



Analytical report



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COMPLIANCE WITH THE LEGISLATION REQUIREMENTS REGARDING THE «PERIOD OF SILENCE» IN FORESTRY

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The report has been commissioned by FSC Ukraine.

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Preface

The accusations of illegal harvested timber in the Earthsight¹ report relate to ambiguous legislative norm banning sanitary cuts during the «period of silence». In the FSC's answers to the most popular questions on this issue, it has been stated, in particular, that a letter was going to be sent to the relevant authorities requesting an explanation of the legal requirements, which would be used to further instruct the certification bodies. The current report contains an analysis of the applicable legislation and the position of public authorities on application of the legislation related to "period of silence".

Adoption of changes to the legislation

On May 9, 2015, the Law of Ukraine "On Amendments to Certain Legislative Acts Concerning the Protection of Fauna" dated April 9, 2015 № 322-VIII (hereinafter - Law №322) has become effective, according to which a number of amendments were made to the Law of Ukraine "On Fauna", "On Local Self-Government in Ukraine", the Code of Ukraine on Administrative Offenses, etc.

In particular, according to the new edition of Part 1 of Art. 39 of the Law of Ukraine "On Fauna", "Enterprises, institutions, organizations and citizens in carrying out any activity that affects or may affect the state of the fauna, must ensure the protection of habitats, breeding conditions and migration routes of animals. At the same time, these entities together with the central executive body that ensures the formation of state policy in the field of environmental protection, the central executive body that implements state policy in the field of forestry and hunting, local governments take measures to determine breeding sites of wild animals and timely inform the public about the rules of conduct that shall be followed on such sites".

In addition, part 5 of this article is worded as follows: "During the period of mass breeding of wild animals, from April 1 to June 15, it is prohibited to carry out works and activities that are a source of noise and disturbance (firing, blasting, fireworks, sanitary cuts, use of small motor vessels, holding rallies and other competitions on vehicles)".

¹ <https://www.earthsight.org.uk/investigations/flatpacked-forests>

Determination of wildlife breeding sites: legal prescriptions

In accordance with Part 1 of Art. 39 of the Law of Ukraine “On Fauna”, forestry enterprises, as permanent land users and permanent forest users on the provided lands of forestry purpose, when carrying out forest management activities are obliged to ensure the protection of habitats, breeding conditions and migration routes of animals.

Therefore, based on the literal interpretation of this rule, forestry enterprises together with the Ministry of Environment and Natural Resources and local self-government bodies (i.e. – village, settlement, city, district, regional councils) were obliged to take measures to establish wildlife breeding sites, and to inform citizens about the rules of conduct to be followed on such sites.

However, the law did not provide for the development of a bylaw, which would determine the procedure, method, specification of measures to be taken by enterprises (including forestry enterprises) to determine the breeding sites (including sites of mass breeding) of wildlife (including, obviously, sites of raising their offspring).

The lack of a procedure for “taking measures” by local self-government bodies and central executive bodies together with the relevant management entities is a significant gap in the Law № 322. In particular, the Main Juridical Department of the Verkhovna Rada of Ukraine on January 22, 2015 has drawn attention to this in its remarks to the relevant draft law with registration №0916.



Conflicts and shortcomings of the adopted law

In addition to the lack of a procedure for establishing breeding sites of wild animals, the Law № 322 has a number of significant shortcomings in the legislative technique, which have had an extremely negative impact on its enforcement, causing conflicts and differences in practical implementation. In particular, the Law contains various formulations of nearly similar concepts, namely:

1. In the text of Art. 26, 33, 24, 43 of the Law of Ukraine “On Local Self-Government in Ukraine” the concept of “mass wildlife breeding and offspring raising sites” is used. At the same time, in Art. 39 of the Law of Ukraine “On Fauna” almost similar, but narrower in its meaning, concept of “wildlife breeding sites” is used.

Therefore, the Law № 322 actually identifies four types of wildlife breeding sites:

- a) sites of mass wildlife breeding (excluding sites of offspring raising);
- b) sites of “non-mass” wildlife breeding (excluding sites of offspring raising);
- c) sites of mass wildlife breeding and offspring raising;
- d) sites of “non-mass” wildlife breeding and offspring raising;

In addition, the Law of Ukraine “On Fauna” in its current version also uses the following concepts:

- “wildlife habitat”;
- “conditions of wildlife breeding”;
- “other housing and constructions of animals, sites of breeding, molting, nesting colonies of birds, permanent or temporary clusters of animals, spawning grounds”.

The content of these concepts is not explained in the text of the law and at the level of bylaws, which negatively affects the understanding and interpretation of the legal act.

The biological assessment of the consistency, appropriateness and adequacy of this classification is beyond the scope of this analysis of legislation. However, undoubtedly, this regulation has complicated the implementation of the requirements of the Law № 322 in practice and caused confusion in its interpretation by controlling authorities, enterprises and local self-governments.

2. In the text of Art. 26, 33, 24, 43 of the Law of Ukraine “On Local Self-Government in Ukraine” the concept of “period of silence” is used. However, in the same Law № 322, as amended by Part 5 of Art. 39 of the Law of Ukraine “On Fauna”, a similar concept is used – “period of mass wildlife breeding, from April 1 to June 15”. It can be reasonably assumed that the term “*period of silence*” (*i.e. the period aimed at reducing or offsetting human impact on the normal functioning of wildlife during their breeding period by prohibiting works and activities that are a source of increased noise or disturbance*) used in the text of the Law №322 is a synonym of the term “period of mass wildlife breeding” used in the same law.

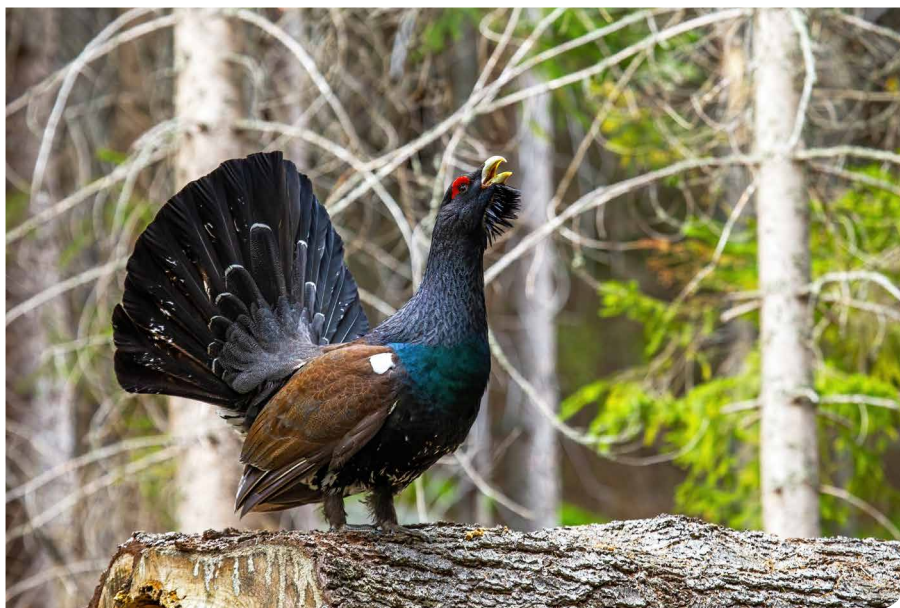
It is worth noting that in this regard the Main Legal Department of the Parliament has provided relevant remarks to the draft law with registration № 0916, stating that the “wording “period of silence” is not clear enough, does not define the nature and essence of measures needed to maintain such a regime, etc., allows ambiguous interpretation, and therefore does not comply with the principle

of legal certainty, which is an integral part of the rule of law enshrined in Art. 8 of the Constitution of Ukraine and according to which legal norms must be clear, unambiguous and unequivocal, as otherwise it is impossible to ensure their uniform application, and to preclude infinity of interpretation in law enforcement practice”.

3. The Law № 322 did not clearly delineate the competences of village, settlement, district, city and region councils regarding decision-making on declaring “period of silence” with restriction of economic activities in sites of mass wildlife breeding and offspring raising.

4. The Law № 322 contains logical inconsistencies related to certain prohibitions on some activities during the period of mass wildlife breeding, namely, the prohibition of carrying out exclusively sanitary cuts.

Inter alia, in accordance with the requirements of Paragraph 4 of “Sanitary rules in the forests of Ukraine”, approved by the Decree of Cabinet of Ministers of Ukraine № 555 dated 27.07.1995 (as amended on September 17, 2020), among the measures to improve sanitary condition of forests there are selective sanitary cuts and sanitary clear cuts. At the same time, the current forest legislation, depending on the purpose, system, method and types of trees removal, differentiates between about 30 types of felling, which are carried out in two main forms: clear cuts and selective cuts. Therefore, it is completely illogical for Law № 322 to prohibit only sanitary cuts. After all, the purpose of the “period of silence” in certain sites should a priori be to avoid any activity that is a source of increased noise or disturbance for wildlife. However, this factor of “disturbance” accompanies all, without exception, logging operations in forestry: both clear cuts and selective cuts. Therefore, the ban on sanitary clear cuts and selective cuts during the “period of silence”, based on the rules of formal logic, cannot apply only to certain forestry measures.



Position of permanent forest users on law enforcement

The vast majority of forestry enterprises have complied with the requirements of the adopted law by applying to the relevant district councils, within which the forests are located as a habitat for wildlife. Their appeals (petitions) usually provided a list of breeding sites of the relevant game management enterprises within the forest fund and proposed to define these areas as “sites of mass wildlife breeding and offspring raising”.

The fact is that according to the order of the State Forestry Committee of Ukraine dated 22.01.2004 № 4 “Procedure for determining sites for game protection and reproduction (reproductive sites)”², reproduction sites should be considered the sites belonging to sites of mass wildlife breeding and offspring raising. At least 20 % of the area of the best in terms of fodder and protection lands is usually allocated as reproduction sites, and their allocation is approved by an order of a hunting lands user and is determined in the materials of game management planning. In these areas, the Law of Ukraine “On Game Management and Hunting”³ prohibits hunting activities.

Of course, the concept of “wildlife” (wild animals) is broader than the concept of “game” and covers it. However, in the absence of an appropriate procedure for establishing the appropriate breeding sites (which is a gap in the law), such actions can be considered justified, although they do not fully meet the requirements of Law № 322.

Some forestry enterprises have been carrying out sanitary cuts during a “period of silence” since the entry into force of Law № 322 and until now, having received decisions of district councils in accordance with the established procedure. Such forest users have justified the legitimacy of their actions by the fact that the “period of silence” is not automatically introduced from April 1 to June 15 throughout the territory of Ukraine, but only in sites of wildlife breeding, determined by the relevant decisions of district and settlement councils.

² <https://zakon.rada.gov.ua/laws/show/z0158-04#Text>.

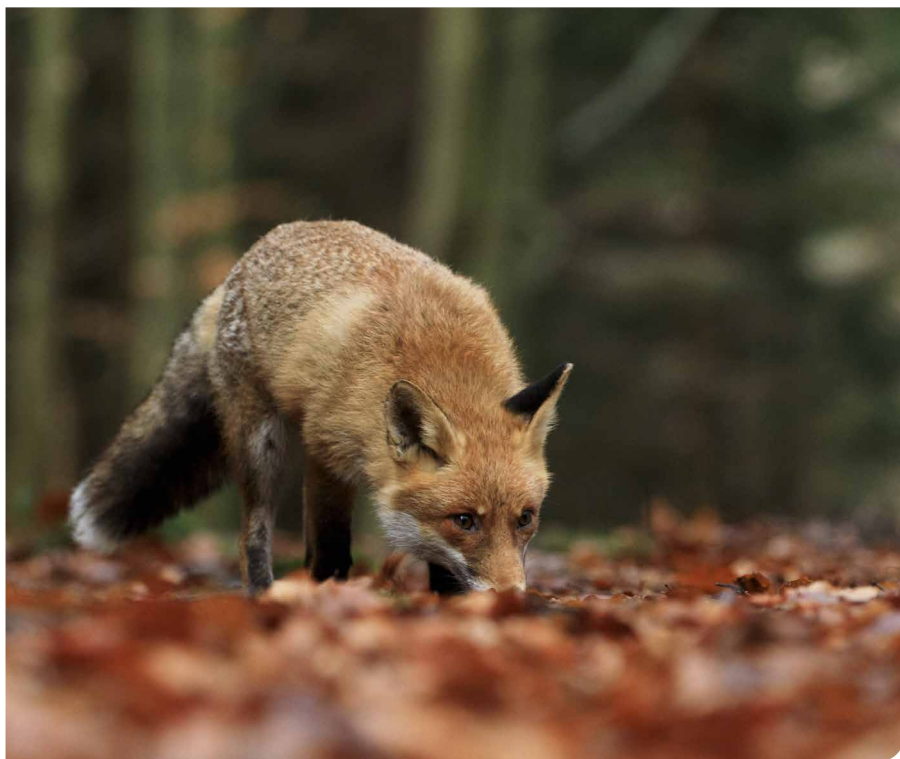
³ <https://zakon.rada.gov.ua/laws/show/1478-14#Text>.

Position of local self-governments

A clear indication of the different interpretation and application of the terminology of the Law № 322 is the analysis of decisions of district councils and United Territorial Councils (UTCs), by which the latter determined the sites of mass wildlife breeding and offspring raising sites within the “period of silence” in the respective districts. The texts of the relevant decisions adopted by about twenty district councils and UTCs have been published on the Internet. In addition, they have established restrictions on economic activity and wildlife hunting and declared the period from April 1 to June 15, 2018 a “period of silence”, with restrictions on economic activity and wildlife hunting in areas determined by the decision.

Other district councils have declared a “period of silence” with restrictions on economic activity and wildlife hunting for the period from April 1 to June 15, 2018 only on sites of mass wildlife breeding and offspring raising.

However, the majority of forestry enterprises, in order to avoid conflicts with environmental inspections, despite the decisions of district councils, did not carry out sanitary felling within the entrusted forest fund.



Position of the State Forest Resources Agency

When considering the positions of the authorized state bodies on this issue, it should be emphasized that only the Constitutional Court of Ukraine has the power to officially interpret the laws of the country in terms of their accordance with the Constitution of Ukraine. Clarifications of state bodies on issues within their competence are for information purposes only and are not legal norms.

In order to figure out the position of the State Forest Resources Agency, FSC Ukraine has sent a request to clarify certain requirements of the Law of Ukraine "On Fauna" regarding the ban on sanitary cuts during the "period of silence".

In the response letter dated June 18 and 23, 2020, the State Forest Resources Agency reported, in particular, the following: "Currently, the applicable requirements of the Law of Ukraine "On Fauna", namely the fifth paragraph of Article 39 do not allow for sanitary condition improving and pests and diseases localization measures to be carried out in timely manner between April 1 and June 15. This leads to a catastrophic decline in the performance of important ecological functions of forests and the irreversible loss of valuable forest resources over large areas. During this period there is a need to take measures to improve the condition of pest-infested trees to prevent mass flight of pests, increase of the area of damaged stands and loss of annual increment."

In addition, the State Forest Resources Agency of Ukraine noted that forestry "enterprises are independent economic entities, whose prerogative is to plan and carry out their own statutory activities, including preparation of proposals for decision-making on the announcement a "period of silence" on sites of mass wildlife breeding and offspring raising with the restriction of economic activity and wildlife hunting, which should be done jointly with the executive bodies of village, settlement and city councils (paragraph 37 of Article 26, subparagraph 3 of paragraph "a" of part one of Article 33 of the Law of Ukraine "On Local Self-Government in Ukraine").

That is, the State Forest Resources Agency has actually pointed to the existence of a legislative conflict, when forestry enterprises jointly with local authorities have the right to declare a "period of silence" on sites of mass wildlife breeding and offspring raising.

Position of the Ministry of Ecology and Natural Resources of Ukraine

The following year after the entry into force of the commented Law, the position of the Ministry of Ecology and Natural Resources of Ukraine on this issue has become available. The relevant state body in the field of environmental policy-making, in reports on the Internet and in the media, underlined the ban of sanitary cuts during the “period of silence”.

In July 2020, The Ministry of Ecology and Natural Resources of Ukraine, when answering the request of the National Representative of FSC in Ukraine dated 18 June 2020, has referred to Art. 39 of the Law of Ukraine “On Fauna” and stated that while setting time limits for sanitary cuts, the law does not contain spatial exceptions to the banning sanitary cuts and other activities during the period of mass wildlife breeding. Therefore, there is no legal basis to consider that the ban of sanitary cuts and other activities in the period from April 1 to June 15 applies to wildlife breeding sites.

Position of the State Environmental Inspectorate

The State Environmental Inspectorate, similarly to the interpretation of the Ministry of Ecology and Natural Resources of Ukraine has taken a categorical position in the implementation of state control over enforcement of environmental legislation by permanent forest users. It is based only on the requirements of part five of Art. 39 of the Law of Ukraine “On Fauna”. According to this norm, annually, in all Ukrainian forests without exception, it is forbidden to carry out both clear and selective sanitary cuts during the period from April 1 to June 15, regardless of the presence or absence of local governments’ decisions regarding the identification of mass wildlife breeding sites.

In particular, answering the request of the National Representative of FSC in Ukraine dated June 18, 2020 regarding interpretation of approaches to application of requirements of the legislation on wildlife, in a letter dated 24 June, 2020 outgoing No. 4948/2.6/7-20, the State Environmental Inspectorate has referenced part five of Art. 39 of the Law of Ukraine “On Fauna” and reported that during the period of mass breeding of wild animals, from April 1 to June 15, the applicable legislation prohibits sanitary cuts in the forests of Ukraine.

In practice, in cases of identification of these violations during scheduled and unscheduled inspections of forestry enterprises, the Inspectorate indicates illegality of sanitary cuts during the “period of silence”. There are facts of bringing of forestry officials to administrative liability under Part 1 of Art. 87 of the Code of Administrative Offenses for violation of the requirements for protection of wildlife habitat. Prescriptive orders were issued according to which forestry enterprises were prohibited to carry out clear and selective sanitary cuts within the period from April 1 to June 15.

There were also occasional court decisions of stopping logging on the claims of the State Environmental Inspectorate bodies due to violations by forest users of the requirements of Part 5 of Art. 39 of the Law of Ukraine “On Fauna”.

Conclusions

Poor legal regulation of the “period of silence” by introducing a ban on sanitary cuts in Law № 322 during the specified period has caused a legislative conflict. The references to the diverging legislative norms in the letters of the corresponding state bodies on this issue confirms the existence of such a conflict. At the same time, the Ministry of Environment of Ukraine, which forms the state policy in the field of forest matters, and the State Environmental Inspectorate, which is a specialized controlling body, express a clear position on extending the ban on sanitary cuts throughout the whole forest fund.

As a result of the legal dispute, business entities, state authorities and local governments determined the implementation of the requirements of this law in different ways. In general, the legal conflict caused by different interpretations and applications of requirements of the Law № 322 has led to litigation, departmental confrontation, increased corruption risks, disruption of economic mechanism of forest management, and manipulations in the media.

Given the poor legal regulation introduced by the Law № 322, immediate legislative changes are required to be made.





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