The Committee will meet at 9.30 am in Committee Room 5.

1. **Subordinate legislation:** The Committee will take evidence on the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67) from—

   Richard Lochhead MSP, Cabinet Secretary for Rural Affairs and Environment, David Barnes, Deputy Director, Agriculture and Rural Development Division, and Alan Williams, Divisional Solicitor, Scottish Government.

2. **Subordinate legislation:** John Scott to move S3M-6035—

   That the Rural Affairs and Environment Committee recommends that nothing further be done under the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67).

3. **Subordinate legislation:** The Committee will consider the following negative instruments—

   the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87); and

   the Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88).

4. **Crofting Reform (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.
The papers for this meeting are as follows—

**Agenda Items 1 and 2**

- The Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)  
  - RAE/S3/10/8/1
- Extract from Subordinate Legislation Committee report  
  - RAE/S3/10/8/2

**Agenda Item 3**

- The Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87)  
  - RAE/S3/10/8/3
- The Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88)  
  - RAE/S3/10/8/4

**Agenda Item 3**

- Draft report (private)  
  - RAE/S3/10/8/5
- Supplementary submission from Registers of Scotland  
  - RAE/S3/10/8/6

**For Information**

- Recent Developments  
  - RAE/S3/10/8/7
INSTRUMENTS SUBJECT TO ANNULMENT

The Beet Seed (Scotland) Regulations 2010 (SSI 2010/67) (Rural Affairs and Environment Committee)

1. These regulations provide for transposition and implementation of Commission Directive 2008/62/EC, which permits derogations for acceptance of agricultural landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion, and for marketing of their seeds.

2. These regulations also provide for the transposition and implementation of Council Directive 2002/54/EEC on the marketing of beet seed.

3. The 2008 Directive was required to be transposed by 30 June 2009. This instrument comes into force on 20 April 2010.

4. A significant number of issues were identified in relation to this instrument. Correspondence between the Committee and the Scottish Government is reproduced at Appendix 1.

5. There are a very high number of errors in this instrument ranging from careless minor points to significant cross-referencing and formatting errors which could impact on the operation of the instrument itself.

6. In the Committee’s view there has been no effective quality control applied to the instrument. It seems obvious that no-one in the Scottish Government read through the final instrument before it was submitted to the Cabinet Secretary for signing. Had they done so, the Committee is confident that the majority of the drafting errors identified would have been noted and corrected.

7. The Committee is also disappointed to note that the Scottish Government appears to consider that these regulations are unimportant as they “have no practical consequences” for Scotland, since beet seed is not currently marketed here. The Committee would be very concerned if, on that basis, a lower standard of workmanship has been considered acceptable. The same reason is deployed for the decision not to correct immediately the errors which the Committee has identified.

8. Of further concern to the Committee is the impression that the Scottish Government appears not to place any weight on the requirement to transpose EU obligations properly, irrespective of the practical position on the ground. All EU members are entitled to expect that the law in other member states
properly implements EU obligations - a fundamental requirement of the proper operation of the common market.

9. Under the devolution settlement, the Scottish Government is to take responsibility for delivery of EU obligations in relation to matters within devolved competence. It is therefore appropriate for the Committee to hold the Scottish Government to account for the proper use of delegated powers to fulfil those obligations. The Committee intends to address these general questions of quality control of SSIs and approach to implementation separately with the Scottish Government. The Committee also reports on each of the defects identified in this particular instrument as follows.

Questions raised with the Scottish Government

Question 1
Is there unauthorised sub-delegation of functions in regulation 7?
10. There is a general rule that where Ministers have been given delegated powers, they cannot further delegate that power to a third party, or to themselves, to exercise through a different mechanism unless that is expressly permitted.

11. The Committee notes that there is limited authorisation for this purpose in the Seeds Act 1964 (“the 1964 Act”) in relation to exemptions. It was unclear from the drafting whether the power to grant general licences in relation to the matters set out in 7(1)(c) to (e) was intended to have that effect, so the Committee asked for clarification.

12. The Scottish Government confirmed that the intention is that 7(1)(c) to (e) would be used only to provide exemptions to the regulations where that was necessary to deliver the relevant obligations. The Scottish Government agreed that the wording could be clearer and has undertaken to take this into account when next amending the instrument.

13. The Committee reports that the Scottish Government has agreed that the meaning of regulation 7(1)(c) to (e) could be clearer in restricting the application of the power to issue general licences to create exemptions from the operation of the regulations.

Question 2
Is contravention of regulation 10(8) intended to be a criminal offence, and if so, are the circumstances giving rise to criminal liability clear?
14. The Committee considers that the creation of criminal offences is a matter of significant importance which requires to be expressed in the clearest of terms. The Committee is of the view that the instrument is not clear in this respect.

15. In the Committee’s view the Scottish Government response to the question also demonstrates a difference of view as to the nature and effect of the powers being used by Ministers here.
16. Section 16(7) of the 1964 Act provides, “If any person contravenes any provision contained in seeds regulations he shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale”.

17. The Committee considers therefore that no express words are required in the regulations to create criminal offences. Instead, care should be taken in the use of words so as not to create requirements, the contravention of which would automatically be treated as giving rise to criminal liability because that was the express intention of Parliament when passing the 1964 Act. While section 16(5) allows Ministers to exempt persons from the need for compliance with the regulations, there is no power for Ministers to exempt persons from the operation of section 16(7) of the 1964 Act.

18. The Committee therefore queries whether Ministers can create any offences at all in regulations made under section 16 of the 1964 Act, as Parliament did not give them authority to do so. What it did was to provide that, as a matter of law, if the regulations made by Ministers are contravened, the person that does so is liable to a criminal penalty on conviction.

19. The Committee does not accept the Scottish Government’s contention that if it had wanted to create criminal liability it would have been required to use express words to that effect.

20. This issue has been raised before in the context of seed potato regulations. The Committee is concerned that there is a repeated misunderstanding of the effect of the powers here.

21. The second paragraph of the response explains the intended policy approach. That approach is the way in which the Scottish Government has chosen to enforce the requirements of EU law restricting the maximum amount of seed which can be used. However, in an effort to demonstrate on the face of the regulations what is expected to be done, the Committee considers that the Government has, as a matter of law, imposed criminal liability for a contravention of the requirements of regulation 10.

22. The Committee reports that there has been an unusual exercise of the power in section 16. Regulation 10(8) prohibits the marketing of seed of a conservation variety in excess of the maximum amount. Contravention of this prohibition is automatically a criminal offence by virtue of section 16(7) of the Seeds Act 1964, but the Scottish Government advises that it did not intend to create a criminal offence. The Committee also reports that, in this respect, the drafting of the regulations is not sufficiently clear.

Question 3
Clarity of drafting of particular provisions
23. The question identified six examples of drafting which did not appear to be clear and asked the Scottish Government to comment.

24. The Scottish Government accepts that the drafting of regulation 17(3)(e), 18(2)(b), the definition of “EEA state” and the definition of “seed lot” are not
properly drafted. In the Committee’s view the improper formatting of 17(3)(e) and 18(2)(b) could lead to the regulations not being properly applied. Both contain a list of provisions, the final element of which should apply in every case. As this is not clear from the drafting, there is potential for confusion.

25. Due to the drafting error, the definition of EEA state is not given its proper meaning. It also seems unnecessary to provide a definition since the Interpretation Act 1978 supplies one which applies to these regulations.

26. The error in the definition of seed lot results in the potential for the 5% tolerance permitted by EU law being applied twice, with the result that EU law is not properly applied in Scotland. While a court might be prepared to use section 101 of the Scotland Act to read down the additional tolerance in so far as that was necessary to ensure compliance with EU law, the Committee concluded that the regulations are, at best, defectively drafted and, at worst, to be considered ultra vires as incompatible with EU law and therefore to raise a devolution issue in this respect.

27. The Scottish Government provided an explanation as to the meaning of “some other sealing system”, referring to the requirements set out in regulation 18(2)(a) and (4). While the drafting could be improved upon, the Committee accepts this explanation.

28. In relation to regulation 19(13), the Scottish Government explains that paragraphs 4(e) and 5(f) of Schedule 6 are alternatives depending on the type of seed. Given that it is clear that only one or other will apply depending on the circumstances, and that both cannot apply, this could have been more clearly expressed. However, the Committee accepts that users will be able to work out what it is intended they do.

29. The Committee reports that the drafting of regulations 17(3)(e), 18(2)(b), 19(13) and the definition of EEA state are not sufficiently clear, and that in relation to regulations 17 and 18 this could have an effect on the proper operation of the instrument.

30. The Committee reports that, to the extent that the definition of seed lot purports to add a 5% tolerance in addition to that provided by Schedule 5, this is not compatible with EU law and therefore raises a devolution issue.

31. The Committee reports that it is content with the explanation provided for the meaning of “some other sealing system” for the purposes of regulation 18.

Question 4
Cross-referencing errors
Omission of maximum moisture content for certain types of fodder beet
32. Five possible cross-referencing errors were identified. The Scottish Government confirmed that these are errors and identified the correct provisions in its response.
33. The Committee reports the cross-referencing errors listed in question 4 as defective drafting. The Committee considers that these errors could have an effect on the operation of the instrument.

34. The omission of a value for maximum moisture content in the final line on page 33 of the table in paragraph 8(a) of Schedule 4 is a failure to properly transpose and implement EU requirements set out in the 2002 Directive and, as such, raises a devolution issue. The Committee reports this accordingly.

Question 5
Whether the sampling guidance to be issued separately is in fact a matter which the 1964 Act contemplates being made under the exercise of the delegated powers in section 16 and whether it is properly identified for the purpose of the regulations.

35. The Committee was satisfied with the Scottish Government’s response to the matter of whether the guidance is sufficiently identified, and accepts that there are arguments to support the ability to prescribe sampling requirements by reference to named guidance.

36. However, the Committee notes that if the Parliament is not content with this arrangement, or wishes to consider the terms of the sampling guidance, then it must do so before the 40 day period for annulment of the instrument. In the event of a future challenge, it is highly unlikely that the courts would be willing to declare the sampling guidance referred to as ultra vires.

37. The Committee therefore reports that it is content with the explanation provided as to why the use of published guidance to set sampling methods is permissible, but draws to the lead committee’s attention that any concerns as to the terms of that guidance would require to be addressed before the 40 day period expires.

APPENDIX 1
The Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)

On 4 March 2010, the Scottish Government was asked:
1. To explain whether regulation 7(1)(c) to (e) delegates to the Scottish Ministers the power to make further provision which is legislative in character and if so, why this is permitted within the enabling powers, when such authority is generally required to be explicit (it being accepted that section 16(5) of the parent act permits Ministers to authorise further exemptions but it is not clear that this is what is afforded by regulation 7(1)(c) to (e)).

2. To explain whether it is intended that contravention of regulation 10(8) is to be treated as a criminal offence by virtue of section 16(7) of the parent act. If so, how is the maximum amount referred to in that regulation to be established and published so that persons may comply with the law or, if not, is this sufficiently clear given the terms of section 16(7) and these regulations?
3. To explain the following and to comment on whether the drafting is considered sufficiently clear:

- Should regulation 17(3)(e) a full out to regulation 17(3) which applies in the event of any of (a) to (d) applying

- In regulation 18(2)(b) - are (ii) and (iii) alternatives or cumulative

- What are the mandatory attributes (if any) of “some other sealing system” for the purposes of regulation 18(2)(a) and (4).

- In regulation 19(13) are the requirements of paragraphs 4(e) and 5(f) of Schedule 6 alternatives or cumulative

- in the definition of “EEA State” is the reference to EEA State intended to be a reference to member State of the European Union

- in the definition of “seed lot” is the addition of a 5% tolerance within that definition is in addition to the tolerance already specified in Schedule 5

4. Whether the following cross references are correct, and if not, to confirm the correct reference and whether the Government considers that this requires to be amended in order to make clear the obligations imposed by these regulations:

- The reference to paragraph 4 of Part II of Schedule 2 in the definition of "seed of a Conservation Variety"

- The reference to paragraph (11) in regulation 18(1)

- The reference to sub-paragraph (a) in regulation 18(8) (which contains no sub-paragraphs)

- The reference to Part I of Schedule 6 in regulation 19(2)(a)

- The reference to regulation 14(1) in paragraph 1 of Schedule 2

- In the table in para 8(a) of Schedule 4 the entry in the column “maximum moisture content” for “fodder beet - natural seed of varieties with 15% or more triploids and/or tetraploids” is blank when the appropriate entry in the Directive is “15”.

- In the note to the table in para 8(a) of Schedule 4 the reference to paragraph 3 of Schedule 5 (there is no paragraph 3)

5. The Scottish Government is also asked to explain whether the Sampling Guidance as defined:
is considered to be made in furtherance of the powers by which these regulations are made (or by which seed regulations are made generically under the parent act) and if so why its provision take the form of guidance and are not fully incorporated in the SSI; and

is already in existence and if so whether it has been fully identified for the purposes of the regulations.

The Scottish Government responded:
1. Section 16(5)(a) of the parent Act 1964 provides that ‘seeds regulations may exempt, or authorise the Minister to exempt, any person or class of persons, or persons generally, from compliance with any of the provisions of the regulations, and may provide that the exemptions are to be, or may be made, subject to conditions’. This is a wide power that enables the Scottish Ministers to make specific exemptions from compliance with seed marketing regulations in specific circumstances.

Regulation 7(1)(c) to (e) enables the Scottish Ministers to issue general licences which will exempt persons from compliance with certain provisions of the regulations where this is deemed necessary in order to comply with Articles 23 and 24 of the Beet Seed Directive or to give effect to the Agreement between the EC and the Swiss Confederation on Trade in Agriculture Products. These exemptions would be made in such circumstances as when there is a germination problem or where there are supply issues and no other stocks are available from other member states.

It is acknowledged that the drafting could have made it clearer that the exemptions are exemptions from the regulations and we will take this into account when next amending this instrument.

2. The Scottish Government did not intend to create a criminal offence for this provision. Had the intention been to do so, express words to that effect would have been chosen.

The intention is to regulate the situation administratively on the basis that enforcement action against an individual would be evidentially difficult and unnecessary to achieve the effect of article 14 of Commission Directive 2008/62/EC. Regulation 10(7) gives the Scottish Ministers the flexibility to specify the maximum amounts of seed that may be marketed in any given growing season. The person(s) applying to the Scottish Ministers to market seed of a conservation variety would be notified by the Scottish Ministers of the maximum amount of seed of a conservation variety that can be marketed. Regulation 10(8) clarifies that these amounts will be that maximum that a particular person can market. In the event that a person exceeds any maxima applicable to them, then SASA would seek to limit amounts by administrative action. Although this is highly unlikely, if this was deemed necessary, SASA state that the relevant parties would be brought together to discuss the way forward.
3. Regulation 17(3)(e) should not be a separate paragraph and was intended to be a full out to apply to paragraphs (a) to (d) in regulation 17(3). The Scottish Government is grateful to the SLC for pointing out this formatting error. We will correct this when the Regulations are next amended.

Regulation 18(2)(b) – a similar formatting error has occurred in this paragraph as paragraph (iii) should not be a separate sub-paragraph but should be a full out applicable to (i) and (ii). We will correct this when the Regulations are next amended.

The mandatory attributes of ‘some other sealing system’ are those outlined in regulation 18(2)(a) and (4). The package must be sealed using either a non-reusable sealing system or another type of sealing system that still meets the requirements in regulation 18(2)(a) and (4). This provision was drafted to provide for the inclusion of some other sealing systems which may be used and which are re-useable. The Scottish Government are of the view that these requirements fully implement Article 11 of the Beet Seed Directive (2002/54/EC) and are clear from the drafting of regulation 18.

In relation to regulation 19(13), the requirements of 4(e) and 5(f) of Schedule 6 are the same requirements. The reference to the two paragraphs is to make it clear that these requirements apply to be fulfilled when marketing seed in respect of which a breeder’s confirmation has been applied for. The appropriate paragraph in Schedule 6 will be dependant upon the type of seed (Pre-Basic Seed, Basic Seed or Certified Seed). The Scottish Government are of the view that it would be clear to the reader that, when affixing a label in respect of which a breeder’s confirmation is to be applied for, they would of course require to follow the requirements set out in the appropriate paragraph of Schedule 6 (be it paragraph 4 or 5) depending on the type of seed.

The term ‘EEA State’ in the definition of ‘EEA State’ should in fact be a reference to a Member State of the European Union. The Scottish Government is grateful to the Committee for pointing out this error and we will correct this when the Regulations are next amended.

The addition of a 5% tolerance within the definition of “seed lot” in addition to the tolerance already specified in Schedule 5 is an error and we will remove this reference when we next amend the Regulations.

4. The Scottish Government accepts that the cross references referred to in paragraph 4 of the Legal Adviser’s email of 4 March 2010 are erroneous and we will correct these when the Regulations are next amended.

- The reference to paragraph 4 of Part II of Schedule 2 should be to paragraph 4 of Part II of Schedule 1
- The reference to paragraph (11) in regulation 18(1) should be to paragraph (13)
• The reference to sub-paragraph (a) in regulation 18(8) should be a reference to paragraph (7)

• The reference in regulation 19(2)(a) should be a reference to Part II of Schedule 6, rather than Part I

• The reference in paragraph 1 of Schedule 2 to regulation 14(1) should actually be a reference to regulation 15(1), which deals with applications for official certificates

• The entry in the table should be 15

• The reference in the note to the table regarding the minimum weight of a sample to be submitted for moisture content testing refers to paragraph 3 of Schedule 5, when it should refer to paragraph 2(2) of Schedule 5.

5. Regulation 17(1)(b) provides that samples of seed taken for the purpose of an official examination shall be taken in accordance with the methods specified by the Scottish Ministers in Sampling Guidance. “Sampling Guidance” is defined in regulation 2 as the guidance booklet titled ‘Instructions for Seed Samplers Licensed in Scotland, 2010’, produced by the Scottish Ministers. The Explanatory Note explains that copies of this document can be obtained from SASA and an address is provided. The guidance is therefore already in existence and has been fully identified for the purposes of the regulations.

Section 16(1)(e) of the parent Act provides a very broad power for the Scottish Ministers to make regulations necessary for the purposes of prescribing anything which is authorised or required to be prescribed under Part II of the parent Act. In addition section 16(4) allows the Scottish Ministers to make regulations about the manner in which samples are to be taken. The Scottish Government takes the view that these powers in combination are sufficient authority for sub-delegation in this particular instance.

As Beet Seed is not currently marketed in Scotland the Regulations currently have no practical consequences. Nonetheless we plan to bring forward a further a set of seed regulations in the near future and will use that opportunity to make any necessary amendments referred to above.
Common grazings
The Crofting Reform (Scotland) Bill does not currently make provision for the registration of common grazings. The Scottish Government has informed me that it is their intention to bring forward Stage 2 amendments to the Bill that will achieve this. The consultation on the draft Bill set out proposals for the registration of common grazings and the policy memorandum for the Bill states that it is the intention that the Crofting Register will record details of common grazings and any shareholders. This will ensure that all land held in crofting tenure is captured on the register.

Changes to boundaries
Under a map-based system of registration the challenge with natural water boundaries derives, as the Committee recognise, from the fact that they may not remain static. The medium filum, for instance, is a fairly abstract notion as the width of a river or burn is not constant. Similarly both the width of a river and burn and the lie of those can change with the seasons and be affected by other factors such as weather conditions and erosion. Plotting natural water boundaries on to the register map can therefore pose practical challenges for the Keeper. We currently encounter such challenges with the Land Register. However we have developed techniques to deal with these. We have learned that there is no one solution that fits all circumstances. Rather there is a need for the Keeper to retain the flexibility to be pragmatic and accordingly we view each application where there is a water boundary on its own particular merits. We would intend to continue that approach with the Crofting Register.

Where we are in no doubt about the location of the natural water boundary that boundary would simply be edged on the register plan in the same way as any other boundary would be. However it is more common for us to delineate the boundary on the register plan and also enter an explanatory note on the register to the effect that the water boundary shown on the title plan is only indicative of the position of the boundary feature and narrate that the actual boundary is for instance the medium filum of the river. In some instances the water boundary will not be mapped at all. Instead it will be arrowed and letter referenced and a note added indicating where the boundary lies. The note will be in terms similar to the following: ‘the northern boundary comprises the medium filum of River X between the points arrowed and letter referenced A and B on the title plan’. In applying these techniques as appropriate to the particular circumstances surrounding a water boundary we seek to future proof the register map in the event that there are changes in the actual boundary position. In addition, as is presently the case with the Land Register, the crofter could apply to have the register map updated to show the new position of the boundary if that was necessary. The crofter would have to supply evidence of the changed position of the water boundary. However
because of the aforementioned techniques such applications in the Land Register are exceedingly rare and we consider they would be rare in the Crofting Register likewise.

Registers of Scotland
19 March 2010
Marine Protected Areas

The Cabinet Secretary for Rural Affairs and the Environment has written to the Committee about the UK Marine and Coastal Access Act 2009. The Act places a duty on Scottish Ministers to make a statement about the principles and other matters that the Scottish Government intends to follow when contributing to the development of a Marine Protected Area network. Hard copies of the letter and accompanying documents are available from the Clerks on request and can be viewed online at:


Pre-consultation on the draft UK Marine Policy Statement

DEFRA has published a discussion paper on the UK Marine Policy Statement (MPS). The MPS will be the first step in new systems of marine planning being introduced around the UK. It will provide the high level policy context within which Marine Plans will be developed, and set the direction for marine licensing and other authorisation systems. A formal consultation on the draft MPS and supporting policy documents will take place this summer. The pre-consultation period closes on 7 May 2010. The pre-consultation paper can be viewed online at:


Consultation on Scottish Wild Salmon protected food name registration

The Scottish Government has issued a consultation following an application to register the name “Scottish Wild Salmon” as a Protected Geographical Indication under the EU Protected Food Name Scheme. The closing date for responses is 5.00pm on 4 June 2010. More details about the consultation can be read online at:

http://www.scotland.gov.uk/Publications/2010/03/08154833/0
2009 Abstract of Agriculture and Geographic Summary Sheets

Scotland’s Chief Statistician has published results from the 2009 Abstract of Agriculture Summary Sheets, which present data from 1982 onwards, and the 2009 Geographic Summary Sheets, which provide a regional profile of Scottish Agriculture. The reports can be viewed online at:

Data from the June Agricultural Census for years 1982-2009 –

http://www.scotland.gov.uk/Publications/2010/03/16160036/0

June 2009 Agricultural census collected by region and groupings of local authority areas:

http://www.scotland.gov.uk/Publications/2010/03/16165732/0

Brussels Bulletin

The monthly Brussels Bulletin produced by the Parliament’s European Officer is available online at: