

**Explanatory Memorandum to The Planning (Hazardous Substances) (Wales) Regulations 2015.**

This Explanatory Memorandum has been prepared by the Planning Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

**Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Planning (Hazardous Substances) (Wales) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Carl Sargeant  
Minister for Natural Resources  
3 August 2015

## 1. Description

- 1.1 These Regulations contribute towards the implementation of a European Directive (2012/18/EU) on the control of major accident hazards involving dangerous substances, known as the Seveso Directive III (the “Directive”). The Directive became European law in August 2012 and replaces the Seveso II Directive (96/82/EC).
- 1.2 The Directive aims to control of major accident hazards involving dangerous substances, dealing with health and safety controls as well as land use planning of the establishments and developments around them.
- 1.3 The new Directive changes the quantity of individual and categories of hazardous substances that are controlled. It also includes specific requirements for public consultation relating to decisions on where hazardous substances are to be located; development around those locations; and policies, plans and programmes that affect those decisions.
- 1.4 The integrity of on-site controls and procedures for emergencies at establishments in Wales have been addressed by regulations made by the Parliamentary Under Secretary of State, Department for Work and Pensions. These Regulations implement for Wales the land use planning aspects of the Directive.
- 1.5 The Planning (Hazardous Substances) Act 1990 (the “1990 Act”) requires hazardous substances consent (HSC) for the presence of a “controlled quantity” of a hazardous substance on, over or under land. The detailed controls and associated procedures are set out in the Town and Country Planning (Hazardous Substances) Regulations 1992. In addition, other legislation (The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPWO 2012) and The Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 (LDPWR 2005)) places specific requirements on how development is managed around sites where hazardous substances are stored.
- 1.6 To implement the changes required by the Directive, these Regulations consolidate, with amendments, the Town and Country Planning (Hazardous Substances) Regulations 1992. They specify the list of substances that require consent, the controlled quantities at which consent is required and specify the process by which consent is to be granted. They also specify the public consultation that should be undertaken on policies, plans, programmes or applications for hazardous substances. These processes ensure that hazardous substances can be kept or used in significant amounts only after the hazardous substances authority has had the opportunity to assess the degree of risk arising to persons in the surrounding area, and to the environment.

## **2. Matters of special interest to the Constitutional and Legislative Affairs Committee**

- 2.1 There was no factor indicating the use of affirmative procedure for these Regulations.

## **3. Legislative background**

- 3.1 The Welsh Ministers make these Regulations in exercise of the powers conferred by section 4, 5, 7, 8, 17, 21, 21B, 24, 25, 26A, 28, 30 and 40 of the Planning (Hazardous Substances) Act 1990, section 2(2) and Schedule 2, paragraph 1A of the 1972 Act and section 26 of the Welsh Language Act 1993.
- 3.2 Those powers are now vested in the Welsh Ministers so far as they are exercisable in relation to Wales. They were transferred to the National Assembly for Wales by Article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) and subsequently transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32) by virtue of being “relevant Assembly functions” as defined in paragraph 30(2).
- 3.3 Section 2(2) of the European Communities Act 1972 enables a designated Minister or department (including Welsh Ministers) to make provision for the purpose of implementing any Community obligation of the United Kingdom. The Welsh Ministers are designated for the purpose of “the prevention and limitation of the effects of accidents involving dangerous substances, insofar as they relate to, land-use planning; transport routes; or fisheries”.
- 3.4 This instrument is subject to the Negative procedure.

## **4. Purpose & intended effect of the legislation**

### **Background**

- 4.1 The objective of the Directive is the prevention of major accidents which involve dangerous substances and the limitation of their consequences for human health and the environment, with a view to ensuring a high level of protection throughout the European Union in a consistent and effective manner.
- 4.2 The main obligations arising under the Directive relate to health and safety measures. These are implemented through Regulations overseen by the Health and Safety Executive (HSE)
- 4.3 The Directive also requires Member States to ensure that the objectives of preventing major accidents and limiting the consequences of such

accidents are taken into account in their land use policies. It requires that these are pursued through controls on:

- the siting of new establishments;
- modifications to existing establishments that could have significant repercussions on major-accident hazards; and
- new development in the vicinity of existing establishments where the siting or development may be the source of or increase the risk or consequence of a major accident.

4.4 Land use planning controls apply to all establishments that are within the scope of the Directive.

4.5 The Directive replaces the Seveso II Directive. The main reason for the new Directive is to address changes that have been made in the EU chemical classification system. At the same time the opportunity has been taken to bring the Directive in line with other environmental legislation, to include wider public information requirements in accordance with the Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters).

4.6 Implementation of the Directive is being taken forward primarily through the Control of Major Accident Hazard (COMAH) Regulations, which apply to the whole of Great Britain and are implemented by the Health and Safety Executive (HSE). The COMAH Regulations deal with on-site safety measures, requirements for the inspection of sites and the preparation of site safety plans and emergency plans. However implementation of the land use planning aspects of the Directive is being undertaken through town and country planning legislation. As town and country planning is largely a devolved matter it falls to the Welsh Ministers to implement this element of the Directive in Wales.

4.7 The current land use planning requirements of Seveso II are primarily implemented in Wales through The Planning (Hazardous Substances) Act 1990 and the Town and Country Planning (Hazardous Substances) Regulations 1992 (as amended for Wales) with additional requirements contained in DMPWO 2012 and LDPWR 2005.

### **The issue**

4.8 The Directive became European law in August 2012 and all EU member states are required to comply with the Directive. Whilst the UK is a Member State in this respect, responsibility for transposition of the land use planning elements of the Directive is devolved to the Welsh Government. Failure to properly transpose the Directive could result in infraction proceedings against the UK.

4.9 The existing legislation needs to be amended to reflect the revised list of hazardous substances and their controlled quantities. The new Directive

also includes specific requirements on public consultation, relating to decisions on where hazardous substances are to be located; development around those locations; and policies, plans and programmes that affect those decisions. These additional requirements will need to be incorporated into the existing legislation.

- 4.10 Alongside the implementation of the Directive, it has become apparent that there is a practical issue within the current domestic legislation. The current regulations can result in an applicant losing the right of appeal where the LPA does not issue a decision and the applicant does not lodge an appeal within the relevant period. Currently an appeal in relation to an undetermined application must be lodged within a period calculated from the end of the period prescribed by regulations for issuing a decision. If an appeal is not lodged within the requisite period, the applicant loses the right to appeal. An extension of the period for the LPA to issue a decision may be agreed in writing. LPAs operate different practices regarding such time extensions. Whilst some routinely write to the applicant asking for their agreement, others do not and at least one LPA considers it is for the applicant to approach them. There have consequently been instances where applicants have lost their right of appeal where the LPA has not issued a decision, no extension of time has been agreed in writing and an appeal is not lodged in time.
- 4.11 Most applicants are unaware that their right of appeal can be lost in this way and some appeals have been found to be out of time. Whilst it is proper that there should be a limit on the period in which an appeal can be made following a decision, the right of appeal should not be lost due to the failure of the LPA to make its decision within a reasonable period.

### **Purpose and intended effect**

- 4.12 The existing legislation provides a robust system for preventing major accident hazards through the existing hazardous consent regime and the wider planning system. The new Directive does not require fundamental changes to the existing regime and the main changes in the legislation are made to take account of the new Directive.
- 4.13 The main changes will:
- accommodate revisions in the Directive for the classification of hazardous substances;
  - strengthen existing provisions for public participation;
  - include transitional provisions to ensure that existing HSC and other matters such as appeals and enforcement related to existing consents are not affected by the amendments; and,
  - ensure the applicant retains the right of appeal where an application is undetermined.

## **Risks if legislation changes are not made**

4.14 If the proposed revisions are not introduced, the following issues may arise.

- Infraction costs

4.15 Failure to transpose the Directive would risk infraction proceedings. Where the issues relate to land use planning these costs would be borne by the Welsh Government.

- Increased burden on industry and Hazardous Substances Authorities

4.16 Not introducing the new Regulations will mean that HSC will be required at a lower threshold than is considered necessary for the risk posed by the substance. This will mean that applicants and authorities will have to deal with applications that they really should not be troubled with, taking resources from elsewhere.

- Confusion amongst stakeholders

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4.17 Not introducing the new Regulations will mean that stakeholders, especially those that operate cross-boarder, will be uncertain as to thresholds and procedures that should apply.

## **5. Consultation**

5.1 Details of consultation undertaken are included in the RIA below.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **6. Options**

#### **Option 1 – Do nothing**

- 6.1 The Directive (2012/18/EU) became European law in August 2012 and the Welsh Government is responsible for elements that relate to the siting of new establishments and development around them, including transport routes and fishery harbours. This will require changes in legislation to ensure that the Seveso III Directive is fully transposed.
- 6.2 Judgments of the European Court of Justice have consistently taken the view that European Community legislation has to be properly transposed into the legislation of Member States. Failure to do so can result in infraction proceedings by the European Commission and the imposition of fines for failure to transpose. 'Do nothing' is therefore not a viable option.

#### **Option 2 – Amend legislation to meet the requirements of the Directive**

- 6.3 Amend the existing HSC and planning regimes to take account of amendments in the Directive. The regimes will be amended to include changes in the EU chemical classification system, exemptions for minor modification of consents, increased public involvement and other minor changes as required by the Directive.

#### **Sectors and groups affected**

- 6.4 Option 1 and option 2 have potential impacts for the following groups and sectors:
- businesses/industry who require consent;
  - local planning authorities (LPAs) who make Local Development Plans and determine applications for HSC and planning permission;
  - statutory consultees who comment on such applications;
  - the public who may be affected by the change; and,
  - the Welsh Government who are required to transpose the Directive.

### **7. Costs & benefits**

#### **Option 1 – Do nothing**

##### **Costs**

- 7.1 This could result in infraction proceedings and fines against Welsh Government. It would also create uncertainty for industry, regulators and

other stakeholders. In some instances HSC consent would be required unnecessarily, as some of the thresholds in the new Directive have increased.

### **Benefits**

- 7.2 No benefits have been identified for the sectors that are potentially affected.

### **Option 2 – Amend legislation to meet the requirements of the Directive**

- 7.3 Amend the existing HSC regime to take account of amendments in the Directive. The main changes are:
- changes in the EU chemical classification system;
  - public involvement and information arrangements;
  - exemption for minor modification of consents;
  - transitional arrangements; and,
  - the content of applications.

### **Changes in the EU chemical classification system**

- 7.4 The Directive sets out a schedule of hazardous substances and thresholds for storage that supersede the schedules and thresholds in Seveso II. The regulations copy out these thresholds with the exception of liquefied petroleum gas (LPG), liquefied natural gas (LNG) and hydrogen where the existing levels are retained.

### **Costs**

#### Cost to business

- 7.5 An effect of replicating the new schedule of substances and thresholds of the Directive in the regulations means that some sites which are outside the scope of current regulations will come within scope for the first time whereas some existing establishments may fall out of scope and no longer require controls. HSE have undertaken research<sup>1</sup> in order to understand the impact on the number of establishments in scope. The overall picture is that more sites will fall out of scope than will come within scope as a result of the changes regarding substances and thresholds.
- 7.6 Based on the HSE and DCLG research<sup>2</sup>, and considering that Wales only has 6% of the total number of registered sites in Great Britain, it is unlikely that an existing business will come into scope for the first time as a result of the changes.

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<sup>1</sup> Source: HSE: consultation on draft COMAH Regulations 2015 to implement the Seveso III Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances, amending Council Directive 96/82/EC

<sup>2</sup> Source: Regulatory Impact assessment on The Planning (Hazardous Substances) Regulations 2015

- 7.7 In addition, the higher thresholds may mean that newly created sites will not fall within the regime. This might result in a small reduction in the number of applications made for hazardous substance consent and this will reduce the cost on new establishments. The application process for hazardous substances consent has been estimated to cost an average £17,300<sup>3</sup>.
- 7.8 HSE have advised that the existing level of control in the hazardous substances consent regime for liquefied petroleum gas, natural gas and hydrogen is considered to be justified in terms of public safety. They have advised that liquefied petroleum gas, hydrogen and natural gas are all extremely flammable gases and have the potential to cause a major accident even under the current control quantities, which are stricter than those imposed by Seveso III.
- 7.9 There is a current drive for use of hydrogen as a 'clean' fuel at the point of use which may lead to more sites storing this substance. Maintaining control levels is therefore precautionary in light of the possibility of rapid proliferation of these sites. There is also a current trend for liquefied natural gas fuel facilities at logistics sites (where a number of people will be present on site), and other sites which are not experienced major hazard operators, it is therefore also advisable to maintain current control standards on natural gas.
- 7.10 Retaining the existing thresholds for LPG, LNG and hydrogen will have no additional financial effect on existing sites as these sites are already compliant with the regulations. But new sites will require consent and business will be subject to the cost of submitting an application for HSC, , with a potential cost of £17,300<sup>3</sup> per new site. However businesses will not be at a disadvantage in the UK market as other UK administrations have also retained the lower threshold.

#### The cost to LPAs

- 7.11 Increasing thresholds may lead to a small reduction in the number of hazardous substances consent applications made to LPAs. The application fees that accompany these vary between £200 and £400. The LPA will see a reduction in this income but this will be offset by a reduction in costs to process and determine these applications and so the overall impact on LPAs should be cost neutral. However, the changes between schedules should not significantly alter the number of applications that are made and there is not anticipated there will be a significant reduction in income or costs of the LPA.

#### The cost to public

- 7.12 There are no costs to the public.

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<sup>3</sup> Source: Regulatory Impact assessment on The Planning (Hazardous Substances) Regulations 2015

## **Benefits**

### Benefits to Business

- 7.13 Aligning the regulations with the schedule of substances and thresholds from the Directive will ensure consistency across the UK and provide certainty for industry, regulators and stakeholders. Retaining lower thresholds for certain substances is precautionary, however this approach is preferable to the retrospective application of lower thresholds should it be required and is consistent across Britain.

### Benefits to LPA

- 7.14 There are limited benefits to the LPA. Applications for HSC would still be submitted to the LPA for determination, allowing them to control the impact of hazardous substances on land-use within their area. The changes between schedules will not significantly alter the number of applications that are made.

### Benefits to the Public

- 7.15 Aligning the planning controls with those in the Directive ensures public safety for sites and development around hazardous substances. Retaining the existing levels for liquefied petroleum gas (LPG), liquefied natural gas (LNG) and hydrogen is precautionary, reflects the developing fuel market and locations of these substances and accords with the HSE public safety advice.

## **Public involvement and information arrangements**

- 7.16 As required by the Directive, the regulations have been amended to take account of the Aarhus Convention and the right to participate in environmental decision making. In particular they enhance public consultation relating to decisions where hazardous substances are to be located and on development around those locations.

## **Costs**

### Costs to Business

- 7.17 Businesses are already required to undertake a process of public consultation when an application for HSC is made. The changes to the consultation process will place no additional costs onto business.

### Cost to LPAs

#### *Development management*

- 7.18 The LPA already undertakes a process of consultation when development is proposed around existing establishments. The regulations place a specific requirement on the LPA to take account of the responses received during this consultation period. As LPAs already take account of consultation responses in their decision making, placing this on a statutory footing will not create any additional cost.

### *Plans and Programmes*

- 7.19 LPAs will have to undertake a process of consultation where a plan or programme affects the location of new establishments, or where it affects development around existing establishments. As the regulations do not apply where a plan or programme is subject to Strategic Environmental Assessment (as the plan will already be subject to a process of public consultation) most relevant plans and programmes will already meet these obligations. Other plans will need to make minor modifications to the procedure of public consultation. This should only add minor costs to the system.

### Cost to the public

- 7.20 There are no additional costs to the public.

## **Benefits**

### Benefits to business

- 7.21 The proposed regulations allow the public to be “informed by public notices or other appropriate means, including electronic media where available”. There is no longer a requirement to publish a notice in the local newspaper providing the information is available electronically. This will save costs and administrative burden of undertaking a paper advert.

### Benefits to LPAs

- 7.22 As the public is fully involved in the planning and consenting process, there may be a reduction in the resources the LPA uses in dealing with concerns of the public.

### Benefits to the public

- 7.23 The public is fully informed of the decision making process that determines where hazardous substances are to be located and on development around those locations.

## **Minor modification of consents**

- 7.24 Current legislation requires operators to seek full HSC if they wish to operate outside the terms of an existing consent. This approach is more restrictive than is required by the Directive which only seeks control where a modification would result an establishment changing tier or where a modification would have significant consequences for major accident hazards. The regulations provide that where modifications do not meet these criteria (which would be confirmed by HSE and NRW), the modification would be exempt from the need for a new HSC.

## **Costs**

### Costs to business

- 7.25 The proposal will reduce the number of applications for HSC that are submitted to make minor changes to sites with an existing consent. This

will reduce the number of applications that need to be made to the hazardous substances authority for such changes. This will make a very small reduction to the costs (£200 fee per application) to industry of making an application for a minor change.

#### Costs to LPAs

- 7.26 As applications are no longer made to LPAs, the application fees received will reduce by a very small amount. But as this reduction in income will reflect the reduction in HSC case work that is undertaken the overall impact is cost neutral.

#### Costs to statutory consultees

- 7.27 NRW and HSE are statutory consultees on applications to amend an existing consent, and they will no longer incur a cost in undertaking this role. As a minor modification is required to be agreed by HSE and NRW before the change can be made, they will experience a cost in undertaking this work. But as this is a function they already perform for the purposes of applications to amend existing consents the cost impact of the proposal on HSE and NRW should be neutral.

### **Benefits**

#### Benefits to business

- 7.28 This proposal complies with the requirements of the Directive and removes an unnecessary regulatory burden. Although operators will need to seek confirmation that a change is acceptable, the process is more streamlined than the existing procedures and should result in a quicker decision.

#### Benefits to LPAs

- 7.29 As no formal application is made to the LPA, no consultation or notification exercise is undertaken. This will reduce the time and resources spent dealing with such applications, allowing the resource to be used elsewhere in the planning function of the LPA.

#### Benefits to the public

- 7.30 As no formal application is made to the LPA, the public are not provided the opportunity to comment on the proposed change. This will not result in any adverse impacts as the proposal only relates to minor changes that do not have significant consequences.

### **Transitional arrangements**

- 7.31 The legislation provides transitional arrangements to account for the changes in the substances and thresholds in the Directive, these are:
- where a substance already has HSC, that consent will remain “valid” despite any change in classification of the substance as a result of the regulations; and,

- where sites were operating legally prior to these regulations coming into force without the need for consent they will not be required to secure consent even where their substances and quantities now come within scope .

7.32 This policy position is based on Article 13 of the Directive only requiring controls on “new establishments”, as defined in the Directive. When subsequently new or modified consents are required, the consents can be regularised in line with the new schedules.

### **Costs**

7.33 The proposed transitional arrangements will not result in additional costs for operators, regulators, statutory consultees or the public.

### **Benefits**

7.34 The regulations will provide certainty for industry, regulators and statutory consultees over existing consents. In addition, it will not introduce regulatory burden through the requirement to reapply for consent, saving time and resources for both the operator and LPA. There are no identified benefits for the public

### **Content of applications**

7.35 The regulations allow the same information to be submitted for the purposes of hazardous substances consent and health and safety requirements under COMAH. This will reduce the duplication of data requirements.

### **Costs**

7.36 The removal of duplication should ensure longer term savings to operators and regulators by allowing applications to be processed more quickly and efficiently as information is not unnecessarily duplicated.

### **Benefits**

7.37 The proposal should improve the quality of submissions and significantly reduce the number of invalid applications received by LPAs. This will reduce the number of occasions in which LPAs and statutory consultees need to seek further information from operators after submission and help to speed up the determination of applications. This will benefit applicants by providing improved clarity about what information needs to be provided, reducing administrative burden with an application and allow applications to be determined more quickly

## **Timescale within which non-determination appeals may be made**

7.38 The regulations remove the limit on the end of the period within which an appeal against non-determination of an application can be made (which was previously six months from the statutory time period for issuing a decision, or a longer period if agreed in writing). This ensures that applicants do not lose their right of appeal as the six month period has expired. An appeal may still only be made from the end of the prescribed period for issuing a decision, unless an extension of this period has been agreed in writing. Previously, where the right of appeal has been lost the LPA is able to treat the application as 'finally disposed of'. This means that no decision needs to be made on the application, causing uncertainty as to the development granted within an area. The change means that a decision must be made on the application before it can be removed from part one of the register.

### **Costs**

7.39 The cost to the applicant of making an appeal where an LPA has not issued a decision, and the cost to the LPA to make representations in these instances will not change. The removal of the time limit to make the appeal is considered unlikely to affect the overall number of appeals made. It is anticipated that any increase that results from an extended appeal opportunity, this would be offset by those applications that are no longer appealed because the negotiation process is able to continue without the risk of the appeal being lost.

### **Benefits**

7.40 The proposals will overcome the existing frustrations with the appeal process and ensure that the appeal system remains equitable. The right of appeal will not be lost due to the failure to agree a time extension to the determination period. In giving applicants an unlimited period in which to appeal against the non-determination of an application, the development industry will no longer be constrained by a timeframe in which to make an appeal, thus improving the quality of appeal submissions.

7.41 The community and interested parties will have the benefit of participating in a planning system which is efficient, fair, and transparent. This is achieved through a higher percentage of applications being decided upon, rather than being finally disposed of. This removes an associated uncertainty where no firm decision has been made on a particular proposal.

### **Summary**

7.42 Option one provides no or very limited benefits. The existing legislation provides a regime of control over hazardous substances, however as this does not transpose the requirements of the Directive it could result in infraction proceedings and fines against Welsh Government. It would also

create uncertainty for industry, regulators and other stakeholders. In some instances HSC consent would be required unnecessarily, as some of the thresholds in the new Directive have increased.

- 7.43 Option two transposes the requirements of the new Directive and will ensure that there is consistency across the UK and Europe in the chemicals and thresholds where controls over hazardous substances are required. By doing this the risks of a major accident involving these substances is minimised and so are the costs in economic and social terms of such an accident. The changes to the procedural arrangements in relation to HSC will increase and improve public participation in the process. In addition the benefit of amending planning legislation to accord with the schedule in the Directive is that this would ensure compliance with the Directive and its aims and limit the potential for infraction proceedings against the Welsh Government.

## **8. Consultation**

- 8.1 The 'Consultation on transposing the land use planning requirements of the Seveso III Directive on the control of major accident hazards' document was issued on 11 February 2015 setting out the Welsh Government's proposals for amending the hazardous substances controls. An 8 week period for responses was provided for the consultation, closing on 08 April 2015.
- 8.2 The consultation paper, and annexes that included draft Regulations, were made available on the Welsh Government's website. In addition, stakeholders from the private, public and third sectors were notified in writing.
- 8.3 The consultation exercise generated 13 responses. Respondents supported the methodology for implementation of the Directive, although some did raise technical issues about aspects of the draft regulations. These issues have either been addressed within the legislation or in the 'Summary of Consultation' document that is available on the Welsh Government website.

## **9. Competition Assessment**

- 9.1 A competition filter test has been applied to the proposed amendment. The results of the test suggest that the proposals are unlikely to have any significant detrimental effect on competition.
- 9.2 The proposal will have equal benefit across the business sectors. In particular, it will ensure that controls on hazardous substances are based on the risk of the substance(s).

## **10. Post implementation review**

10.1 The Welsh Government has close dialogue with all stakeholders involved with the planning system as a whole, which will allow general feedback and assessment of how the changes have impacted stakeholders. Due to the technical nature of the legislation, it is anticipated that should anything arise specific stakeholders will raise concerns on how the new regime is working and whether there are any particular areas of ambiguity.