised as part of a review of muirburn control, and it agrees with the 5 points above to justify this.

The Code could be improved to make it more user-friendly. Unless it is in a form that can be easily digested by those carrying out muirburn, the Trust believes that much of its impact will be lost.

More emphasis should be placed on the use of other moorland management techniques such as: cutting / swiping, wildfire risk reduction, control of scrub/gorse by fire.

A review of the Supplement is less urgent. This contains much useful information and if revised it could be used to include some detail removed from the Code.

The review of muirburn should be ongoing and the ability to introduce changes to the Code when deemed appropriate should be granted to the Minister.

Q76B. Which aspects need to be reviewed and why?

As stated above, the Heather Trust believes that the whole control of muirburn should be reviewed. The Code was given a ‘facelift’ in 2008, and it is not considered to be value for money to tinker with it further. A full revision is recommended.

Additional comments

Q77. Are there any other legislative changes which would encourage well managed muirburn; increase the scope for the beneficial use of prescribed burning; or allow wildfire risk to be managed more effectively?

Legislative Changes

- Better regulation principles need to be applied. The existing Muirburn Code is not focussed sufficiently on practitioners and it is practitioners that need to get the message about best practice muirburn.
- The Code should be revised to be better targeted.

- The legislation should be simplified to place more emphasis on best practice management as set out in a revised muirburn code. Due to its nature and location, it would be extremely difficult, if not impossible, to use legislation alone to control muirburn. Strong, carefully targeted guidance is more likely to be successful.

Prescribed Burning

- Introducing revised legislation and guidance is only the first part of the battle. A series of meetings, workshops and demonstration events should be planned to get the message out to those who carry out muirburn. The Heather Trust is well placed to organise and deliver such a programme.

Management of Wildfire Risk

- The Wildfire Forum has been promoting the establishment of Wildfire Groups / Fire Protection Groups across Scotland.
- Potentially, These Groups have a vital role to play in coordinating the resources available within the Group's area to tackle wildfires, but they can also be a conduit for muirburn training and development.
- Only a few of these Groups have been formed and this is due to a lack of support and funding. There would be great benefit arising from the establishment of these groups across Scotland. As a result of the input to the Groups that would be provided by public and private landowners and managers, and investment in the Groups by the Scottish Government would be highly geared resulting in good value for money.