



Northern Ireland

**Public Services**

Ombudsman

# Investigation Report

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## Investigation of a complaint against the Department for Environment, Agriculture and Rural Affairs

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**NIPSO Reference: 17038**

The Northern Ireland Public Services Ombudsman

33 Wellington Place

BELFAST

BT1 6HN

Tel: 028 9023 3821

Email: [nipso@nipso.org.uk](mailto:nipso@nipso.org.uk)

Web: [www.nipso.org.uk](http://www.nipso.org.uk)



@NIPSO\_Comms

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## **The Role of the Ombudsman**

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities. She may also investigate and report on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

Where the Ombudsman finds maladministration or questions the merits of a decision taken in consequence of the exercise of professional judgment she must also consider whether this has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. The Ombudsman may recommend a remedy where she finds injustice as a consequence of the failings identified in her report.

The Ombudsman has discretion to determine the procedure for investigating a complaint to her Office.

## **Reporting in the Public Interest**

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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## EXECUTIVE SUMMARY

I received a complaint regarding the actions of the Department of Agriculture, Environment and Rural Affairs (DAERA) (the Department) concerning the Department recovering a Single Farm Payment<sup>1</sup> (SFP) overpayment and imposing an over declaration penalty following an On the Spot (OTS) inspection. This inspection determined that the complainants had established entitlement in 2005 on areas of land which are ineligible for SFP, and had further claimed this ineligible area in each subsequent year up to 2010.

The focus of the complainant's concern was that the overpayment recovery and penalty were applied to a 'grazeable' quarry which they considered to be eligible for SFP prior to 2011. They therefore submitted an application to have their overpayment decision reviewed. The Department's review determined that the overpayment recovery, and the penalties applied, were appropriate.

### Issues of Complaint

I accepted the following issues of complaint for investigation:

- **The Department's determination of ineligible land**
- **The Department's Inspection**
- **The Department's review of the decision**

### Findings and Conclusion

I have investigated the complaint and have found maladministration in relation to the following matters:

- *Failure to provide clear and complete guidance on land eligibility from the commencement of established entitlements in 2005;*
- *Failure of the inspector to follow the inspection manual in regard to the recording of the inspection discussion and the coding of areas of quarry;*

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<sup>1</sup> The Single Farm Payment Scheme was introduced by EC Council Regulation 1782/2003. Access to the payment depended on the number of Entitlements that a farmer holds. Farmers who are/were carrying out an agricultural activity had to apply to the Scheme in 2005, as part of a one off exercise, if they wished to establish entitlements for their eligible agricultural land. Applicants then 'activate' the relevant number of these entitlements within each year they apply.

- *Failure to provide a clear and accurate inspection report to the complainants;*
- *Failure to appropriately address the complainant's concerns in regard to the eligibility of the quarry within the Stage One Review;*
- *Failure to identify and acknowledge the inaccuracies within the inspection report during the review process.*

I am satisfied that the maladministration I identified caused the complainant's to experience the injustice of uncertainty, frustration, distress and financial loss. They also expended considerable time and trouble pursuing their complaint before they were provided with a clear and appropriate response.

## **Recommendations**

I recommend the Department:

- Provide the complainants with an apology for the failings identified within this report.
- Provide the complainants with a consolatory payment. This consolatory payment will include an amount equivalent to the deductions and penalties applied in relation to the area of the quarry as well as £250 to reflect the time, trouble and stress they have suffered pursuing their complaint.
- Share the learning from this report with Department's inspectorate staff. This discussion should focus on:
  - a) *the identified failings of the inspector:* emphasis should be placed on the need for Department inspectors to adhere to the Department's OTS manual when undertaking inspections.
  - b) *the identified failings of the Senior Agricultural Officer at the Stage One Review:* emphasis should be placed on the need to provide independent, objective advice when undertaking a review of case files. Attention should also be given to the importance of identifying failures where necessary.
- Review the layout of the inspection report as provided to applicants. Consideration should be given to the provision of a clear, easy to follow, explanation of inspection findings.

I recommend that the Department implement an action plan to incorporate these recommendations and should provide me with an update within **six months** of the date of my final report. That action plan should be supported by evidence to confirm that appropriate action has been taken (including, where appropriate, records of any relevant meetings, training records and/or self-declaration forms which indicate that staff have read and understood any related policies).

## THE COMPLAINT

1. A husband and wife jointly complained that the Department's On-The-Spot (OTS) inspection inaccurately determined that they had been claiming for areas of land which were ineligible for Single Farm Payment (SFP). This determination resulted in the Department seeking to recover a retrospective overpayment and also monetary penalties being applied.

### **Issues of complaint**

2. The issues of complaint which I accepted for investigation were:
  - Issue 1: The Department's determination of ineligible land
  - Issue 2: The Department's On the Spot (OTS) inspection
  - Issue 3: The Department's review of the decision

## INVESTIGATION METHODOLOGY

3. The Investigating Officer obtained from the Department all relevant documentation together with the Department's comments on the issues raised by the complainants. This documentation included information relating to the review of the Department's decision.
4. The information which has informed my findings and conclusions are included within the body of my report. However how I have weighed this information, within the context of this particular complaint, is a matter for my discretion.

### **Relevant Standards**

5. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case.
6. The general standards are the Ombudsman's Principles<sup>2</sup> Of Good Administration

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<sup>2</sup> These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

7. The specific standards are those which applied at the time the events occurred and which governed the exercise of the administrative and professional judgement functions of those organisations and individuals whose actions are the subject of this complaint.
  
8. The specific legislative and administrative standards relevant to the investigation of this complaint are:
  - The Department's SFP applicant guidance booklets 2005-2011.
  - The Department's supplementary guidance booklet: Guide to Land Eligibility 2011 & Guide Land Eligibility 2012 Update.
  - The Department's Control Management System for On-The-Spot Checks manual, 2012.
  - Article 22-24, 44 of Council Regulation (EC) No 1782/2003 in respect of 2005-2008 SFP.
  - Article 19-21, 35 of Council Regulation (EC) No 73/2009 in respect of 2009-2011 SFP.
  - Article 24, 51, 53, 73 of Commission Regulation (EC) 796/2004 in respect of 2005-2009 SFP
  - Article 28, 58 of Commission Regulation 1122/2009 in respect of 2010-2011 SFP.
  
9. I have not included all of the information obtained in the course of the investigation in this report but I am satisfied that everything that I consider to be relevant and important has been taken into account in reaching my findings.

# MY INVESTIGATION

## Issue 1: The Department's determination of ineligible land

10. The complainants dispute the Department's decision to retrospectively recover an overpayment and apply a penalty on their SFP claims. The overpayment and penalty were calculated following the Department's inspection of their land in 2012. The inspection identified that areas which they had established entitlements on, (including a quarry and areas of scrub and pond/lake) were ineligible for SFP.
11. The complaint relates to the Department's determination that their quarry area was ineligible for SFP. They affirm that, at the time of inspection, the quarry was ungrazed and had been for a period of two years. For this reason they had stopped claiming SFP for the area from 2010. However, they maintain that prior to this they were entitled to claim the area as eligible land as the quarry was 'grazeable'. In order to find whether the Department's determination was attended by maladministration, the Department's definition of ineligible land has been considered.
12. The relevant regulation is Council Regulation (EC)No73/2009 which defines 'eligible land' as follows:  
*'Eligible Hectare means any agricultural area of holding, ..., that is used for an agricultural activity or, where areas are used as well for non-agricultural activities, predominantly used for agricultural activities... (Art 34(2)(a))...Agricultural area means any area taken up by arable land, permanent pasture or permanent crops. (Art. 2 (h))...Agricultural activity means the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established in Article 6 (Art.2 (c))*

13. As part of the investigation, the Department were asked to provide an explanation as to its determination of eligibility for SFP. In response, it stated (13 January 2017) *‘...Claiming for eligible land was a fundamental rule of SFP... Eligible land was defined each year in the guidance notes about how to complete the Single Application Form (SAF). It included, for example, permanent pasture, land used for crops and growing vegetables. Examples of ineligible land and land in non-agricultural use have also been explained each year since 2005...While ‘quarry’ was not given as an example in 2005, it would be reasonable to conclude that a quarry would not fall within the definition of land being used for agricultural purposes. However the Department published more detailed guidance about land eligibility in 2011 in the ‘Guide to Land Eligibility’. A region wide series of information and events and publicity was carried out during 2011/12 to inform claimants of the specific details about land eligibility. The 2011 Guide to Land Eligibility, Section 6 (page 28) specifically states that quarries are not eligible. Inspectors were trained using this Guide in preparation for the 2011 inspection campaign...’*
14. The Department were also asked whether it deems a quarry to be permanently non-agricultural use or whether a quarry can be considered eligible if grazed. In response the Department advised (20 November 2017) *‘Quarries are an ineligible feature and irrespective of whether they are kept in GAEC, or if stock are present, a quarry is not eligible.’*
15. In relation to this question I refer to the following Land Eligibility extracts taken from the Department’s applicant guidance booklets (2005- 2012).
16. *Single Farm Payment 2005: Part 6 Land Matters:*  
*‘... You can only establish and claim payment of your Entitlements against land which is eligible for SFP. A definition of eligible land can be found at Annex B....’*

*Annex B: Land eligible for SFP is land which is capable of being used for agricultural activities. This is the area taken up by arable land<sup>3</sup> or permanent pasture<sup>4</sup>....'*

*'To be eligible under SFP for the establishment and payment of Entitlements, land should be in agricultural use or be suitable for agricultural use (and as a minimum, kept in Good Agricultural and Environmental Condition). Use of the land for non- agricultural purposes will generally render it ineligible to support the establishment or payment of SFP entitlements.'*

17. *Single Farm Payment 2005: Part 8 IACS/2005 Single Application:*

*'Land Not Eligible for Establishing Entitlements*

*7.52 Land which on the 16 May 2005 is under the following crops is not eligible for SFP...:*

- *Permanent crops/nurseries of permanent crops..*
- *Non-agricultural use; or*
- *Non-grazeable orchards and woodlands.'*

18. In relation to the term '*Non- Agricultural use*' – this is described as follows:

*7.54 Land used for non-agricultural activity, for example, as a golf course, for motor sports, as a campsite or peat cutting, is ineligible for SFP.*

*Land defined as Non-Agricultural*

*Land that is a garden, a recreational park, urban common or a zoo is not eligible. Scrub land would only be defined as agricultural and be subject to Cross compliance if it is managed and more than 50% of the area is capable of being grazed. Orchards/woodlands which do not have an agricultural use are not eligible. A shelterbelt of trees will not be classified as agricultural if the trees are of a density greater than 50 per hectare. Other features such as ponds will not be classified as agricultural.'*

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<sup>3</sup> Arable land (as defined within Single Farm Payment 2005 Part 6 Land Matters : DARD) is land used to grow crops.

<sup>4</sup> Permanent pasture (as defined within Single Farm Payment 2005 Part 6 Land Matters : DARD) is land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that is not included in the crop rotation of the holding for five years or longer.

19. I note '*Non-agricultural use*' was further described by the Department in its guide for Applicants as '*.. for example, land used as a golf course, for motor sports, as a campsite or for peat cutting.*' This definition was also repeated in the 2007-2009 applicants guide. However roads and lanes were added as further examples of non-agricultural use.
20. The 2010 guidance for Applicants provided examples of ineligible land in non-agricultural use as follows:
- Buildings and yards
  - Gardens
  - Roads
  - Laneways
  - Hard Standing
  - Slurry Sites
  - Golf Courses
  - Race tracks, gallops
  - Ponds, streams, rivers, lakes
  - Rocky Outcrops
  - Concreted areas.
21. I note that no reference was made to the ineligibility of quarries in successive Departmental booklets published between 2005- 2010.
22. The 2010 guidance booklet in its introduction also referred to the following: '*Many farmers are claiming land for SFP/LFACA which is not eligible. In some cases a whole field may not be eligible and in others only part of a field may not be eligible...*'
23. In 2011 a supplementary '*Guide to Land Eligibility*' booklet was provided together with a '*Guide on how to complete your 2011 Single application and Field data sheet*'. At the introduction section of this booklet the general land eligibility rules for claiming on the SFP scheme '*from 2011 onwards*' are provided. This booklet included examples of ineligible land as detailed at

paragraph 20 with the addition of 'Quarries', and explained that quarries should be coded OT7 – non-agricultural use.

24. A further update to this guidance was provided by the Department to applicants in 2012 which included the following statement:
- '... Last year, we provided detailed information on land issues in the 'Guide to Land Eligibility' booklet. This year we have provided some updates to this booklet ... These updates are needed because we have received further clarification on some land eligibility issues from the European Commission. **Others are because of requests from farm businesses for clarification or because our 2011 inspections have identified a number of areas that may need clarified...**'(my emphasis).*
25. The codes that applicants were invited to use to identify ineligible land on their SFP form, regularly changed within each successive SFP guide. The following codes were used to identify ineligible land in each given year:
- 2006** OT4<sup>5</sup>, OT5<sup>6</sup>, OT6<sup>7</sup>, OT7<sup>8</sup>.
- 2007** OT4, OT5, OT6, OT7.
- 2008** OT6, OT7.
- 2009** OT6, OT7.
- 2010** OT6, OT7, OT13<sup>9</sup> (new code), OT14<sup>10</sup> (new code), OT15<sup>11</sup> (new code).
- 2011** OT6, OT7, OT13, OT14, OT15, OT16<sup>12</sup> (new code) OT17<sup>13</sup> (new code).
26. I refer to the Departmental Manual entitled - Control Management System for On- the-Spot Checks Manual 2012 (2012 Manual). I note that a significant

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<sup>5</sup> Ornamentals and Nurseries

<sup>6</sup> Non-grazed/ Commercial Orchards

<sup>7</sup> Forests and Woodlands (non-grazing)

<sup>8</sup> Non-agricultural use

<sup>9</sup> Dense patched of scrub, whin, bushes, bracken.

<sup>10</sup> Walls hedges, ditches, drains and agricultural features more than 4m wide at the base (2m at the base if internal to the field)

<sup>11</sup> Bogs, swamps, reed-beds, fens which have no forage available

<sup>12</sup> Land temporarily out of agricultural use for storage of silage bales, bare ground or mulch under trees with no grazing, deeply rutted tracks, all other land temporarily out of agricultural use which is not covered above.

<sup>13</sup> Ineligible heather

number of OTS inspections were carried out in 2011/2012 in order to assess applicant compliance with the SFP scheme rules. This included assessment of the eligibility of the land which was subject to a claim. The Department's inspectors were trained in accordance with the 'Control Management System for On- the-Spot Checks manual 2012'. The following extracts from this manual are relevant to the investigation of this complaint:

27. "3.2 Effective date

*For each permanent eligible feature (deletion) and ineligible feature, you will need to record the 'effective date of change'. Inspectorate staff will establish this through discussion with the farm business and/or use of the ortho imagery<sup>14</sup>. However for some ineligible features DARD business rules apply and you will be unable on your mobile device to select an earlier year, these are outlined in the table below:*

Ineligible Land Use Code	Description	Effective Date used at 2012 OTSC
<b>OT7</b> (Permanent Ineligible Features)	<b>Non – agricultural Use</b> <ul style="list-style-type: none"> <li>• Buildings, building sites and yards</li> <li>• Gardens and Park</li> <li>• Roads</li> <li>• All laneways</li> <li>• Hard standing</li> <li>• Slurry storage sites</li> <li>• <b>Quarries</b></li> <li>• Golf courses</li> <li>• Race Tracks, gallops</li> <li>• Ponds, lakes and any designated streams, rivers and watercourses maintained by the Rivers Agency</li> <li>• Scree rocky outcrops</li> <li>• Concreted areas</li> </ul>	Relevant year as identified on ortho image.
<b>OT16</b>	<b>Land temporarily out of agricultural use for</b> <ul style="list-style-type: none"> <li>• Storage of silage bales, machinery or stones</li> <li>• Bare ground or mulch under trees with</li> </ul>	Relevant year as identified on ortho image

<sup>14</sup> an aerial photograph or image geometrically corrected such that the scale is uniform: the photo has the same lack of distortion as a map.

	no grazing available <ul style="list-style-type: none"> <li>• Deeply rutted tracks</li> <li>• All other land temporarily out of agricultural use which is not covered above.</li> </ul>	
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28. I refer to the Inspector's Report (26 November 2012) and retrospective note (28 January 2014). The following extracts relate to the inspection of the complainant's land (26 November 2012).

*"Field Data report*

*..21/A – Claim<sup>15</sup>: OT16 0.00. OTSC<sup>16</sup>: OT16 0.99. **Temporary non agri use : Quarry not grazed (my emphasis).***

*..21/B – Claim: FR1<sup>17</sup> 0.60. OTSC: OT13 0.11 Scrub."*

29. The complainants sought a review of the Department's decision on ineligibility. During Stage One of the Review process the inspector was asked to comment on their concerns. In response the inspector provided a retrospective statement: *'Discussed at length when actually standing in the field/quarry with [complainant]. [He] agreed that the field was to be split, with just the bottom fraction remaining eligible as no signs of livestock/grazing around quarry area (my emphasis). (Field split with wire fence which was G.P.S ed with Toughbook.) Inspection findings agreed with [complainant] @ inspection.'*

30. In 2013 the Northern Ireland Audit Office (NIAO) published its Audit Findings of the 2011 SFP payments and the corresponding inspections. This Audit was commissioned by the European Commission. I note the following relevant extract:

*'Observations regarding the quality standard of the field inspections*

*....the following areas of the on-the-spot control methodology could be further improved...More attention to the correct interpretation of 'land in agricultural*

<sup>15</sup> This indicates that the information came from the SFP claim form as completed by the applicant

<sup>16</sup> This indicates that the information came from the on the spot check i.e. was determined by the inspector

<sup>17</sup> Forage: Grass (grass for grazing, hay and silage, rough grazing, grazed heather, sainfoin, clover, Lucerne and forage vetches).

*use' and 'farming activity' (for example, recreational gardens or non-grazed woodland not clearly in agricultural use).'*

## **Issue 1 - Analysis and Findings**

31. The complainants contend that their 'quarry' was eligible for SFP during 2005-2010, as it was 'grazeable'. In response to investigation enquiries the Department clarified that *'Quarries are an ineligible feature and irrespective (my emphasis) of whether they are kept in GAEC, or if stock are present, a quarry is not eligible'*.
32. I have reviewed the Department's SFP applicant guidance booklets from 2005 onwards. I note that 'quarry' was not identified as ineligible until 2011. I also note that the Department's annual guidance for applicants limits its definition of 'ineligible land' to *'Permanent crops/nurseries of permanent crops..Non-agricultural use; or Non-grazeable orchards and woodlands.'*
33. These limited definitions have caused confusion for applicants. This is evidenced by the Department's assertion in 2010 that *'many farmers are claiming land for SFP which is not eligible'*. This lack of clarity will have impacted on Departmental staff. As a result an NIAO audit report (2013) recommended that the Department's OTS inspections pay more attention to the *'correct interpretation' of 'land in agricultural use and farming activity'*.
34. In support of the NIAOs recommendation, I note the inspector in this case classified the quarry as *'OT16 temporary non-agricultural use – quarry not grazed'*. In his retrospective statement the inspector stated that the quarry was deemed ineligible as there were *'no signs of livestock/grazing around quarry area'*. This statement does not reflect the content of the Department's OTS manual, or the Department's response to my office, which state that quarries are permanently ineligible irrespective of stock being present, and should be coded OT7.

35. The Department subsequently sought to remedy the confusion about land eligibility for SFP by holding a '*region wide*' series of information events in 2011/12. These events coincided with the introduction of a supplementary guidance booklet dealing solely with SFP eligibility for land. This document expanded the Department's explanation of 'ineligible land', and included reference to quarries, which are considered to be non-agricultural and permanently ineligible. However I note that by this stage (2011/12) the complainants had stopped claiming SFP for the quarry area.
36. In consideration of this issue I had regard to the third principle of Good Administration '*Being open and accountable*' which requires that public bodies ensure that information, and any advice provided, is clear, accurate and complete. I consider that the limited ineligible land definitions provided within the applicant guidance prior to 2011, the number of applicants claiming for ineligible land, the Department's subsequent actions, and the inspectors inaccurate interpretation of '*temporary non-agricultural use*', evidence that the Department's guidance and advice in regard to land eligibility, prior to 2010, was incomplete, misleading and required considerable clarification. I therefore consider that the Department's guidance, and the inspector's subsequent inaccurate inspection report failed to meet the standard required by this principle. This constitutes maladministration.
37. In consideration of this inaccurate and misleading advice I refer to the legal principle Equitable Estoppel<sup>18</sup>. The rationale behind estoppel is to prevent injustice owing to inconsistency<sup>19</sup>. I consider that the Department's provision of inconsistent and misleading guidance/facts, in regard to the eligibility of land for SFP, led the complainants to mistakenly assume that a 'grazeable' quarry was eligible prior to 2010. As a result they claimed for a feature which the Department considers to be permanently ineligible. This led to the imposition of penalties, in addition to the recovery of money which they felt they were entitled. As a result they suffered the injustice of frustration, distress

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<sup>18</sup> Equitable estoppel protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may include an action, silence or concealment of facts.

<sup>19</sup> <https://legal-dictionary.thefreedictionary.com>

and financial loss. I consider it was unfair for the Department to reclaim the overpayment and the applied penalties. I consider the doctrine of estoppel applies in this case. **I uphold this issue of the complaint.**

38. I welcome the Department's acceptance of my findings in respect of the guidance provided to applicants prior to 2010. I note the Department's advice that since 2011 it has enhanced scheme guidance and its communication with applicants, year on year.

## **Issue 2: The Department's OTS Inspection**

39. The complainants stated that they believed the OTS inspection was inappropriate. They affirm that a conversation took place with the inspector on the day of inspection. However they dispute the Department's assertion that there was a discussion at length on the preliminary inspection findings and that they agreed to these findings.
40. I will consider the OTS inspection below.

### **Department Manual**

41. As previously noted, prior to undertaking OTS inspections the Department's inspectors were trained in accordance with the '*Control Management System for On- the-Spot Checks manual 2012*'. Chapter three of this manual '*Conducting an On-the-Spot Check*' covers the information required and actions to be taken when carrying out OTS checks. I note the following relevant extracts:
42. *"8 Concluding the Farm Visit*  
*8.1.1 Once the OTS check is completed, the inspector should explain the preliminary inspection findings to the farmer using the Change Summary Report on the Toughbook...The farmer should then be asked to sign the toughbook to confirm that an OTS check took place and that he has been made aware of the preliminary findings. Note: The inspector should not enter*

*into any discussion with the farmer about the final impact of any area reductions at inspection on their SFP claim. This is the responsibility of SFP Branch in Orchard House.*

43. *8.1.4 If the farmer does not sign the report, an explanation should be recorded at Section 8.2 of the IRF L form on the toughbook.*
44. I note the complainants did not sign the inspection report at the time of the inspection nor did they make any further comments. I note there is no comment from the inspector as to why this was the case.

### **The Department's Response (13 January 2017)**

45. I note the Investigating Officer queried the discrepancy in the inspector's record keeping with the Department who advised: *'The Department is satisfied that the client was given the opportunity to sign, however declined. In line with inspection policy the Department accepts that the inspector should have noted any comments made by the client in relation to their unwillingness to sign.'*

### **Issue 2 – Analysis and Findings**

46. I note the Department remain satisfied that the inspector discussed the preliminary findings at length with the complainants at the time of the inspection. This discussion is an inspection requirement. However the complainants dispute that a detailed discussion in regard to the preliminary findings, took place.
47. Following review of the inspection report I note that the section which requires confirmation from the applicant that they have been made aware of the preliminary findings remains blank. The additional section which is used to record any explanation as to why a signature has not been gained, also remains blank.

48. In consideration of this issue I had regard to the first principle of Good Administration '*Getting it right*' which requires that public bodies act in accordance with their own policy and guidance. I also had regard to the third principle '*Being open and accountable*' which requires that public bodies keep proper and appropriate records. I consider the inspectors failure to contemporaneously record the discussion with the complainants and to secure a signature does not meet this requirement. The inspector failed to record an explanation as to the absence of this signature. This is a clear departure from Department policy in addition to the failure to record the discussion. The standard required by these principles has therefore not been met. I consider these failures to constitute maladministration. As a result the complainants have suffered the injustice of uncertainty, frustration and the loss of an opportunity to have their feedback, appropriately recorded in the inspection report.
49. I note the Department acknowledged the inspectors 'record keeping' failure within their response to my office. However, I remain concerned by the Department's continued acceptance that an appropriate discussion took place. In consideration of this issue I had regard to the fourth Principle of Good Administration '*Acting fairly and proportionately*' which requires that public bodies deal with people and issues objectively. The Department did not contemporaneously record the discussion which the complainants dispute. Therefore the Department's continued assertion as to the content of that discussion causes me concern. A decision impacting upon an individual's entitlement must be based on objective evidence, which has not been provided in this case. I consider this to be a failure to meet the standards required by this principle. This amounts to maladministration. As a result the complainants suffered the injustice of distress and frustration as they felt their recollection of events were disregarded by the Department.
50. I further note that the inspector's retrospective statement, which the Department has accepted as having taken place, supports the contention that quarries were potentially eligible for SFP. The phrase 'temporarily ineligible'

(my emphasis) underscores the belief of the complainants that there was actual entitlement.

51. In consideration of this issue I had regard to the first principle of Good Administration '*Getting it right*' which requires that public bodies act in accordance with their own policy and guidance and provide effective services, using appropriately trained and competent staff. I also had regard to the third principle of Good Administration '*Being open and accountable*' which requires that public bodies ensure that information, and any advice provided, is clear, accurate and complete. I am satisfied that the inspectors inaccurate coding and description of the quarry demonstrates a departure from Departmental policy. I am also satisfied that in consequence of the inaccurate coding and description, the complainants were not provided with clear and accurate information about the inspection and as a result were further misled that quarries may be considered eligible by the Department. I therefore consider that the standards required by these principles were not met. I consider this to be maladministration. As a result the complainants have suffered the injustice of frustration and a further missed opportunity to provide a considered response to the inspection findings. **I therefore uphold this issue of the complaint.**
52. I welcome the Department's acceptance, following its review of the draft report, that the inspection report was not fully completed and that there was ambiguity in the recording of quarries which led to confusion. I acknowledge the Department's advice that ongoing enhancement has taken place in the delivery of OTS inspections in line with EU development. This includes increased inspector training and use of new technology solutions. I note the Department remains satisfied that the land was correctly identified as ineligible for payment and the outcome of retrospective action to recovery monies was accurate.

### **Issue 3: The Department's Review of the Decision**

53. The complainants stated that the review panel were entirely reliant on the evidence of a single inspection which took place two years after the area had been farmed or claimed. They contend that the panel relied on unsupported evidence from the inspector who used irrelevant information regarding the grazing on unclaimed land. I will consider whether the Department's review was attended by maladministration and where I identify instances of maladministration I will also consider the merits of the review decisions.
54. I note that in April 2018 the Department implemented a revised 'Review of Decision' procedure. This one stage review is conducted by a specialist team of officials within the Area Based Schemes Payments Branch who were not involved in making the initial decision. However at the time of the complainant's request for a review the Department undertook a two stage review.
55. I will therefore consider this issue within the following subheadings
- i. Stage One Review Decision*
  - ii. Stage Two Review Decision*
- i. Stage One Review Decision**
56. I note that a Stage One Review is an internal review of the SFP claim. It was carried out by the Single Farm Payments (SFP) branch within Rural Payments Division which operates independently from the Grants and Subsidies Payments Branch.
57. The complainants initiated a Stage One Review application of the Department's decision as follows:
- "With regard to a notification regarding our farm business I wish to appeal this decision for the following reasons. The inspector has divided the field into 21a and 21b since 2004. Photographic evidence shows that this was not divided until at least 2010. In addition to this he has classified field 21a as a quarry not used in 2004. This is incorrect as in 2004 and until 2010 this was all one*

*field. The top part may have been a quarry but since 1961 it was grazed and had sufficient forage on it to graze, therefore it was eligible for SFP. The inspector did not discuss either this area or the erection of the fence with me therefore must have made a subjective assumption. In 2005 this field (21) was claimed at its full size 1.83 ha. The new division shows 21a @ 0.99 ha and 21b 0.6ha and 0.11 scrub, less than 50% then I am assuming that as I know 21a, 0.99 ha was eligible in 2005, the full area should be allocated @ 1.83 ha...”*

58. The following relevant extracts from the Department’s Stage One Review Decision in regard to the complainant’s concerns:

***‘Original decision***

*2005-2011 Notification of overpayments dated 29 May 2013*

***Reason for decision***

*[The complainant] submitted the 2012 single application on 15 May 2012 and activated 78.51 entitlements. Following a 2012 On-the-Spot check, field discrepancies have been identified relating to areas ineligible to support aid application. A number of these discrepancies were found to be effective from the 2005 scheme year. Following the application of the inspection findings the Department determined that this business over-declared land in the years 2005-2011 and has subsequently been overpaid for these particular scheme years. In accordance with the EU rule, as the business has been incorrectly paid the Department sought recovery of the undue monies.’*

***Change sought by applicant***

*A review of the 2005-2011 Notification of over-payments...*

*Point 1...Consideration: In light of [the complainant’s] comments his Ground for Review were provided to Senior Agriculture Officer [SAO] for comment. In response [SAO] states that they have reviewed this field and he is content that the inspector has explained the finding of the inspection of the field to [the complainant] on the day of inspection. Ortho – images of the field would suggest that there was a fence there since 2005.*

*Point 2..Consideration: The inspecting officer, states that he discussed this matter at length when actually standing in the field/quarry with [the*

complainant]. [He] agreed that this field was to be split, with just the bottom portion remaining eligible as there was no signs of livestock/grazing around quarry area. This field was split with wire fence which was GPS'ed with Toughbook [Inspector] concludes that the inspection findings were agreed with [the complainant].

*Point 3:... Consideration: Field 21 (1.83 hectares) was split into Field 21A (1.00 hectares) and Field 21B (0.83 hectares) and reduced to:*

*Boundary change with field 12 of FSN 6/5/7 – 0.02 hectares removed;*

*Boundary change with field 13 of FSN 6/5/7- 0.02 hectares removed;*

*Code OT7 – pond/lake – 0.09 hectares removed.*

*Code OT16 – quarry – 0.99 hectares removed (Field 21A)*

*Code OT13 – scrub – 0.11 hectares removed.*

*Overall area removed = 1.23 hectares.*

*1.83 hectares less 1.23 hectares ineligible = 0.60 hectares eligible (which is recorded as Field 21B).*

**Decision:** *Do not change the Department's decision.*

**Reasons for Decision:** *[SAO] has reviewed the inspection finding with regards to Field 21 of FSN 6/5/7 and is content that the inspector explained the finding of the inspection of this field on the day of inspection and that ortho-images of the field would suggest there was a fence there since 2005'*

59. I note the Stage One Review decision form stated that the 'Change sought' by the complainants was 'A review of the 2005-2011 notification of overpayments'. The reasoning for the Department's decision were recorded as 'field discrepancies being identified relating to areas ineligible to support an aid application'. These ineligible areas were identified as a quarry and areas of scrub and pond/lake. However I note the focus of their concern related to the determination that their quarry was ineligible. This was consequently central to the review.
60. I am therefore concerned to note that the Stage One Review focused on the complainant's thoughts in regard to the dating of a fence, and the inspection discussion. Neither of these issues had any bearing on the calculation of their SFP overpayment. I note the only reference made to the eligibility of the

quarry was a misleading reiteration that the quarry was deemed ineligible as *'there was no signs of livestock/grazing around the quarry area'*. In my view this statement would have further compounded their inaccurate belief that a quarry could be considered eligible if it is 'grazeable'. I would have expected that the Department would have clarified that a quarry is considered to be permanently ineligible for SFP, irrespective of stock being present.

61. I am further concerned to note, as previously identified in Issue two, that a definitive determination was made that an appropriate discussion took place despite the complainant's disagreement, and a lack of supporting contemporaneous records. I acknowledge that the inspector provided a retrospective note to the review panel (almost a year following the inspection). However this recollection cannot be used to objectively verify the content of a discussion or that the complainant had agreed to the findings.

**ii. Stage Two Review Decision**

62. I note a Stage Two Review constituted a review of the original decision by an external independent panel. The external panel was made up of two members. Panel members were appointed by the Department from a pool of people who were formally selected to act as panel members. The review was based on a case file which was developed independently from the file prepared as part of the Stage One Review. In concluding on each case, the panel made a non-binding recommendation to the Department. The Head of the Department was not obliged to accept the panel's recommendation but took into account its findings before making the final decision.

**The complainant's Stage Two review application**

63. I note the following relevant extracts from the complainant's request for a Stage two review:

*"Point 1: [Inspector] in his statement says that ortho images suggest that there was a fence between 21a and 21b since 2005. In my opinion the images which I possess date May 08 until May 12 do not suggest there was an internal fence anywhere in this field...Point 2: I do not dispute the fact that I*

*had a conversation with [Inspector] on the day in question. There was no discussion at length on the inspection findings. [Inspector] informed myself about what he was doing...No one is disputing that I spoke with the inspector, rather the retrospective imposition of penalties which I feel are totally inappropriate. Point 3: I still maintain that there should be a full allocation of 1.83ha in 2005 and nothing in this report has changed my view.”*

### **The Stage Two Review Panel Recommendation**

64. I note the following extracts from the Panels Stage Two Review:

*‘Panel Findings*

*1...The panel acknowledges that there are different opinions provided by the farmer and the inspector on when an internal fence dividing the field was in place. The orthos are not clear enough for the panel to take a decision on when an internal fence was erected but concludes that the key issue is the area of eligible land within field 21 in each of the years 2005-2012 (see conclusions on eligible area at point 3 below)...2... The inspector states that a conversation did take place and it was agreed that field 21 was to be recorded, following inspection, as being split...[the complainant] did not agree with this account of the inspection. The inspection report shows this change along with deductions of ineligible areas and their effective date as 1/1/2004. [The complainant] did not query the report findings...Regarding the imposition of retrospective penalties the panel concludes that as ineligible land was used to establish entitlements it was correct that the Department recalculated the entitlements allocated (Articles 73A Commission regulation 796/2004 and Article 81 Commission Regulation 1122/2009). 3... [The complainant] contends that there should be a full allocation of 1.83 ha for field 21 in 2005 and that the quarry was grazed between 2004 to 2010 and as such should be eligible for SFP. The inspection in November 2012 reduced the SFP eligible area of field 21 to 0.60 ha and recorded it as field 21B. Information provided by [the complainant] was of a subjective nature and not of significant weight to discredit the inspector’s measurements...At inspection 0.99 ha was classified as a quarry in 2012. The panel concludes that this area should not have been included as an eligible area for SFP from 2004 because the ‘Guide to land Eligibility’, page 28, states that quarries are classified as land permanently out*

*of agricultural use and are not eligible for SFP. No substantive evidence was provided at the panel hearing to show that the area designated as a quarry was wrongly classified by the inspector or that the other deductions were eligible areas in the years between 2005 and 2010. This being so, the panel concludes that the areas within field 21 (21A and 21B) which were determined as ineligible were ineligible from 2005...'*

### **Stage Two Review Department determination 22 December 2015**

65. I note the following relevant extract from the Department's determination:  
*'You will note that the Panel recommended that the Department's original decision should not be changed. I have accepted the Panel recommendation...I have concluded that the original decision of 29 May 2013 should not be changed. Taking into account the evidence, the Department is content with the division of the field into 21a and 21b backdated to 01 January 2004. The Department has considered the points raised by [the complainants] and the evidence available. At the inspection field 21A was found to be ineligible quarry not grazed. The Department would agree with the Panel findings that no evidence has been submitted that would discredit the findings of the inspector...'*
66. I note the Panels Stage Two Review identified the disparities in the complainant's and the inspector's accounts of their discussion on the date of the inspection and the dating of the fence. The panel identified that these issues had no bearing on the focus of the review - namely his overpayment calculation. I welcome the Panel's objective, independent comments. I also welcome the panel's clarification, that quarries are ineligible for SFP as they are classified as land permanently out of agricultural use.
67. However I note in providing this clarification the Panel relied on the '*Guide to land eligibility*'. This guidance was published in 2011 and therefore became available to the complainants only when they had stopped claiming for the area. I am disappointed that the Department did not reflect on this when making its final determination. I am further concerned that, although the Panel identified that quarries are classified as permanently out of agricultural use,

the Department failed to identify the inspectors incorrect classification and coding of the area. The Department again referred in its determination, to the area as *'ineligible- quarry not grazed'*.

68. The complainant's request for a review focused on the calculation of the SFP overpayment by the Department as a result of the ineligibility of areas of their land. It is therefore of concern that the Stage One Review decision focused on the dating of a fence. There is also an unsupported determination in regard to the content of a discussion which took place between the complainant and the inspector on the day of inspection.

### **Issue 3 – Analysis and Findings**

69. In consideration of the issues identified in the Stage One Review I had regard to the first Principle of Good Administration *'Getting it Right'* which requires public bodies to take reasonable decisions, based on all relevant considerations. I also had regard to the fourth Principle of Good Administration *'Acting fairly and proportionately'* which requires that public bodies deal with people and issues objectively and consistently. I find that the review failed to appropriately address the complainant's reasoning in regard to their 'grazeable' quarry's eligibility for SFP. I also find that the Department's review failed to support its determination in regard to the content of the discussion which took place between the inspector and complainant. These failings demonstrate that the standards required by these Principles were not met in this instance. I consider this to constitute maladministration. As a result the complainants have suffered the injustice of frustration as an opportunity was missed to provide them with an appropriate response to their concerns within the Stage One Review.
70. It is disappointing to note that although my investigation has highlighted several errors on the part of the inspector, these errors were not identified during the review process. In consideration of this issue I had regard to the fifth Principle of Good Administration *'Putting things right'* which requires public bodies to acknowledge mistakes, apologise where appropriate and put

mistakes right quickly and effectively. I also had regard to the Sixth Principle '*Seeking continuous improvement*' which requires that public bodies ensure that lessons are learnt from complaints in order to improve services and performance. The Department's failure to identify the inspectors' inaccuracies demonstrates a failure to meet the standards required by these Principles. As a result the Department missed an opportunity to learn from its mistakes in the processing of the SFP application. This failing, in light of the NIAO recommendation, ought to have been avoided.

71. In consideration of the Stage Two Review and the Department's determination, I acknowledge and welcome the clarification provided by the panel to the complainants in regard to their concerns. However, I note the panel relied on land eligibility guidance which was published six years after the complainants established their entitlements. I note that in considering the panel's findings the Department failed to consider and address this error. I further note the Department failed to reflect on the panel's assessment that the ortho-images were unclear in relation to the dating of the fence.
72. In consideration of this issue I had regard to the first principle of Good Administration '*Getting it right*' which requires that public bodies take reasonable decisions, based on all relevant considerations. I also had regard to the fifth principle of Good Administration '*Putting things right*' which requires that public bodies put mistakes right quickly and effectively. The Department's failure to acknowledge the panel's assessment that the ortho-images were unclear demonstrates a failure to meet these standards. Furthermore its failure to consider the panel's reliance on postdated land eligibility guidance, demonstrates a failure to meet these standards. I am satisfied these failings constitute maladministration. As a result the complainants suffered the injustice of frustration as they felt the panel, and the Department, based their decisions on irrelevant and unsupported information.

**I therefore uphold this issue of the complaint.**

73. I welcome the Department's acceptance, following review of the draft investigation report, that it could have taken a broader view of the areas considered within its review of the complainants concerns.

## CONCLUSION

74. I received a complaint about the actions of the Department relating to the Department's recovery of overpayments and the application of penalties on an area of land the complainants considered to be eligible for SFP.
75. I have investigated the complaint and have found maladministration in relation to the following matters:
- *Failure to provide clear and complete guidance on land eligibility from the commencement of established entitlements in 2005;*
  - *Failure of the inspector to follow the inspection manual in regard to the recording of the inspection discussion and the coding of areas of quarry;*
  - *Failure to provide a clear and accurate inspection report to the complainants;*
  - *Failure to provide a timely, accurate and appropriate response to the complainant's concerns in regard to the eligibility of the quarry;*
  - *Failure to identify and acknowledge the inaccuracies within the inspection report during the review process.*
76. I am satisfied that the maladministration I identified caused the complainants to experience the injustice of uncertainty, frustration and distress. They also expended considerable time and trouble pursuing their concern before they were provided with a clear and appropriate response.

### Recommendations

77. I recommend that the Department:
- Provide the complainants with an apology for the failings identified within this report.
  - Provide them with a consolatory payment. This consolatory payment will include an amount equivalent to the deductions and penalties applied in

relation to the area of the quarry as well as £250 to reflect the time, trouble and stress they have suffered pursuing their complaint.

- Share the learning from this report with Department staff. This discussion should focus on:
  - c) *the identified failings of the inspector*: emphasis should be placed on the need for Department inspectors to adhere to the Department's OTS manual when undertaking inspections.
  - d) *the identified failings of the Senior Agricultural Officer at the Stage One Review*: emphasis should be placed on the need to provide independent, objective advice when undertaking a review of case files. Attention should also be given to the importance of identifying failures where necessary.
- Review the layout of the inspection report as provided to applicants. Consideration should be given to the provision of a clear, easy to follow, explanation of inspection findings.

78. I recommend that the Department implement an action plan to incorporate these recommendations and should provide me with an update within **six months** of the date of my final report. That action plan should be supported by evidence to confirm that appropriate action has been taken (including, where appropriate, records of any relevant meetings, training records and/or self-declaration forms which indicate that staff have read and understood any related policies).



**MARIE ANDERSON**  
Ombudsman

**August 2018**

## APPENDIX ONE

# PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

### 1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

### 2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

### 3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

### 4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.

- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

**5. Putting things right**

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

**6. Seeking continuous improvement**

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.