

Explanatory Memorandum to the Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2010.

This Explanatory Memorandum has been prepared by the Department for Environment, Sustainability and Housing and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2010. I am satisfied that the benefits outweigh any costs.

Jane Davidson

Minister for Environment, Sustainability and Housing

24 February 2010

1. Description

- 1.1 European Directive 96/82/EC, commonly known as ‘the Seveso II Directive’, contains a list of hazardous substances for which controls and procedures must be in place to ensure their safe storage and to avoid major accidents occurring. The list of substances has been amended by Directive 2003/105/EC and this change needs to be incorporated into subordinate legislation in Wales. The proposed regulations amend the Planning (Hazardous Substances) Regulations 1992 to ensure the hazardous substances consent system in Wales complies with the requirements of the amended Seveso II Directive.

2. Matters of special interest to the Constitutional Affairs Committee

- 2.1 It has not been possible to meet the transposition deadline of July 2005 due to the need for a co-ordinated approach across the United Kingdom on the issue of whether ‘deemed consent’ should be available to industry for their existing inventory of substances. Deemed consent is explained further in paragraph 5.3.

3. Legislative background

- 3.1 The power to make regulations in relation to hazardous substances consent is provided by sections 4, 5 and 40 (1) of the Planning (Hazardous Substances) Act 1990 (as amended) (‘The Act’).
- 3.2 Section 4 of the Act states that the Secretary of State may by regulations, require a hazardous substances consent to be sought in relation to land of prescribed descriptions by reason of a presence of a hazardous substance in prescribed circumstances.
- 3.3 Section 5 of the Act provides that the Secretary of State shall by regulations specifying what substances are defined as ‘hazardous substances’ and the quantity of any such hazardous substance which is to be subject to controls.
- 3.4 Section 5(3) of the Act provides the Secretary of State with powers to make transitional arrangements for operators as is appropriate.
- 3.5 Section 40(1) of the Act provides that the Secretary of State may make regulations under the Act for any purpose for which regulations are authorised or required to be made under the Act provided that the purpose of the regulations are not to be authorised or required to be made by another Minister.
- 3.6 The functions of the Secretary of State under sections 4, 5 and 40(1) were, so far as exercisable in relation to Wales, 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. The functions were 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).
- 3.7 These powers are sufficient to transpose the Directive’s requirements. Section 80 of the Government of Wales Act 2006 makes the UK’s obligation to transpose the Directive the direct statutory responsibility of the Welsh Ministers.

3.8 Negative Resolution: Section 40 of 'the Act' provides statutory instruments made under the Act follow the negative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 Directive 96/82/EC (the Seveso II Directive) came into force in 1999. It aims to prevent major accidents and limit the consequences of such accidents for people and the environment. It applies to establishments where specified dangerous substances, or generic categories of dangerous substances, are present at or above qualifying quantities listed in the Directive.

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 are such as to 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 We have given effect to these requirements by way of the amendment the Planning (Hazardous Substances) Regulations 1992 (by the Planning (Control of Major Accident Hazards) Regulations 1999 in relation to hazardous substances consents, preparation of development plans and on consultation before the grant of planning permission. The effect is that sites that fall within scope of the Seveso II Directive have to obtain hazardous substances consent from the local planning authority. Once consent is issued, the HSE fixes a consultation zone around the site that serves to control future development within the vicinity of dangerous sites.

4.6 Directive 2003/15/EC made changes to the way in which some substances and preparations are classified or defined, and to some qualifying quantities that determine whether an establishment falls within scope of Seveso II.

4.7 The proposed regulations amend the Planning (Hazardous Substances) Regulations 1992 to reflect changes to the Directive and ensure we continue to fulfil the land use planning requirements of the Seveso II Directive. The costs shown arise solely from application of the specific land use planning requirements of the Directive. It is not possible to distinguish the benefits of these measures from those generally derived from the other, complementary health and safety provisions operated by the HSE.

4.8 Accidents involving dangerous substances have the capacity to cause serious dangers to human health and the environment. Stringent safety measures applied at

the plant can minimise, but never completely eliminate, the risk. Where such accidents happen there is no guarantee the hazard can be contained on site.

- 4.9 We have no information about accidents at the sites that will be brought into the scope of these new regulations against which we can meaningfully assess risk. But the incidents at Toulouse, in France and Enschede, in The Netherlands, with loss of life, significant damage to property and huge economic cost adequately demonstrate the off-site consequences that can arise in the event of a major accident.

5. Consultation

- 5.1 Public consultation was undertaken for 12 weeks up to 28 June 2005. Draft regulations and an accompanying consultation document, including a partial regulatory impact assessment were sent to over 90 individuals and organisations to obtain views on whether the proposed approach adequately transposed the requirements of the Seveso 2 Directive as amended and whether the cost and benefits associated had been properly identified. Consultees included: businesses including those in the chemical industry, representatives of the voluntary sector, environmental conservation organisations, all local authorities, national park authorities and other government departments and agencies.
- 5.2 Six responses were received. The British Coatings Federation, the Royal Society of Architects in Wales, the Royal Town Planning Institute and Snowdonia National Park Authority were not opposed to the proposals, whilst the Health and Safety Executive raised some practical issues and drafting points. The Law Society welcomed the proposals but expressed concern about the additional burden in terms of extra costs and resources on businesses and the need to introduce transitional arrangements.
- 5.3 The Assembly Government has also taken into account views expressed by the chemical industry in response to similar consultations in other parts of the United Kingdom. The most notable of these was a concern about a lack of provision for deemed consent. On previous occasions when controlled quantities specified in legislation have been lowered, the amending legislation has included provisions to allow the chemical industry to claim 'deemed consent' based on what they held on sites in the twelve months prior to the legislation coming into force. Such provision was considered appropriate at that time to lessen the affect on industry. However 'deemed consent' was not included in the proposals consulted on in 2005 because the Assembly Government concluded that deemed consent was inconsistent with the Directive's scope and purpose. However, in light of the consultation responses, transitional arrangements have been included that allow operators six months to obtain any necessary additional consents.

6. Regulatory Impact Assessment

- 6.1 The following sections comprise a Regulatory Impact Assessment of the likely effects of proposals to amend the Planning (Hazardous Substances) Regulations 1992 to comply with amendments made to the Seveso II (Directive 96/82/EC) by Directive 2003/105/EC. A Partial Regulatory Impact Assessment formed part of the public consultation in 2005.

7. Options

Option 1: Do nothing

- 7.1 As outlined in the background above, the Planning (Hazardous Substances) Regulations 1992 give effect to the land use planning requirements of the Seveso II Directive. Directive 2003/105/EC has amended the Seveso II Directive and it is therefore necessary to amend the 1992 Regulations in relation to Wales to ensure that the Seveso II Directive as amended is fully transposed.
- 7.2 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.

Option 2: Continue to give effect through the consent procedure

- 7.3 Amending the 1992 Regulations to reflect the amendments to the Seveso Directive made by Directive 2003/105/EC will involve the substitution of a new Schedule which increases the range of dangerous substances and revises the definitions and qualifying quantities of dangerous substances and as such will involve minimum change.

Option 3: Change the way in which we comply with the planning requirements of the Directive

- 7.4 In 1999, when the land use planning requirements of the Seveso II Directive were transposed by way of amendment of the Planning (Hazardous Substances) Regulations 1992, an alternative approach had been considered. This involved amending the definition of 'development requiring planning permission' in section 55(2) of the Town and Country Planning Act 1990 to provide for modifications that could have significant repercussions on major accident hazards but do not fall within the definition of development. Examples are increases in the amount or nature of hazardous substances stored; or a change in the location of a substance on site or the way in which it is stored.

Sectors or Groups affected

- 7.6 The legislation is intended to ensure that more establishments that store harmful substances are designated major accident hazards and are not located where they would pose unacceptable risks to the surrounding population. In pursuing this aim, there is not one particular sector of the general population that would benefit to a greater extent than another from the changes introduced by the legislation.
- 7.7 The organisations affected by this legislation are business in Wales that want to store chemicals above the proposed thresholds but below the existing controlled quantity. These business will have to apply for hazardous substances consent. This could affect up to two firms that currently hold such an inventory. It would also affect the relevant hazardous substances authorities that would have to determine the applications.

8. Costs and Benefits

Benefits

Option 1: Do Nothing

8.1 No economic, social or environmental benefits are derived from doing nothing.

Option 2: Continue to give effect through the consent procedure; and, Option 3: Change the way in which we comply with the planning requirements of the Directive

Environmental and social benefits

8.2 The benefits that arise are in providing members of the public with extra reassurance that adequate controls are being exercised over the use and storage of hazardous substances and preparations and the establishments where they are present; and that such controls are effective in maintaining public health and safety, and in protecting the environment. The controls complement other regulations that give effect to the requirements of the Seveso II Directive that are implemented by the Health and Safety Executive and the Environment Agency. Land use planning controls cannot themselves prevent a major accident. But by ensuring that proposed development within the vicinity of dangerous establishments is authorised only after the public health and safety issues have been taken fully into account, they mitigate the consequences of any major accident minimising damage that may be caused to property or injury to persons or loss of life.

Economic benefits

8.3 It is difficult to quantify economic benefits directly attributable to regulations that give effect to the land use planning requirements of the Seveso II Directive. However, it is expected that these changes will reduce the off-site risks associated with dangerous substances and will reduce economic damage caused as a result of a major accident. An estimate of such costs at fairly recent major accidents is given below under option 1.

Costs

Option 1: Do nothing

8.4 The 'do nothing' option involves no costs to industry. As above, if we do nothing the European Commission will pursue infraction proceedings against the UK for failing to implement the land use planning requirements of the Seveso II Directive. Continued failure to implement the Directive would result in costs to the UK through fines imposed by the European Court of Justice.

8.5 It is difficult to estimate social or environmental costs of this option, which would only become apparent in the event of a major accident of the type that the Directive aims to prevent. The costs of fairly recent major accidents at Toulouse (2001) and Enschede (2000) have been estimated at €2,066 million and €170 million, respectively. These costs include reconstruction and lost production, but it is not

clear how much is due to 'off-site' costs. However, it is clear that major accidents can have substantial social and environmental costs.

Option 2: Continue to give effect through the consent procedure

Economic costs

- 8.6 It is estimated that as a result of the amendment to the Seveso II Directive 53 businesses within the UK will be brought within the scope of the planning hazardous substances consent procedure and will have to apply to the local planning authority for consent. Of these only two are in Wales. The cost of an application is either £250 or £400 if the quantity of substance for which consent is sought exceeds twice the controlled quantity.

Environmental and social costs

- 8.7 We do not believe there are any social or environmental costs

Option 3: Change the way in which we comply with the planning requirements of the Directive

Economic costs

- 8.8 This option would not involve initial costs to industry. But changes to the inventory of substances or amounts of materials present at a site might constitute a material change of use that requires a new planning application and appropriate fee. In Wales, the current fee for change of use is £330. Companies with changing inventories and quantities of hazardous substances might have to make several applications each year. When this option was previously considered it was concluded that such changes could significantly distort the accepted concept of development as consisting of something which changes the physical characteristics of the land or making a material change to the purpose for which land is used to the detriment of good administration of the planning system and this remains our view.

Environmental and social costs

- 8.9 We do not believe there are any social or environmental costs

Statutory Duties

- 8.10 We have considered the Assembly Government's duties to promote equality of opportunity and the Welsh language but concluded there is no scope to promote either through this legislation. With regard to the duty to promote sustainable development, it is considered that the legislation will promote the sustainable location of major accident hazards through the assessment and subsequent management of risks associated with surrounding land uses, thereby protecting the safety, health and wellbeing of the population.

Summary

- 8.11 The proposed regulations are necessary in order to transpose the specific land use planning requirements of Directive 96/82/EC, as amended by Directive 2003/15/EC.

The costs associated with infraction proceedings alone are sufficient to rule out option 1, but the benefits of avoiding a major accident reinforce this conclusion.

8.12 The proposed means of giving effect to these requirements is by way of amendment to the Planning (Hazardous Substances) Regulations 1992. This will continue the procedure introduced in 1999. We have considered whether the planning requirements could be achieved by another means but concluded that option 2 is still the most preferable way of achieving this objective.

8.13 The costs to business will be small, an estimated £250 - £400 for each company affecting up to two existing companies in Wales. We estimate that these companies are large enough to absorb this cost without damaging their competitiveness, and enabling them to provide extra reassurance that they are responsibly managing their health and safety obligations.

9. Competition Assessment

9.1 The competition filter was applied to this proposal. We do not consider that the proposal will have any differential effect on operators, affect the market structure, penalise new firms or place restrictions on the services or products that firms provide.

10. Post Implementation Review

10.1 The changes made by these Regulations are designed to achieve full compliance with the Seveso II Directive as amended by Directive 2003/105/EC. The Commission will be reviewing the Directive in due course.

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