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Dear Steve,

THE DEFINITION OF WASTE : MANURE AND SLURRY

1. I replied on 14 January to your letter of 28 December 2001 about agricultural waste and the transposition of the Waste Framework Directive (as amended) ("the WFD"). One of the issues that you raised concerned manure and slurry and my reply said:-

"Paragraphs 2 and 3

10. I think the issues which you raise about the definition of waste and slurries/manure can most usefully be pursued in the context of the paper which the Agency undertook to prepare following the Workshop held on 9 November 2001. I understand that the Agency hopes to be in a position to submit this paper by the end of this week."

2. We subsequently received a paper on the issue prepared by Caroline Blatch of the Environment Agency. As you are aware, interpretation of the law is a matter for the Courts. Subject to that consideration, the Department's views on the issues raised in your letter and Caroline Blatch's paper are set out below.

3. The effect of the original WFD (1975) was to enable each Member State to adopt its own national definition of waste. The effect of Article 1(a) of the amended WFD (1991) was to introduce a new EU definition of waste which each Member State is required to transpose and implement. In order for a substance or object to be "waste" within the meaning of the WFD, it must be a substance or object "**which the holder discards or intends or is required to discard.**" The advice on the definition of waste in DOE Circular 11/94 was provided in the absence of case law on the interpretation of this definition. In relation to the issue which you raise, the advice provided in DOE Circular 11/94 was that:-

"2.40...slurry or manure produced on a farm and used on that farm as a fertiliser or soil conditioner are not waste where they are used to meet the requirements of agricultural land (ie the use is beneficial to the land). (Reference should be made to the guidance in paragraphs 2.32-2.38 above where the slurry or manure are



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transferred for use by someone other than the producer.)”

“2.41 However, there may be circumstances where the beneficial use to which the substance is put by the producer appears to be incidental [and] ...the purpose of the [beneficial] use [is] wholly or mainly to relieve the producer of the burden of otherwise disposing of the substance...For example, where slurry or manure are used on a farm in quantities which exceed the requirements of agricultural land (ie the use is no longer beneficial to the land).”

4. On this basis, the advice provided in DOE Circular 11/94 envisaged three sets of circumstances:-

(a) A farmer uses slurry or manure on the farm on which it is produced as a fertiliser or soil conditioner to meet the requirements of agricultural land (ie the use is beneficial to the land);

(b) A farmer uses slurry or manure on the farm on which it is produced in quantities which exceed the requirements of agricultural land (ie the use is not beneficial to the land); or

(c) Slurry or manure is transferred from the farm on which it is produced for use by someone else.

5. Since the guidance in DOE Circular 11/94 was issued there have been several judgments by the European Court of Justice (ECJ) on the definition of waste. These judgments include *Wallonie* (Case C-129/96) and *Arco Chemie* (Joined Cases C-418/97 and C-419/97). In *Wallonie* the Court held that a substance is not excluded from the definition of waste in the WFD by the mere fact that it directly or indirectly forms an integral part of an industrial production process. However, the Court also recognised that there is a distinction between waste recovery within the meaning of the WFD and the normal industrial treatment of products which are not waste.

6. The Agency’s paper appears to have particular regard to the judgment in *Arco Chemie* and to paragraphs 82-87 which read as follows:-

“82 As the Court has already stated in paragraph 51 of this judgment, it may not be inferred from the fact that a substance undergoes an operation referred to in Annex IIB to the Directive, such as use as fuel, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of the Directive.

83. On the other hand, certain circumstances may constitute evidence that the holder has discarded the substance or intends or is required to discard it within the meaning of Article 1(a) of the Directive.

84. That will be the case, in particular, where the substance used is a production residue, that is to say a product not in itself sought for use as fuel.

85. The use of a substance such as LUWA-bottoms as fuel, instead and in place of a normal fuel, is a factor which may give the impression that its user is discarding it, either because he wishes or because he is required to do so.

86. The fact that the substance is a residue for which no use other than disposal can be envisaged may also be regarded as evidence of discarding. That fact gives the impression that the holder of the substance acquired it for the sole purpose of discarding it, either because he wishes to or because he is required to, for example under an agreement concluded with the producer of the substance or with another holder.

87 The same will apply where the substance is a residue whose composition is not suitable for the use made of it or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition.”

7. However, in the Department's view, the circumstances relating to the use of manure and slurry on farms are very different from the subject of the *Arco Chemie* case - LUWA-bottoms and their use as fuel. In the *Arco Chemie* case the Court based its findings partly on the fact that this production residue would not normally be sought for use as fuel. That is not the case with manure [or slurry] which is sought by a farmer as a fertilizer; and is included in the definition of “fertilizer” in Article 2 of the Nitrates Directive (91/676/EEC). Spreading on land of manure and slurry is a natural use of these substances and may well be used by farmers in preference to other fertilizers.

8. Since the submission of the Agency's paper the ECJ has also issued its judgment in the *Palin Granit Oy* case (C-9/00). In this judgment the Court acknowledged (paragraphs 31 and 32) the findings in paragraphs 83-87 of the judgment in *Arco Chemie* and the importance of determining whether a substance is a production residue. That is to say, a product not in itself sought for a subsequent use. And that, according to its ordinary meaning, waste is what falls away when one processes a material or an object and it is not the end-product which the manufacturing process directly seeks to produce. But the Court then went on to say:-

“34. One counter-argument to challenge that analysis is that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to ‘discard’, within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse.

35. Such an interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products.

36. However, having regard to the obligation, recalled at paragraph 23 of this judgment, to interpret the concept of waste widely in order to limit its inherent risks and pollution, the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process.

37. It therefore appears that, in addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in

question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product."

9. In the light of these considerations, the Department's views on the three sets of circumstances originally identified in DOE Circular 11/94 are as follows:-

(a) A farmer uses slurry or manure on the farm on which it is produced as a fertiliser or soil conditioner to meet the requirements of agricultural land (ie the use is beneficial to the land).

- (i) It remains the Department's view that in these circumstances the farmer is not discarding the manure or slurry as "waste" within the meaning of Article 1(a) of the WFD. In these circumstances, the manure or slurry is not a burden which the farmer is seeking to discard. It is a by-product which he is seeking to exploit – by using it as a fertilizer – on terms which are financially advantageous to him. In these circumstances, the farmer's use of the manure or slurry as a fertilizer is not a mere possibility but a certainty; and its use is an integral part of the production process carried out on the farm.

(b) A farmer uses slurry or manure on the farm on which it is produced in quantities which exceed the requirements of agricultural land (ie the use is not beneficial to the land).

- (i) It remains the Department's view that in these circumstances the farmer is discarding the manure or slurry as "waste" and that its use is a waste disposal operation which is subject to the permit requirements of Article 9 of the WFD.

(c) Slurry or manure is transferred from the farm on which it is produced for use by someone else.

- (i) In the Department's view it will be necessary in these circumstances to determine on a case-by-case basis whether or not the manure or slurry is being discarded by the farmer as "waste". There are a range of considerations to be taken into account in making any such determination but those set out in paragraphs 82-87 of the *Arco Chemie* judgment and in paragraphs 34-37 of the *Palin Granit Oy* judgment – see paragraphs 6 and 8 above - are of particular significance.

- (ii) In cases where it is determined that the manure or slurry has been discarded as waste then it will be necessary also to determine whether its use is a waste disposal operation or a waste recovery operation subject respectively to the permit requirements of Articles 9 and 10 of the WFD.

- (iii) The list of waste recovery operations set out in Annex IIB to the WFD includes "R10 Land treatment resulting in benefit to agriculture or ecological improvement." In order to address circumstances in which manure or slurry is discarded as waste – and is used for these purposes (ie R10) on agricultural land within the meaning of the Agriculture Act 1947 - the Department proposes to exercise the UK's discretion under Article 11(1)(b) of the WFD to provide an exemption from the permit requirements of Article 10 of the Directive. For these purposes the appropriate entry in the European Waste Catalogue (2001/118/EC) is:-

“02 01 06 animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site.”

(iv) Criteria for use in determining when “benefit to agriculture or ecological improvement” is achieved are being drawn up by the Department in consultation with the Environment Agency’s Exemptions Working Group. This is being done in the context of the revision of the existing licensing exemption provided in paragraph 7 of Schedule 3 to the Waste Management Licensing Regulations 1994.

(v) In circumstances where manure or slurry is discarded as waste and is used in a manner which does not result in benefit to agriculture or ecological improvement then it will fall to be classified as a waste disposal operation which is subject to the permit requirements of Article 9 of the WFD. In these circumstances the UK has no discretion under Article 11 of the Directive to provide an exemption from the permit requirements of Article 9.

10. I understand that the Environment Agency has made the NFU aware that it has sought the Department’s views on the issue of manure and slurry in relation to the WFD. I am therefore copying this letter to Dr. Diane Mitchell of the NFU.

Yours sincerely,

SUE ELLIS