

THE ANIMAL BY-PRODUCTS (SCOTLAND) REGULATIONS 2003¹

GUIDANCE NOTE ON LEGAL POWERS

Approvals

Regulation 13

13(1) The Scottish Ministers (SMs) are the competent authority for the purposes of granting approvals

Cf. *Carltona, Ltd V Commissioners of Works* [1943] 2 All ER 540
Lord Greene MR “The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department.”

The court accepted that a Minister could delegate this responsibility to officials for whom they are responsible.

BUT

In exercising this responsibility an official must act in accordance with the law and will be held liable to account for such action:

e.g. through Parliamentary accountability, The Parliamentary Commissioner for Administration (the ombudsman), Public Inquiries or Judicial Review.

Regulation 14

14(1) No person shall use premises listed unless premises, operator of the premises and where appropriate equipment are approved

14(2) Operator shall ensure approved premises maintained and operated in accordance with:

(i) conditions of approval

[cf Regulation 3 - Any approval (registration or notice) shall be in writing and made subject to such conditions as are necessary to ensure that the provisions of the Council Regulation and these Regulations are complied with]; and

(ii) the requirements of these Regulations and the Council Regulations

14(4) Any person who fails to comply is guilty of an offence

Regulation 32

The regulation imposes a requirement for records and that they be kept for at least 2 years. Any record which is “made” must also be “kept”. While there is no direct sanction in regulation 32, under regulation 47(1)(d) if the appropriate

¹ Scottish Statutory Instrument 2003 No. 411.

records are not present on inspection, there is an offence of failure to produce a record. The duty to keep the records for 2 years falls on whoever has the duty to initially record the relevant information, which is specified elsewhere in the Regulations.

The exact time from which the records must be kept is not set out in the Regulations and will depend on the circumstances. In practice this will operate as follows. Under each of the record-keeping requirements in Part 7 of the Regulations, an event will trigger the duty to record and the start of the 2 year period:

1. When animal by-products are consigned, transported or received (regulation 33)
2. When animal by-products are burned or buried (regulation 34)
3. "On disposal or use" (regulation 35)
4. When catering waste is received (regulation 36)
5. When catering waste or other animal by-products are treated (regulation 37) subject to the fact that under regulation 37(d) the results of checks carried out will only become available, and the duty will only arise then. This consideration may also apply to information provided to satisfy regulation 37(e).
6. For regulation 38(a) to (e) it is clear that the duty arises when a sample arrives at the laboratory, while under regulation 38(f) the duty will only arise when the information becomes available on testing.
7. For regulation 39, the duty to record arises when:
 - compost or digestion residue is brought on to the premises (paragraphs (a) and (b))
 - when that compost or residue is applied to land (paragraphs (c) and (d)), or
 - when access to land by the relevant animals is allowed (paragraph (e)).

Regulation 40

40(2) Lists what must be specified on an approval

40(1) The Scottish Ministers shall i.e. MUST grant an approval if they are satisfied that the requirements of the Council Regulation and the domestic Regulation will be complied with

How do you know what the conditions of Council regulation are?

Chapters III and IV of the Council Regulation list requirements in order for plant to be approved:

E.g. Article 11 storage plants

- "1. Storage plants shall be subject to approval by the competent authority.
2. To be approved, storage plants must:
 - (a) meet the requirements of Annex III, Chapter III; and
 - (b) be checked by the competent authority in accordance with Article 26".

40(3) If refuse to grant an approval or grant an approval subject to conditions the SMs shall give notice in writing of-

- (a) the reasons for the refusal or conditions; and
- (b) the right to make written representations to the SMs within 21 days and to be heard by an independent person appointed by the SMs.

[cf Regulation 42 below]

Regulation 41

41(1) amend, suspend or revoke an approval or registration by notice in writing

- SMs SHALL SUSPEND if condition of approval not being complied with (this is requirement of Community Regulation in relation to plants listed in Articles 12-15, 17 and 19)

- SHALL SUSPEND OR AMEND if SMs satisfied that the provisions of the Council Regulation or the domestic Regulations are not being complied with

41(2) amendment or suspension SHALL have immediate effect if

- SMs considers it necessary for protection of public or animal health
-otherwise amendment or suspension does not have effect for at least 21 days

41(3) notice in writing shall give-

- (a) the date when it takes effect;
- (b) the reasons for the suspension and why it was considered necessary; and
- (c) the right to make written representations to the SMs and to be heard by an independent person appointed by the SMs within 21 days

[cf Regulation 42 below]

41(4) Where there is a review (i.e. the appeal allowed under the Regulations) the amendment or suspension shall not have effect until final determination by the SMs unless they reasonably consider it necessary for the protection of public or animal health. In this case a notice in writing must be served giving the reasons why this is reasonably considered necessary.

41(5) SMs be notice in writing serve don the operator can revoke if satisfied, taking into account all the circumstances, that the premises will not be operated in accordance with Council Regulation or the domestic Regulations. This can only be done after a review [cf Regulation 42 below] or after 21 days after the service of a notice of suspension.

Review

Regulation 42

42(1)) Reviews only in relation to notices served under regulations 40 or 41 i.e. grant of approvals and suspension, amendment or revocation of approvals or registrations.

Within 21 days of service of notice person on whom notice is served can:

- (a) provide written representations to SMs; and
- (b) provide notice of wish to appear before independent person

What constitutes service of notice?

Personal service- does not require the letter to be accepted or handed over simply requires the letter to touch the person on whom service is to be effected. Important to keep a note of how service effected, how you identified the person etc. in case of future dispute

42(2) independent person is appointed by SMs, person aggrieved can ask for public hearing and for a copy of the report

42(3) independent person conducts hearing and reports to SMs

42(4) SMs makes final determination after having regard to report provides written notification to the aggrieved person and provides reasons

42(5)-(7) provisions for costs

Why do we have this provision?

The Human Rights Act 1998 created a statutory duty for public authorities to Act compatibly with rights enshrined in the European Convention of Human Rights.

Article 6 of the Convention provides that:

“In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Depending on the particular facts of a case, the granting or suspension, amendment or revocation of an approval is likely to be considered by the courts to amount to a determination of a person's civil rights.

The courts will look to the decision-making process as a whole in deciding whether the process complies with Article 6, here the court will be concerned with the initial decision of the SMs, the process of providing representations to the SMs or appearing before an independent person and the final determination by the SMs.

One of the leading domestic cases is R (Alconbury Developments Ltd) V Secretary of State for the Environment [2001] 2WLR 1389 concerning the decision making powers of the Secretary of State in relation to planning applications. The court determined that judicial review was a sufficient means of challenge to administrative decisions which are in part “fact” and “policy”.

It is argued that “policy” in this context can extend to discretionary matters such as the weighing of resource considerations, taking into account the interests of others and expert judgment as to present and future fact. Depending on the facts it is likely that the decision making process in relation to approvals of premises under these Regulations will be part fact and part policy and include the views of veterinary experts, supporting the argument that the decision maker i.e. the SMs are based placed to make the decision.

In assessing the compatibility of the process with Article 6 the court will have regard to the procedural safeguards in place prior to the taking of the decision which is challenged in the courts to ensure the process was fair and reasonable.

The right of the aggrieved person here to make written representations to the SMs, or appear before the independent person who then reports to the SMs, informing the SMs’ final decision is a further procedural safeguard to ensure that the aggrieved person has had as full an opportunity to present all the relevant information and the SMs has had an opportunity to consider the same before making their final determination.

Powers of entry of Inspectors

Definition of inspectors- see Regulation 2(1)

Regulation 46

General Power-

46(1) Inspector shall have a right to enter (on producing if required a duly authenticated document showing his authority):

- any premises (except premises used only as a dwelling)
- at reasonable hours

-for the purposes of administering and enforcing these Regulations and the Council Regulation

Specific Power-

46(2) In particular inspector can enter to:

- (a) seize and animal by-products and dispose of them as necessary;
- (b) carry inquiries, examinations and tests;
- (c) take any samples;
- (d) have access to inspect and copy any records kept under the Regulations
- (e) have access to and inspect/check operation of computers/ apparatus or material used in connection with the records
- (f) mark any animal, animal by-product or thing for identification
- (g) take other persons with them as considered necessary.

The pocket certificate is evidence of who you are and your appointment the certificate does not create a right to enter; your power to enter is from

Regulation 46 and you can only enter to carry out the activities listed in Regulation 46(1).

ABPO was made under the Animal Health Act 1981, the Act and Orders made under it are enforced and executed by the police (Section 60). As the enabling power for the new Regulation is Section 2(2) of the European Communities Act 1972 it has been necessary to expressly provide for a power of entry

Remember that Regulation 41(b) discussed above provides that an approval may be suspended or amended if the provisions of the Council Regulation or these Regulation are not being complied with. If an occupier of premises refuses to allow an inspector to exercise his power of entry pursuant to Regulation 46 or obstructs an inspector acting in execution of these Regulations (regulation 47) then arguably this would be sufficient grounds for the suspension of the approval.

Please note though that the inspector has to leave the premises as effectively secured against unauthorised entry as they were before entry

SEERAD
November 2003

THE ANIMAL BY-PRODUCTS (SCOTLAND) REGULATIONS 2003
SUPPLEMENTARY GUIDANCE ON PET ANIMALS

1774/2002 provides the following definition of “pet” animals which under article 24.1(a) may be buried.

“pet animal means any animal belonging to a species normally nourished and kept, but not consumed, by humans for purposes other than farming”

Although, it can be argued that humans within the UK do not consume horses/ponies/donkeys (equines), the UK does export equines, which may be used for human consumption. A strict interpretation the EU Regulation may well ban the burial of ‘pet’ equines, but we would advise enforcement officials to take a pragmatic approach and deal with such cases flexibly.

The line we suggest enforcement officials should adopt is to exercise a degree of common sense. If the animals are housed or kept on a commercial establishment then the Executive would not regard the animals as pets but as working animals. Normally burial would not be permitted and potentially inclusion in the national fallen stock scheme may be an option. No doubt there will be horses, ponies etc housed on such establishments but owned by someone else that are only used for recreational purposes and they might well be regarded as a pet and so could be buried at the end of their lives. The same would be true for pet horses; ponies etc keep in a field or pasture near the family home etc.

If burial of “pet” horses etc is permitted then the normal requirements to observe the guidance the PEPFAA Code and consult SEPA on the location of the burial site should apply in these circumstances as well.

REGULATION (EC) NO 1774/2002 OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL LAYING DOWN HEALTH RULES CONCERNING ANIMAL BY-PRODUCTS
NOT INTENDED FOR HUMAN CONSUMPTION

THE ANIMAL BY-PRODUCTS (SCOTLAND) REGULATIONS 2003 (SSI 2003/411)

NOTICE FOR THE DISPOSAL OF CATEGORY 3 MATERIAL

To.....
Address.....

1. I, being an inspector appointed for the purposes of the Animal By-Products (Scotland) Regulations 2003, give notice as follows —

2. You are in possession of the following animal by-products [*Specify by-products and location*]—

3. This is Category 3 material to which Regulation (EC) No 1774/2002 and the Animal By-Products (Scotland) Regulations 2003 apply.

4. The Category 3 material has not been disposed of in accordance with Article 6(2) of Regulation (EC) No 1774/2002. This is an offence under regulation 6 of the Animal By-Products (Scotland) Regulations 2003.

5.—(1) In accordance with regulation 43 of the Animal By-Products (Scotland) Regulations 2003, being satisfied that you are not complying with the provisions of those Regulations [and that this is necessary for animal and public health purposes], I require you to act as follows -

(2) You must collect the material specified in paragraph 2.

(3) You must transport it, [under the supervision of an inspector], in a covered, leak proof vehicle or container, to [a rendering plant which is approved under Regulation (EC) No 1774/2002 to render Category 3 animal by-products or to an incinerator approved in accordance with that Regulation – *or replace with name and address of premises to which the material is to be sent*]. The materials must be rendered [or incinerated] there at your expense.

(4) [After transportation you must thoroughly cleanse and disinfect all containers and vehicles used [to the satisfaction of an inspector]

(5) These actions must be completed by [].

6. Failure to comply with or breach of this Notice is a criminal offence and may result in—

(a) arrangements for compliance being made by an inspector at your expense; and/or

(b) prosecution for failure to comply with this notice in addition to any prosecution for breach of the Regulations.

7. You may, by application in writing delivered to [] at [] within [] days of this Notice being served on you, make representations against this Notice. This does not in any way affect your duty to act in accordance with this Notice.

Signed

Name

An inspector appointed for the purposes of the Animal By-Products (Scotland) Regulations 2003.

Date

This notice was served atam/pm. on

THE ANIMAL BY-PRODUCTS (SCOTLAND) REGULATIONS 2003

ADVISORY NOTE ON ABPR APPROVALS AND THE ROLE OF “THE OPERATOR”

Limited companies

A limited company is a body corporate. The operator can be the limited company itself. In that case the approval would be granted to the limited company and the company would be liable for any breaches. If there is a breach we would expect the PF to prosecute the company, and the company would be liable to pay the fine.

Because we have regulation 48(2) in the Animal By-Products (Scotland) Regulations, the PF can equally prosecute any director, manager, etc. if the offence has been committed with his or her consent or connivance. This does not alter the fact that the approval has been granted to the limited company itself.

Partnerships

In Scots law partnerships also have a separate corporate existence from their members and can be prosecuted as a firm. Again, the PF can equally prosecute the partnership, or alternatively the partners who are liable for an offence. Accordingly approvals should be granted to the partnership.

In some cases the members of the partnership may set up a limited company controlled by them. We could then approve the limited company. These companies are called service companies, but are uncommon in Scotland except for holding land or buildings. The partnership names some of the partners to be directors of the company. There is however no reason not to approve the partnership itself in Scotland.