

GUIDANCE ON REFUSAL/REVOCAION OF MSER REGISTRATIONS/LICENCES AND THE APPEAL PROCESS

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Introduction

1. The Manufacture and Storage of Explosives Regulations (MSER) give licensing authorities the power to refuse, revoke or vary licences, to refuse draft licences and to refuse or revoke registrations. The Regulations also give applicants, licensees and registered persons the right to make representations about the licensing authority's proposed action and (if the licensing authority subsequently decides to proceed) the right to appeal to the Secretary of State for Work and Pensions.
2. This guidance has two parts. The first part gives guidance to licensing authorities on the processes involved in refusal, revocation or variation. Its aim is to help licensing authorities ensure that their handling of the process follows the requirements laid down in the Regulations.
3. This section is also intended to ensure that applicants, licensees or registered persons receive a clear and transparent explanation of the licensing authority's proposed actions; that they are fully informed about their rights to make representations and are able to appeal against any decision in their case should they choose to do so. It is also intended to help reduce the risk (to both the licensing authority and the applicant) of going through the trouble and expense of having an appeal hearing only for the matter to be dismissed on procedural grounds.
4. The second part of the guidance gives information on the procedures and processes for an appeal to the Secretary of State under section 44 of the Health and Safety at Work Act. This is intended to assist licensing authorities and applicants, licensees and registered persons in the event that they are parties to such an appeal.

Proposal to refuse or revoke a licence or registration

5. Regulation 15 requires the licensing authority to refuse a licence (including, where regulation 14(1) applies, a draft HSE licence) or a registration where it is of the opinion that:
 - the proposed site, or a place within it, is not suitable for the manufacture or storage of explosives; or
 - the applicant is not a fit person to manufacture or store explosives.
6. Regulation 17 states that the licensing authority may revoke a licence or registration it has granted where:
 - there has been a change in circumstances which means that the site, or a place within it, is no longer suitable for the manufacture or storage of explosives;
 - it appears on information obtained by it after granting a licence or registration, that the applicant is no longer a fit person to manufacture or store explosives; or
 - revocation has been agreed with the licensee or registered person.
7. A refusal to renew is treated to be a refusal to grant a registration or licence. It should be noted that the requirements of due process and natural justice/human rights law means that if a licensing authority were to decide to refuse a licence or registration in respect of a place it had previously licenced or registered, it must be able to justify why it has changed its view as to the suitability of the place. That justification might be a change of circumstances or new information about either the site and its surroundings, or about the explosives to be stored there.
8. In cases where the licensing authority is considering whether or not a person is unfit to manufacture or store explosives, the Approved Code of Practice and guidance (ACOP) to MSER makes clear that a conviction alone does not give automatic grounds for refusal or revocation (see ACOP paragraphs 550 to

552). This means the licensing authority must therefore go a step further and consider whether there are grounds for taking the view that the person cannot be relied upon to manufacture or store explosives safely. In considering this, the licensing authority may take into account the nature of the offence itself, any previous dealings with the person (including for example, enforcement notices, warnings/advice), as well as other evidence and information about the person's behaviour before or after the offence. It will then be necessary to record those grounds so that it is possible to demonstrate that there has been a reasoned process.

9. Licensing authorities in England and Wales should note that the Rehabilitation of Offenders Act applies to decisions about licences and registrations under the Manufacture and Storage of Explosives Regulations. 'Spent' convictions may not therefore be used as ground for taking the view that a person is not a fit person. 'Spent' convictions may be taken into account in considering whether someone is a fit person to hold an explosives certificate under the Control of Explosives Regulations (COER).
10. The position in Scotland is different. Currently spent convictions do not need to be declared in relation to the MSER licence and registration regime or in relation to applications for explosives certificates under COER. However, the Scottish Executive is proposing to amend the Rehabilitation of Offenders (Exclusions and Exemptions (Amendment) (Scotland) Order 2003 to require spent convictions to be declared in relation to both MSER licence/registration applications and to applications for COER explosives certificates. At the time of writing (September 2006) the Scottish Executive have no date for the coming into force of the amending order.
11. The grounds for the licensing authority's proposal to revoke etc need to be conveyed to the person as transparently as possible so that they can, for example, challenge any factual issues, and they can see the chain of reasoning that has led to this position.

Notifying the applicant, licensee or registered person

12. Where a licensing authority proposes to refuse or revoke a registration or a licence (including a draft HSE licence) or to vary a licence without the agreement of the licensee, regulation 18 requires it to notify the applicant, licensee or registered person of the proposed course of action. In doing this it must be made clear that the applicant or licensee has the opportunity to make representations to the licensing authority about its proposed course of action within 28 days from the date of the notification.
13. The notification should outline the process for making representations; for example, "write in the first instance to". However, it should be noted that as the Regulations also allow the applicant to make representations orally, the notification should also include guidance on how to do that.
14. The notification should also inform the applicant that if, after considering any representations from them, the licensing authority decides to proceed to refuse or revoke the licence or registration, or to vary the licence, they have the right of appeal to the Secretary of State for Work and Pensions.
15. It is very important that, where appropriate, the notification of the proposal to refuse or revoke a licence or registration for storage under MSER is clearly separate from a notice of intention to refuse or revoke a licence to supply fireworks issued under the Fireworks Regulations 2004. The legislation is different and the appeals processes are entirely separate. In view of this, it is suggested that the two issues are best dealt with in separate letters from the licensing authority.

Confirmation of the decision to refuse or revoke

16. If the licensee/registered person has not made representations by the end of the notice period, or any representations made have been considered, then the authority will go on to make its decision. It should inform the person of the decision to refuse or revoke or vary without agreement, with written reasons for its decision (regulation 18(3)). The statement should refer to all the information that the licensing authority considered in reaching its decision. This is especially important should the case go to appeal to the Secretary of State; although both sides would then have the opportunity to comment on the others submissions, it is preferable that new evidence is not introduced at the appeal stage.

(Note – the term “appeal” is used in paragraphs 17 to 25. Unless otherwise indicated, this means an appeal to the licensing authority about its proposal to refuse or revoke, rather than an appeal to the Secretary of State under s44 of the Health and Safety at Work Act).

17. Regulation 18(4) requires that a decision to revoke or vary without agreement shall take effect “from a date to be determined by the licensing authority which shall be a date after the 28 day period referred to in paragraph (1)” (ie a date after the 28 day period following the date of the notification). However, the legislation is silent on whether a licence or registration can be revoked before the appeal process has been completed.
18. Regulation 18(1) requires the licensing authority to notify the licensee/registered person of their proposal to revoke etc. The notification should include includes a proposed date the decision would take effect (which must be after the 28 day period following the date of notification). If no appeal is made within 28 days the decision would take effect on the date specified.
19. The notice should also set out what would happen in the event that the licensee/registered person makes an appeal. HSE’s advice is that authorities should give applicants the opportunity to have their appeal heard before giving effect to any decision (but see paragraph 25 below).
20. It may be possible to do this within the period specified in the notice (for example the notice might specify a date that gives sufficient time for the hearing etc to be heard). The authority might also specify in the notice that the decision would come into effect either 28 days from the issue of the notice, or in the event that the applicant appeals, a specified period (eg 28 days) after the appeal has been heard.
21. The notice should make clear that as well as making representations about the decision, they may also make representations about when that decision may come into effect. Following the appeal the licensing authority might decide to set a later date for its decision to come into effect.
22. It must also be borne in mind that following the appeal the licensee may wish to appeal to the Secretary of State. HSE’s view is that the licensee should be given the opportunity to make an appeal to the Secretary of State, and that in the event of an appeal, the licensing authority’s decision should not take effect until the appeal has been heard.
23. Section 44 of the Health and Safety at Work Act does not put any time limit on when an appeal to the Secretary of State may be made. In theory this could be months or even years after the licensing authority has made its decision. There is therefore no way for an authority to confirm that an appeal is not going to be made before giving effect to its decision. HSE’s advice is that the authority should give the licensee/registered person a reasonable time to decide whether it wishes to appeal to the Secretary of State following an unsuccessful appeal hearing. It is suggested that 28 days would be a reasonable delay following the appeal hearing.
24. Licensing authorities may wish to make similar considerations in cases where a licence or registration expires before the appeal. HSE’s advice is that the licence or registration should be renewed pending the outcome of the appeal.
25. In cases where the licensing authority has urgent concerns about safety and there were to be an appeal, they have the option of issuing a prohibition notice pending the appeal. It should be noted that section 25 of HSWA provides powers for articles and substances to be seized by an inspector and made harmless if there are reasonable grounds to believe that they are “a cause of imminent danger of serious personal injury”.

Appeal to the Secretary of State

26. Regulation 19 provides the applicant with the right to appeal to the Secretary of State for Work and Pensions against the decision of a licensing authority to refuse or revoke a registration and would be subject to the requirements of Section 44 of the Health and Safety at Work etc Act 1974. HSWA section 44 provides the right of appeal against decisions to refuse, revoke or vary a licence. The refusal of a draft

licence is to be regarded as a refusal of an application for a licence (by regulation 15(3) of MSER) and so is within this scope.

27. The Secretary of State may appoint an independent person to hear the appeal and report to him, or both hear and determine the appeal himself.

28. The Act allows the possibility for the appeal to be considered on the basis of written submissions provided that both parties agree. Any hearing would be subject to the requirements of the Health and Safety Licensing Appeals (Hearings Procedure) Rules 1974 (SI 1974/ 2040) or the Health and Safety Licensing Appeals (Hearings Procedure) (Scotland) Rules 1974 (SI 1974/ 2068) (both SIs are referred to as “the Rules” in this guidance).

Notification of hearing

29. The date, time and place of the appeal hearing are fixed (and may be varied) by the Secretary of State. Not less than 42 days’ notice of the hearing shall be given, although a shorter period may be given with the agreement of the appellant and the licensing authority (the parties). The notice shall also give the name of the person appointed to hear the appeal and whether or not he is to determine it on behalf of the Secretary of State.

30. The Secretary of State may require the licensing authority do one or more of the following:

- publish a notice of the hearing in one or more newspapers circulating in the locality of the site;
- serve notice of the hearing on “such persons or classes of persons as he may direct”;
- give “other notice of the hearingas he may direct”.

31. The 42 day period of notice referred to in paragraph 29 does not apply to these notices.

Statements to be served before the hearing

32. The licensing authority must serve on the appellant a written statement of any submission that they propose to put to the hearing. The statement must be served not later than 28 days before the hearing (although the Secretary of State may specify a later date if the notice of hearing period has been shortened). The statement must be copied to the Secretary of State (for transmission to the appointed person).

33. Where the licensing authority intend to refer to or put in evidence documents (including photographs, maps and plans) their statement must include a list of the documents, together with a notice of the times and place where the appellant may inspect them. The appellant must be given a reasonable opportunity to do so and, where practicable, to take copies of the documents.

34. In cases where a government department has written to the licensing authority expressing support for the authority’s decision, and where the authority intends to rely such an expression at the hearing, they must include it in their statement. The licensing authority must copy the statement to the government department concerned.

35. The appellant shall, if so required by the Secretary of State, serve on the licensing authority (and on the Secretary of State for transmission to the appointed person) a written statement of the submissions that he proposes to put to the hearing. The statement must include a list of any documents that the appellant intends to refer to or put in evidence at the hearing. The statement must be submitted within a time specified by the Secretary of State. The appellant must give the licensing authority reasonable opportunity to inspect and where practicable, take copies of the documents.

Appearances at the hearing

36. The appellant and licensing authority is entitled to appear at the hearing. Any other person may also appear at the discretion of the appointed person provided that he serves on the licensing authority not later than 7 days before the hearing a statement of his proposed submissions. The licensing authority must then send a copy of any such statement received to the appointed person and to the appellant.
37. A person may appear on their own behalf or be represented by counsel, solicitor or any other person. A body corporate may be represented by its clerk, secretary, any other appointed officer or by counsel or solicitor.

Representatives of Government Departments at the hearing

38. Where the licensing authority's statement has included a view from a government department supporting their decision, the appellant may apply to the Secretary of State (no later than 14 days before the hearing) for a representative from the department to be made available at the hearing. The department shall make a representative available. In these circumstances the representative shall be called as a witness by the licensing authority, state the reasons for the view expressed by the department, give evidence and be subject to cross-examination.

Procedure at the hearing

39. Except as provided for by the Rules, the appointed person has the discretion to determine the procedure at the hearing and will state what he proposes at its commencement. He will also state the procedure he intends to adopt in relation to any site inspection arising out of the hearing.
40. Unless the appointed person otherwise determines (with the consent of the appellant) the appellant shall be heard first. All parties have the right to make closing statements.
41. The appellant and the licensing authority are entitled to make an opening statement, to call evidence and to cross-examine. Other persons appearing at the hearing may only do so to the extent permitted by the appointed person.
42. The appointed person may allow both the licensing authority and the appellant to alter or add to the submissions contained in any statement or to any list of documents "so far as may be necessary for the purpose of determining the questions in controversy between the parties....". In these circumstances the parties must be given adequate opportunity to consider any fresh submission or document (if necessary, by adjourning the hearing).

Site inspections

43. The appointed person may decide to make an inspection of the site before or during the hearing. If so, they will give notice of the date and time of the inspection. The appointed person may also (and shall, if requested by any party) inspect the premises after the hearing. The appellant and the licensing authority are entitled to accompany the appointed person on any site inspection.

Procedure after the hearing where the appointed person is to determine the appeal

44. If the appointed person proposes to consider any new evidence or new issue of fact not raised at the hearing that he thinks is material to his decision, he must, before making his decision, notify the appellant and the licensing authority of the substance of the evidence or issue of fact and allow them to make written representations within 21 days or ask for the hearing to be re-opened. The appointed person may in any case decide that the hearing should re-open (if so, they must give no less than 28 days notice of the re-opened hearing).
45. Procedure after the hearing where the appointed person is to report to the Secretary of State.

46. The appointed person is required to prepare a two-part report:

- the first part is a summary of the evidence given, together with their findings of fact. This is copied to the appellant and the licensing authority (and to anyone else who appeared at the hearing). The appointed person will consider any comments received within 14 days. This part of the report may then be amended (although any matter that was not raised at the hearing may not be introduced without the consent of all parties);
- the second part contains the appointed person's recommendations (or their reasons for not making any recommendation).

47. If, after receiving the report, the Secretary of State:

- disagrees with the appointed person on a finding of fact; or
- considers any new evidence or issue of fact not raised at the hearing which would lead to him to disagree with the recommendation

before coming to a decision, he must notify the appellant and the licensing authority of the recommendation, of his disagreement with it and the reasons for it. The appellant and the licensing authority may make written representations within 21 days or, where the Secretary of State has considered new evidence or issue of fact (not being a matter of government policy or affecting the safety of the State), ask for the hearing to be re-opened.

Notification of the decision

48. Written notification of the decision is sent to the appellant, the licensing authority or to anyone who appeared at the hearing and who asked to be notified.

Service of notices

49. Notices or documents served or sent under the hearings procedure rules may be sent by post.

Withdrawal of appeal

50. The appellant may withdraw their appeal if they wish. There is nothing in the Rules (or section 44 of HSWA) to indicate that the agreement of the licensing authority would be needed for this.