

SIMPLIFICATION TASKFORCE
Interpretation of Guidance Sub-Group Meeting
Thursday 4th April 2019 – Saughton House

ATTENDEES

SG Members

Marcus Mackenzie (Chair)
Gordon McMiken
Yvonne Nova (Secretariat)

Apologies

Douglas Petrie
Gail Watt

External Members

Jonnie Hall
Hamish Lean (VC from Inverurie A/O)

Introductions

- Marcus gave an update on the progress of the other sub-groups.

What are your own experience of Interpretation of Guidance

Hamish Lean (HL)

- Comments on a recent SUSSS case which was considered an example of Gold Plating where although the notification was posted, it was missing from the movement pad and the other 2 copies were present.
- The SUSSS guidance required the SAMU database to be updated and the Scottish Land Court (SLC) accepted that by posting the notification the beneficiary had met their requirements.
- 100's of notifications received by SAMU daily and only a small number of producers checked with SAMU if updates were received.
- Gordon McMiken to identify what changes are to be implemented going forward as a result of this case.
- The 'Department' looked at things in a 'perfect system light' but sometimes not the practicalities.

Hamish Lean

- Recently involved in a case to do with the refusal of an Environmental Audit (Region 3). The issue was that the application was inadequate. It was first completed when the rules were not fully formulated.
- The review hearing was 23/03/2018 and the report was not issued until 23/08/2019. The report was very badly put together and did not clearly set out the decision.
- SLC criticised the report as very poor due to no clear statement of the decision.

- Lodged appeal was accepted on the grounds that Scottish ministers should provide clarity on decisions made.
- Scottish Ministers requested decision to be sent back to them, which resulted in the refusal being rescinded due to unclear rules etc.
- The Industry need adherence to timescales and clear information provided.

Jonnie Hall (JH)

- This case is symptomatic with guidance since 2015-16 as it has always been evolving.
- Pillar 1 & 2 from 2015 onwards – RP&S started and had to evolve and while the best at the time was playing catch up – not a clear as it could be. Guidance is only guidance and the regulation is the backstop.
- Keeping track of these changes is challenging and cause for concern.
- Generally the guidance is generally good but it is the regulation which decisions should be based on.
- The dynamic nature of updating guidance – it's good but it should be unequivocal that it is only guidance.
- The best guidance is what sticks around for a while and people get used to it. Constant change and updating can foster a degree of confusion.
- Interpretation of guidance between Area Offices differs. Can get different interpretations – need to work on consistency.
- That was the case for the Islay Estate case, some Area Offices were happy with the audit and one failed it.

Marcus Mackenzie

- Where are the rules too tight?
- No examples from HL & JH

Hamish Lean

- Very frustrating for the applicant going over the 60 days – stuck – only choice is going to SLC without knowing the basis for the decision. (Compared to the previous appeal system) the current system is much better – problem (with RPID) meeting timescales.
- Perception of unfairness – Issue a report within 60 days, Applicant must apply to SLC within 60 days or it is rejected. Draconian to the appellant.
- If the report is not issued in 60 days the appeal should fall (tongue in cheek)

Marcus Mackenzie

- Fol has triggers in relation to deadlines, possibly these should be introduced into the Appeals procedures?

Gordon McMiken

- Can now report to Senior Management regarding Stats from the recording spreadsheets, this should improve the adhering to published timescales.
- A full training and refresher exercise has taken place with Reviewing Officers over the last 4 months.

Marcus Mackenzie

- SG should revisit over the coming year to establish benefits of improvements following training.

Hamish Lean

- Observation on the case which Hamish Lean was involved in. Land Court concerned about the disproportionate penalty. RPID did make clear it was prepared to work with applicant as to how this would be paid – this was an example of good practice in helping someone out.

Jonnie Hall

- Penalties should not be business threatening. Proportionate penalty commensurate to the error.
- Example given was Sherriff Court has the discretion to allow guilty party to pay back in instalments.

Summary

- The only Gold Plating examples identified were the SUSSS case and the Environmental Audit case.
- No examples were offered where the rules were too tight.
- The 60 day timescales requires to be enforced
- Review Reports require decisions to be clearly set out.
- There is inconsistency between Area Offices on interpretation of guidance.
- Perception of unfairness where RPID can breach the 60 days for issuing of the review report and appellants can have their appeal rejected if they breach this timescale.

Actions:

Gordon McMiken

- identify changes made following the SUSSS case.
- identify the criticism from SLC on the Environmental Audit review report to learn lessons.
- establish reporting system to Senior Management for Review progress.

- investigate the opportunity for business threatening penalties to be repaid over time.

Hamish Lean & Jonnie Hall

- It would be useful if Jonnie or Hamish could provide examples (other than the Environmental Audit case) of where inconsistencies in guidance interpretation were identified between Area Offices.
- Marcus encouraged discussions before the next meeting around the circulated spreadsheet detailing simplification suggestions from both NFUS and SG, and for their comments and own suggestions.
- Hamish Lean to replay the main points from this meeting back to the main group on 24th April.

Gail Watt

- What are your views on any cases where interpretation of guidance has been at fault in cases you have been involved in?