



The Planning (Hazardous Substances) (Amendment)
(England) Regulations 2009
Consultation



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Consultation

March 2009

Department for Communities and Local Government: London

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Summary

Consultation document by the Department for Communities and Local Government on a proposal to amend the *Planning (Hazardous Substances) Regulations* to comply with the requirements of Council Directive 96/82/EC on the control of major accident hazards involving dangerous substances (the Seveso II Directive), as amended by Directive 2003/105/EC.

Scope of this consultation

Topic of this consultation:	Amendment of the <i>Planning (Hazardous Substances) Regulations</i> . This will amend the land-use planning legislation so that it complies with the requirements of Council Directive 96/82/EC on the control of major accident hazards involving dangerous substances (the Seveso II Directive), as amended by Directive 2003/105/EC.
Scope of this consultation:	This is a consultation document on a proposal to amend the <i>Planning (Hazardous Substances) Regulations</i> to comply with the requirements of EC Directive 96/82/EC on the control of major accident hazards involving dangerous substances (the Seveso II Directive), as amended by Directive 2003/105/EC.
Geographical scope:	This consultation relates to England only. Planning legislation for Northern Ireland, Scotland and Wales is devolved.
Impact Assessment:	An Impact Assessment is attached at Annex 2.

Basic Information

To:	We would be interested in hearing from, particularly, hazardous substances authorities and the petrochemical and hazardous substances storage industry.
Body/bodies responsible for the consultation:	Planning Directorate, Communities and Local Government
Duration:	This consultation is of 8 weeks duration 23 March 2009 to 18 May 2009
Enquiries:	Major Hazards Consultation Team 0207 944 6511 Andrew.Gough@communities.gsi.gov.uk
How to respond:	Major Hazards Consultation Team PSI Planning Directorate Andrew.Gough@communities.gsi.gov.uk
Additional ways to become involved:	

After the consultation:	A summary of the responses to this consultation will be made available on the Communities and Local Government website 12 weeks after the closing date.
Compliance with the Code of Practice on Consultation:	See Annex 3

Background

Getting to this stage:	The current regulations are the: <i>Planning (Hazardous Substances) Regulations 1992.</i> <i>Planning (Control of Major-Accident Hazards) Regulations 1999</i>
Previous engagement:	An earlier consultation on this matter was conducted in 2005.

The Consultation Process

Comments are invited on this consultation paper and the attached draft regulations. Responses should be sent, or e-mailed, to:

Major Accident Hazards Consultation Team
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Department for Communities and Local Government
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Bressenden Place,
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Andrew.Gough@communities.gsi.gov.uk

The period of publication consultation will last for 8 weeks and responses should be submitted to arrive by 18 May 2009.

This is a shorter-than-usual timescale; consultations usually last for 12 weeks. However, since there was a consultation in 2005 which broadly covered the same subject, and since those impacted by the proposed changes are relatively few in number and we have made contact with the appropriate industry representatives, there is no need for this consultation to be 12 weeks.

A summary of responses to this consultation will be published within three months of the close of consultation on the department's website at www.communities.gov.uk.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

This consultation is being conducted in accordance with the Government's Code of Practice on Consultation. The criteria from this code are reproduced at Annex 3 of this document.

Responsibility for town and country planning matters has been devolved to Scotland, Wales and Northern Ireland. The administrations there will be preparing their own regulations and consulting separately on them. We have discussed this consultation with them and expect that the approach they take will be similar to the one outlined here.

Background

The land-use planning system for major hazards

The purpose of the land-use planning system in relation to potential major hazard sites is to control the uses to which land in the immediate vicinity can be put, and to be responsive to changes in risk presented by such sites.

It is a long-established principle of the land-use planning system that the responsibility for decision-making falls to the local planning authority. Planning law complements the regulations for major hazard sites under the Control of Major Accident Hazards regulation (COMAH) and other health and safety law.

The principal planning legislation for major hazard sites is the Planning (Hazardous Substances) Act 1990 (the Hazardous Substances Act) and the associated Planning (Hazardous Substances) Regulations 1992 (the 1992 Regulations). The Act empowers the Secretary of State to specify the hazardous substances and their controlled quantities. Schedule 1 of the 1992 Regulations contains the list of hazardous substances and their controlled quantities.

Planning (Hazardous Substances) Act 1990 and Regulations

Under the Hazardous Substances Act and the 1992 Regulations, the presence on, over, or under land of a hazardous substance at, or in excess of, a specified amount (termed a controlled quantity) requires consent from the appropriate hazardous substances authority – usually the local planning authority. Such consent is known as ‘hazardous substances consent’.

These controls give hazardous substances authorities the opportunity to consider whether the proposed storage or use of the proposed quantity of a hazardous substance is appropriate in a particular location, having regard to the risks arising to persons in the surrounding area and to the environment. The hazardous substances authority must consult statutory bodies, including the Health and Safety Executive and the Environment Agency, before making a decision on any application for consent. If consent is agreed, as a matter of practice, a consultation zone will be established.

The Seveso II Directive and amendments

Council Directive 96/82/EC, on the control of major-accident hazards involving dangerous substances (known as the Seveso II Directive¹), introduced a requirement on 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 planning policies. It required these objectives to be pursued through controls on:

- the siting of new establishments
- modifications to existing establishments; and
- new developments in the vicinity of existing establishments where the siting or developments are such as to increase the risk or consequences of a major accident

Because of the similarities between the land-use planning requirements of the Directive and the existing procedures for the hazardous substances consent regime, the requirements of the Directive have been implemented through amendment to the Hazardous Substances Act and the 1992 Regulations.

This was done by aligning, as far as possible, the lists and substances and controlled quantities for which hazardous substances consent is required, and the list of substances/quantities stated within the Directive. The effect of this is that if an establishment is one that falls within scope of the Seveso II Directive, then it also needs to obtain hazardous substances consent for the dangerous substances present there.

The resultant legislation was the *Planning (Control of Major-Accident Hazards) Regulations 1999* (SI 1999/981), Schedule 1 of which contained a (revised) list of specified hazardous substances and their controlled quantities. These regulations also amended the *Town and Country Planning (General Development Procedure) Order 1995* and the *Town and Country Planning (Development Plan) Regulations 1991*.

In 2003, the Seveso II Directive was amended by Directive 2003/105/EC. The amendments are largely technical and scientific, designed to broaden the scope and improve the effectiveness of the Directive in preventing major accidents and limiting their consequences. However, a key feature is the revised classification and definition of some dangerous substances and preparations, and changes to qualifying quantities that determine whether an establishment falls within scope of the Directive. These are included in a revised Annex I to the Directive.

Whilst Schedule 1 of the current regulations is broadly similar to the revised Annex I of the Directive, there remain some differences. (These differences are identified later in this consultation paper at *Summary of Proposed Changes*.)

To bring the current legislation wholly into line with the requirements of the Directive requires a number of small changes to Schedule 1 of the Regulations. The proposed

¹ The Seveso Directive (82/501/EC) was so-named after the industrial accident in a small chemical manufacturing plant near the town of Seveso, approximately 10 miles north of Milan, in northern Italy, in 1976. The Seveso Directive (82/501/EC) was replaced in December 1996 by the Seveso II Directive (96/82/EC).

amendments address these differences for England.² However, these changes will mean that a number of establishments that had not previously been covered by the hazardous consent procedure would become subject to it.

A copy of the revised Annex 1 to the Directive may be accessed at:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0082&model=guichett

The 2005 consultation

In May 2005, the government department then responsible for changes to the planning regulations relating to hazardous installations, the Office of the Deputy Prime Minister, issued a consultation document which set out proposals for amending the *Hazardous Substances Regulations* and other planning legislation in order to ensure compliance with the amended Directive.

However, the 2005 document also stipulated that there would be no proposals for transitional arrangements. Previously, when a change in the hazardous substances regulations resulted in the need for industry to obtain consent which it could not have reasonably anticipated, or made plans for, transitional arrangements were put in place which allowed industry to apply for a “deemed consent”.

Under the 1992 Regulations, operators need to make an application for ‘deemed consent’ to the relevant hazardous substances authority. Whilst ‘deemed consent’ implies an expectation that consent will be granted, this is on the basis that the appropriate application is made and that certain conditions are met. Consent is “deemed” to be given on the basis of an established presence (that is, for 12 months) of certain hazardous substance(s) of (or over) a specified quantity at a particular site. It is perhaps worth adding that “deemed consent”, as described here, does not apply in other areas of planning. For example, deemed consent in relation to the display of certain “specified classes” of advertisement implies not having to make an application to the relevant authority; a concept that is closer to permitted development rights.

The arrangements for deemed consent were provided when the Hazardous Substances Act was introduced in 1992 and again in 1999 when changes were made for using the consent procedure to give effect to the land-use planning requirements of the Seveso II Directive.

However, due to the establishment, since 1999, of the link between the need for hazardous substances consent and the dangerous substances and preparations listed in Annex I of the Seveso II Directive, the 2005 consultation paper proposed that ‘deemed consent’ would not be appropriate.

This was not a view shared by the industry generally, and the majority of industry respondents objected to this proposal. There were views that ‘deemed consent’ was necessary and that its omission would initiate uncertainty within the industry, and

² The devolved administrations will consult separately on bringing their own planning regulations into line with the Seveso II Directive.

an unwillingness to invest in plants whose future was dependant on hazardous substances consent which might not be forthcoming.

The Government gave full consideration to these views and decided not to proceed with the proposed amendments without looking into the potential for offering deemed consent to operators.

[Full views on the 2005 consultation paper can be found on the Communities and Local Government website at:
www.communities.gov.uk/planningandbuilding/publications/consultations

2009 consultation

This consultation paper proposes broadly the same changes to the 1992 Regulations as the 2005 consultation paper. However, unlike the 2005 paper, transitional arrangements will be put in place to ensure that there will be no ill-effects as a result of these changes to legislation.

It is our understanding that, across Great Britain, approximately 53³ establishments have specified dangerous substances and preparations at, or above, specified quantities which will, as a result of the changes proposed, fall within the scope of sites needing hazardous substances consent.

As stated below, it is our intention in this consultation to provide transitional arrangements to operators in respect of hazardous substances which have been present on, over, or under a site during the period of 12 months immediately preceding the date on which the 'deemed consent' application is made.

³ Figure refers to numbers of establishments in England, Wales and Scotland, according to HSE.

Options

Option 1: *Do nothing:*

Retain the current regulations unchanged. This will mean that England is not compliant with the requirements of the Directive and, as a result, could be subject to infraction proceedings and possible extensive fines.

Option 2: *Amend legislation to accord with EC Directive:*

Amend the current regulations so that the list of hazardous substances and their controlled quantities accords with that of the Directive, whilst ensuring that transitional arrangements are in place which enable any relevant operators to claim deemed consent from the relevant authorities.

Transitional arrangements

Section 11 of the *Planning (Hazardous Substances) Act 1990* contains provisions which enable operators to claim a 'deemed consent' in respect of hazardous substances which have been present on, over, or under a site during the period of 12 months immediately preceding the date on which the deemed consent application is made.

The purpose of these 'transitional provisions' is to avoid undue disruption by enabling operators to continue with (formerly lawful) operations involving hazardous substances as previously, without a specific grant of consent being required from the hazardous substances authority.

Transitional arrangements were used in 1992, when the Hazardous Substances Act was introduced, and again in 1999, when changes were made to the consent procedure to give effect to the land-use planning requirements of the Seveso II Directive. Transitional arrangements are made on the grounds that the need to obtain consent is a new requirement that industry could not reasonably have anticipated.

Claims for deemed consent should be made to the appropriate hazardous substances authority within six months of the date when the proposed regulations (the *Planning (Hazardous Substances) (Amendment) (England) Regulations 2009*) first come into force. They must be made on the form prescribed for this purpose at Schedule 2 to the 1992 Regulations (Form 8) and include the other information required by Regulation 14. This information will show how and where each substance subject to the claim was present during the establishment period.

Deemed consent is subject to standard conditions set out at section 11(7)(a) of the 1990 Act, as applied by Regulation 4 of the 2009 Regulations, and at Schedule 3 to the 1992 Regulations.

Specific provisions

Regulation 3 of the proposed regulations ensures that operators with existing hazardous substances consent will not have to re-apply for consent in respect of substances which previously fell under a generic Part B category. In short, Regulation 3 provides that pre-existing hazardous substances consents are not to be treated as invalid because the hazardous substances to which they relate have been recategorised.

Regulation 4 of the proposed Regulations makes transitional provision for deemed consents for hazardous substances which would not have required hazardous substances consent before these Regulations come into force. Regulation 5 confers immunity from prosecution and contravention proceedings for a period of six months in relation to such substances.

Legislation

In England, the land-use planning requirements of the Directive are given legal effect through the following Town and Country Planning legislation and regulations:

- The *Planning (Hazardous Substances) Act 1990*
- the *Planning (Hazardous Substances) Regulations 1992* (SI 1992 No 656)
- the *Planning (Control of Major-Accident Hazards) Regulations 1999* (SI 1999 No. 981)
- the *Town and Country Planning (General Development Procedure) Order 1995* (SI 1995 No. 419)
- the *Town and Country Planning (Regional Planning) (England) Regulations 2004* (SI 2004 No. 2203); and
- the *Town and Country Planning (Local Development) (England) Regulations 2004* (SI 2004 No. 2204)

Summary of proposed changes

Intention of proposals

The proposed amendment (the *Planning (Hazardous Substances) (Amendment) (England) Regulations 2009*) will address the requirements of the Seveso II Directive, specifically the list of substances and their qualifying quantities in Annex I of the Directive and will bring the UK regulations into compliance with the Seveso II Directive.

The Seveso II Directive does not apply to military establishments, installations or storage facilities.

Changes to Schedule 1 of the Planning (Hazardous Substances) Regulations

Specifically, the proposed amendment will make changes to Schedule 1 of the *Planning (Hazardous Substances) Regulations 1992*, as amended. Schedule 1 of the Regulations is fundamentally a list of substances – both specifically-named and generic:

- PART A: contains named hazardous substances and controlled quantities
- PART B: contains categories of substances and preparations not specifically named in Part A
- PART C: contains substances used in an industrial chemical process

Part A: Hazardous Substances and Controlled Quantities

Schedule 1, Part A of the proposed amendment contains a list of 67⁴ named hazardous substances and their threshold quantities (known as “controlled quantities”). The substances numbered 1–36 comprise all of those from Part 1 of Annex I of the Seveso II Directive, as amended, and generally have the same controlled quantity (located in Column 2) as the Directive. The exception being where a substance had previously been subject to a lower controlled quantity, in which case the lower number is retained.

The named substances in Part A, numbered 37–67, are not included in Part I of the Directive. However, as they are substances which would generally fall within one of the categories of substances specified in Part II of the Directive, at higher controlled quantities, and are substances that had previously required consent at lower controlled quantities, the lower number is retained.

⁴ Part A of the current regulations contains 63 named substances.

Most of the named substances and their controlled quantity will remain unchanged. The principal changes to Part A will be to the following named substances:

- Ammonium Nitrate
- Potassium Nitrate
- Carcinogenic Substances
- Petroleum Products

The specific changes will be as follows:

- **Ammonium Nitrate:**

Two new classes of ammonium nitrate are being added: one for fertilisers capable of self-sustaining decomposition (qualifying quantity 5,000 tonnes); the other for 'off-specification' or reject material (qualifying quantity 10 tonnes) – see below.

The two existing classes of ammonium nitrate remain, though with reduced concentrations of nitrogen content.

The notes to Part A of Schedule 1 have been amended to define the four categories of ammonium nitrate products for which hazardous substances consent is required.

Of particular significance, perhaps, is the class of Ammonium Nitrate to which Note 4 of Part A '*Ammonium Nitrate off-specification material and fertilisers not fulfilling the detonation test*' applies. We understand it is possible that ammonium nitrate fertiliser which complied with all technical specifications at the point of manufacture and/or delivery to an end-user, e.g. a farmer, could subsequently become contaminated, for whatever reason, and go 'off-specification'. Should this happen, the ammonium nitrate should normally be returned to the manufacturer or supplier for reprocessing or treatment to make it safe. It is not the intention that the Directive should apply to sites of end-users, e.g. farmers, where such 'off-specification' material is temporarily present prior to it being removed for reprocessing etc. Accordingly, there should be no requirement for farmers to have to obtain a hazardous substances consent for the presence of ammonium nitrate fertiliser unless they exceed the controlled quantity for either of the other three classes of this substance.

- **Potassium Nitrate:**

Two classes of potassium nitrate-based fertiliser are added to the list of named substances with controlled quantities of 5,000 tonnes (prilled or granular form) and 1,250 tonnes (crystalline form).

- **Carcinogenic substances:**

Seven new carcinogenic substances have been added to the list of named substances. These are:

- Benzotrichloride
- 1,2 Dibromoethane

- Diethyl sulphate
- Dimethyl sulphate
- 1,2 Dibromo-3-chloropropane
- 1,2 Dimethylhydrazine
- Hydrazine

The controlled quantity for these, and the other existing carcinogenic substances included as named substances, has been increased from 0.001 tonnes to 0.5 tonnes at concentrations above 5% by weight.

All of these substances were previously classified as either 'toxic or very toxic'. As such, it is possible that operators at establishments where they are present may already have hazardous substances consent for them, having obtained consent via an application for substances within a generic category.

- **Petroleum products:**

'Petroleum products' replaces the previous entry of '*Automotive petrol and other petroleum spirits*' (entry number 32 in the list of named substances). Unlike the previous entry, it is also subdivided as follows:

- (a) gasolines and naphthas
- (b) kerosenes (including jet fuels)
- (c) gas oils (including diesel fuels, home-heating oils and gas oil blending streams)

The controlled quantity for petroleum products has been reduced from 5,000 tonnes to 2,500 tonnes. Please note: this refers to petroleum products generally, not per sub-division.

Many of the substances referenced in these sub-divisions will already fall within the scope of the Seveso II Directive, having been categorised as substances and preparations 'dangerous for the environment' at the conclusion in August 2001 of European Community negotiations reviewing and adapting classifications to scientific and technical progress⁵. In the UK, the outcome of these negotiations was given effect from 30 July 2002 by the *Chemicals (Hazard Information and Packaging for Supply) Regulations 2002* (SI 2002 No. 1689), sometimes called the CHIPS 3 Regulations.

As a consequence of this, petroleum products classified as '*dangerous for the environment*' (and included in the Approved Supply List published as part of the CHIPS 3 Regulations) have been, from 30 July 2002, required to obtain a hazardous substances consent, under Part B, for their presence at an establishment at or above the controlled quantity threshold: i.e. 200 tonnes.

⁵ Relevant EC legislation is Directive 1999/45/EC; Directive 2001/60/EC; Directive 2001/58/EC; Directive 2001/59/EC; Directive 67/548.EEC. Copies of EC Directives can usually be accessed through the EC website at <http://europa.eu.int/>

Therefore, businesses with petroleum products within this new category of named substances should already have obtained a hazardous substances consent and should not be affected by these changes.

Part B: Categories of substances and preparations not specifically named in Part A

Part B contains 11 general categories of substances and preparations, rather than specifically named substances, for example: 'Very toxic', 'Toxic', etc. The principal changes to Part B will be to the following general categories of substances:

- explosive substances
- substances dangerous to the environment

The specific changes will be as follows:

- **Explosive substances:**

The two explosive categories included at Part B remain and the controlled quantities remain unaltered.

However, there are changes to the way in which these categories of substances are defined to align with *the United Nations / European Agreement Concerning the International Carriage of Dangerous Goods by Road (UN/ADR)*. These are set out at the Notes to Part B (Note 2)

The principal responsibility for licensing establishments where explosive substances are present lies with the Health and Safety Executive (HSE) under provisions of the *Manufacture and Storage of Explosives Regulations 2005*⁶. Sites licensed under these procedures do not require hazardous substances consent for their explosive substances.

It is likely that establishments where explosive substances within the UN/ADR definitions are present at or above the controlled quantities will be licensed by the HSE rather than under the Hazardous Substances Regulations. However, operators will wish to satisfy themselves on this point. If there is any doubt HSE will be able to advise.

Where a site is not licensed by HSE under the *Manufacture and Storage of Explosives Regulations 2005*, operators may wish to consider whether they need to obtain a hazardous substances consent. This may be required where small amounts of explosive substances below the controlled quantities are present but, when taken in aggregation with other categories of substances, may bring the establishment within scope of the Directive and the consent procedures. In such cases, operators are advised to apply to the hazardous substances authority for a deemed consent.

⁶ The Manufacture and Storage of Explosives Regulations 2005 largely replaced the Explosives Act 1875, as amended. The Regulations came into force on 26 April 2005.

- **Substances dangerous for the environment:**

There is a change to the definition of the category of substances classified as 'dangerous for the environment' and there is a significant reduction to the controlled quantity that triggers the need for hazardous substances consent.

There are two sub-categories of substances and preparations classified as 'dangerous for the environment' which are denoted by their risk phases (R phases)⁷, or their combination risk phases. They are:

- i. R50: very toxic to aquatic organisms (including R50/R53: Very toxic to aquatic Organisms; may cause long-term adverse effects in the aquatic environment). – For these substances, the controlled quantity is reduced from 200 tonnes to 100 tonnes
- ii. R51/53: toxic to aquatic organisms: may cause long-term adverse in the aquatic environment. – For these substances, the controlled quantity is reduced from 500 tonnes to 200 tonnes

The Approved Supply List produced by HSE (ISBN 0-7176-2368) should enable companies to establish whether substances and preparations they hold fall within either of the definitions within this category. If they have substances within these definitions at or above the controlled quantity, and do not already have a hazardous substances consent, they should apply for one to the local hazardous substances authority.

Details of how to apply are included in the *Planning Hazardous Substances Regulations* or in the publication *Hazardous Substances Consent – a guide for industry* available from the Communities and Local Government website at: www.communities.gov.uk/publications/planningandbuilding/hazardoussubstancesguide

Part C: Substances used in the Industrial Chemical Process

There are no changes to Part 3.

Changes to the aggregation rule

The 'aggregation rule' is applied to determine whether consent is required for dangerous substances where the quantities are below the controlled quantity threshold but are above that threshold when different substances with similar properties are added together. Note 4 of the Notes to Parts A and B of Schedule 1 sets out the detail.

⁷ Risk phases (R phases) (the letter R followed by a number) refers to a table which specifies the particular danger(s) of a particular substance, e.g., the particular risks of sodium metal is denoted by R14/15 and R34 which correspond to 'Reacts violently with water liberating highly flammable gases' and 'causes burns'. The EU requires that R phases appear on each label and safety data sheet for hazardous substances.

The 'aggregation rule' has been revised slightly as a consequence of the changes made in the categories of substances. The new rule applies to aggregation of substances as follows:

- the addition of substances and preparations named in Part A of schedule 1 and classified as very toxic or toxic, together with substances and preparation falling into categories 1 or 2 of Part B of schedule
- the addition of substances and preparations named in Part A of schedule 1 and classified as oxidising, flammable, highly flammable or extremely flammable, together with substances and preparations falling into categories 3,4,5,6,7,8 or 9 of Part B of schedule
- the addition of substances and preparations named in Part A of schedule 1 and classified as 'dangerous for the environment' (R50 (including R50/53) or .R51/53, together with substances and preparation falling into categories 10(i) or 10(ii) of Part B of schedule 1

Annex 1

 STATUTORY INSTRUMENTS

2009 No.

TOWN AND COUNTRY PLANNING, ENGLAND

The Planning (Hazardous Substances) (Amendment) (England)
Regulations 2009

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State in exercise of the powers conferred by sections 4, 5, and 40(1) of the Planning (Hazardous Substances) Act 1990⁽⁸⁾ makes the following Regulations:

Citation, commencement, application and interpretation

1.—• These Regulations may be cited as the Planning (Hazardous Substances) (Amendment) (England) Regulations 2009 and shall come into force on [date].

(1) These Regulations apply in relation to England only.

(2) In these Regulations—

“the Hazardous Substances Act” means the Planning (Hazardous Substances) Act 1990; and

“the Hazardous Substances Regulations” means the Planning (Hazardous Substances) Regulations 1992⁽⁹⁾.

Amendment of the Planning (Hazardous Substances) Regulations 1992

2.— The Hazardous Substances Regulations are amended as follows.

(1) In regulation 2(1) (interpretation) after “substances” in the definition of “the Directive”, insert “ (as amended by Council Directive 2003/105/EC⁽¹⁰⁾)”.

(2) In regulation 4(6) (exemptions) for “6, 14, 35 and 39” substitute “10, 18, 39 and 43”.

(3) For Schedule 1 (Hazardous Substances and Controlled Quantities) substitute the Schedule to these Regulations.

⁽⁸⁾ 1990 c.10; section 4 was amended by the Planning (Control of Major–Accident Hazards) Regulations 1999 (S.I. 1999/981); there are other amendments not relevant to these Regulations. These powers are now vested in the Welsh Ministers so far as they are exercisable in relation to Wales. They were previously transferred to the National Assembly of Wales by article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672): see the entry in Schedule 1 for the Planning (Hazardous Substances) Act 1990. By virtue of paragraphs 30 and 32 of Schedule 11 to the Government of Wales Act 2006 (c.32), they were transferred to the Welsh Ministers.

⁽⁹⁾ S.I. 1992/656; relevant amendments were made by paragraph 233 of Schedule 22 to the Environment Act 1995 (c.25), S.I. 1994/2567, S.I. 1996/252, S.I. 1999/981 and S.I. 2005/1082.

⁽¹⁰⁾ O.J. L345, 31.12.2003, p. 97.

Transitional provision: pre-existing consents

3.—a) This regulation applies to a substance, mixture or preparation within the meaning of regulation 3 of the Hazardous Substances Regulations, named or categorised in a hazardous substances consent granted (or deemed to be granted) before the coming into force of these Regulations where—

- (a) the name or categorisation of that substance, mixture or preparation in column 1 of Part A or Part B of Schedule 1 to the Hazardous Substances Regulations would be renamed or re-categorised as a result of the coming into force of these Regulations; and
- (b) the hazardous substances consent is extant in relation to the substance, mixture or preparation concerned on the day before the coming into force of these Regulations.

(2) If a substance mixture or preparation falls within both paragraph (1)(a) and (1)(b), there is no requirement to take into account the amendments to the Hazardous Substances Regulations made by these Regulations in construing the hazardous substances consent in relation to that substance, mixture or preparation or its controlled quantity.

(3) Paragraph (2) ceases to apply where the hazardous substances consent in relation to that substance, mixture or preparation or its controlled quantity is varied by the hazardous substances authority on or after the day on which these Regulations come into force.

Transitional provision: deemed consent

4.—b) For the purpose of the transition to the amendments made by regulation 2, section 11 of the Hazardous Substances Act (deemed hazardous substances consent: established presence) shall apply with the following modifications.

(1) In subsection (1), after “establishment period” insert “for which hazardous substances consent was not required during that period.”.

(2) In subsection (3), for “(4) to” substitute “(5) and”.

(3) Omit subsection (4).

(4) At the beginning of subsection (5), for “If at the relevant date such notification was not so required, hazardous” substitute “Hazardous”.

(5) After subsection (6) insert—

“(6A) If the hazardous substances authority is satisfied that a claim for hazardous substances consent complies with subsection (2), they shall send a copy of the claim (including a copy of the form and information mentioned in that subsection) to the Health and Safety Executive.”

(6) In subsection (7)(a)—

(a) for sub-paragraphs (ii) and (iii) substitute—

“(ii) on, over or under other land which is controlled by the same person and which, in all the circumstances (including in particular the purposes for which the land and the land mentioned in sub-paragraph (i) is used) forms with the land so mentioned a single establishment;

(iii) on, over or under other land which is within 500 metres of the land mentioned in sub-paragraph (i) and controlled by the same person; or

(iv) in or on a structure controlled by the same person any part of which is within 500 metres of the land mentioned in sub-paragraph (i);”;

(b) after the words “established quantity” insert—

“and in calculating whether the established quantity is exceeded, a quantity of a substance which falls within more than one sub-paragraph of this paragraph shall only be counted once;”

(7) For subsection (8), substitute—

“(8) In this section—

“establishment period” means the period of 12 months immediately preceding the relevant date;

“established quantity” means in relation to any land, the maximum quantity which was present on, over or under the land at any one time within the establishment period;

“the relevant date” means the date on which the Planning (Hazardous Substances) (Amendment) (England) Regulations 2009 comes into force;

“the transitional period” means the period of 6 months beginning with the relevant date.”.

Transitional exemptions

5.— No offence is committed under section 23 of the Hazardous Substances Act and no hazardous substances contravention notice may be issued in relation to a hazardous substance which is on, over or under any land, if—

- (a) the substance was present on, over or under the land at any time within the establishment period and was not a substance or quantity of substance for which hazardous substances consent was required before the relevant date; and
- (b) the substance has not been present during the transitional period in a quantity greater in aggregate than the established quantity.

(2) Expressions used in this regulation and in section 11 of the Hazardous Substances Act shall have the same meaning as in that section as modified by regulation 4.

Signed by authority of the Secretary of State for Communities and Local Government

Date

Name
Parliamentary Under Secretary of State
Department for Communities and Local Government

SCHEDULE

Regulation 2

“SCHEDULE 1

Regulation 3

PART A

NAMED SUBSTANCES

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>
<i>Hazardous Substances</i>	<i>Controlled quantity (Q) in tonnes</i>	<i>Quantity for purposes of note 4 to the notes to Parts A and B (Q*)</i>
1. Ammonium nitrate to which Note 1 of the notes to Part A applies	5000.00	10000.00
2. Ammonium nitrate to which Note 2 of the notes to Part A applies	1000.00	1250.00
3. Ammonium nitrate to which Note 3 of the notes to Part A applies	350.00	
4. Ammonium nitrate to which Note 4 of the notes to Part A applies	10.00	
5. Potassium nitrate to which Note 5 of the notes to Part A applies	5000.00	
6. Potassium nitrate to which Note 6 of the notes to Part A applies	1250.00	
7. Arsenic pentoxide, arsenic (V) acid and/or salts	1.00	
8. Arsenic trioxide, arsenious (III) acid and/or salts	0.10	
9. Bromine	20.00	
10. Chlorine	10.00	
11. Nickel compounds in inhalable powder form (nickel monoxide, nickel dioxide, nickel sulphide, trinickel disulphide, dinickel trioxide)	1.00	
12. Ethyleneimine	10.00	
13. Fluorine	10.00	
14. Formaldehyde (≥ 90%)	5.00	
15. Hydrogen	2.00	5.00
16. Hydrogen chloride (liquefied gas)	25.00	
17. Lead alkyls	5.00	
18. Liquefied petroleum gas, including commercial propane and commercial butane, and any mixture thereof, when held at a pressure greater than 1.4 bar absolute.	25.00	50.00
19. Liquefied extremely flammable gases excluding pressurised LPG (entry no.18)	50.00	
20. Natural gas	15.00	50.00
21. Acetylene	5.00	
22. Ethylene oxide	5.00	
23. Propylene oxide	5.00	
24. Methanol	500.00	
25. 4, 4-Methylenebis (2-Chloraniline) and/or salts, in powder form	0.01	

26. Methylisocyanate	0.15	
27. Oxygen	200.00	
28. Toluene diisocyanate	10.00	
29. Carbonyl dichloride (phosgene)	0.30	
30. Arsenic trihydride (arsine)	0.20	
31. Phosphorus trihydride (phosphine)	0.20	
32. Sulphur dichloride	1.00	
33. Sulphur trioxide (including sulphur trioxide dissolved in sulphuric acid to form Oleum)	15.00	
34. Polychlorodibenzofurans and polychlorodibenzodioxins (including TCDD), calculated in TCDD equivalent (to which Note 7 of the Notes to Part A applies)	0.001	
35. The following CARCINOGENS at concentrations above 5% by weight: 4-Aminobiphenyl and/or its salts, Benzotrichloride, Benzidine and/or salts, Bis (chloromethyl) ether, Chloromethyl methyl ether, 1,2-Dibromoethane, Diethyl sulphate, Dimethyl sulphate, Dimethylcarbamoyl chloride, 1,2-Dibromo-3-chloropropane, 1,2-Dimethylhydrazine, Dimethylnitrosamine, Hexamethylphosphoric triamide, Hydrazine, 2-Naphthylamine and/or salts, 4-Nitrodiphenyl and 1,3 Propanesultone	0.5	
36. Petroleum products (a) gasolines and naphthas, (b) kerosenes (including jet fuels), (c) gas oils (including diesel fuels, home heating oils and gas oil blending streams)	2500.00	
37. Acrylonitrile	20.00	50.00
38. Carbon disulphide	20.00	50.00
39. Hydrogen selenide	1.00	50.00
40. Nickel tetracarbonyl	1.00	5.00
41. Oxygen difluoride	1.00	5.00
42. Pentaborane	1.00	5.00
43. Selenium hexafluoride	1.00	50.00
44. Stibine (antimony hydride)	1.00	5.00
45. Sulphur dioxide	20.00	50.00
46. Tellurium hexafluoride	1.00	5.00
47. 2,2-Bis(tert-butylperoxy) butane (>70%)	5.00	50.00
48. 1,1-Bis(tert-butylperoxy) cyclohexane (>80%)	5.00	50.00
49. tert-Butyl peroxyacetate (>70%)	5.00	50.00
50. tert-Butyl peroxyisobutyrate (>80%)	5.00	50.00
51. tert-Butyl peroxyisopropylcarbonate (>80%)	5.00	50.00
52. tert-Butyl peroxy maleate (>80%)	5.00	50.00
53. tert-Butyl peroxy pivalate (>77%)	5.00	50.00
54. Cellulose Nitrate other than— (1) cellulose nitrate for which a licence granted by the Health and Safety Executive (HSE) under the Manufacture and Storage of Explosives Regulations 2005 ⁽¹¹⁾ (where HSE is the licensing authority by virtue of paragraph 1(c) of Schedule 1 to those Regulations) is required; or	50.00	

⁽¹¹⁾ S.I. 2005/1082.

(2) cellulose nitrate where the nitrogen content of the cellulose nitrate does not exceed 12.3% by weight and contains not more than 55 parts of cellulose nitrate per 100 parts by weight of solution.		
55. Dibenzyl peroxydicarbonate (>90%)	5.00	50.00
56. Diethyl peroxydicarbonate (>30%)	5.00	50.00
57. 2,2 Dihydroperoxypropane (>30%)	5.00	50.00
58. Di-isobutyryl peroxide (>50%)	5.00	50.00
59. Di-n-propyl peroxydicarbonate (>80%)	5.00	50.00
60. Di-sec-butyl peroxydicarbonate (>80%)	5.00	50.00
61. 3,3,6,6,9,9-Hexamethyl-1,2,4,5-tetroxacyclononane (>75%)	5.00	50.00
62. Methyl ethyl ketone peroxide (>60%)	5.00	50.00
63. Methyl isobutyl ketone peroxide (>60%)	5.00	50.00
64. Peracetic acid (>60%)	5.00	50.00
65. Sodium chlorate	25.00	50.00
66. Gas or any mixture of gases (not covered by entry 20) which is flammable in air, when held as a gas	15.00	
67. A substance or any mixture of substances which is flammable in air when held above its boiling point (measured at 1 bar absolute) as a liquid or as a mixture of liquid and gas at a pressure of more than 1.4 bar absolute (see Note 8 to the Notes to Part A).	25.00	

NOTES TO PART A

1. Ammonium nitrate: fertilisers capable of self-sustaining decomposition

This applies to ammonium nitrate-based compound/composite fertilisers (compound/composite fertilisers containing ammonium nitrate with phosphate and/ or potash) in which the nitrogen content as a result of ammonium nitrate is

- between 15.75 per cent⁽¹²⁾ and 24.5 per cent⁽¹³⁾ by weight, and either with not more than 0.4 per cent total combustible/organic materials or which satisfy the detonation resistance test described in Schedule 2 to the *Ammonium Nitrate Materials (High Nitrogen Content) Safety Regulations 2003*⁽¹⁴⁾,
- 15.75 per cent⁽¹⁵⁾ by weight or less and unrestricted combustible materials,

and which are capable of self-sustaining decomposition according to the UN Trough Test (see United Nations Recommendations on the Transport of Dangerous Goods: Manual of Tests and Criteria (2003), Part III, sub-section 38.2).

⁽¹²⁾ 15.75 per cent nitrogen content by weight as a result of ammonium nitrate corresponds to 45 per cent ammonium nitrate.

⁽¹³⁾ 24.5 per cent nitrogen content by weight as a result of ammonium nitrate corresponds to 70 per cent ammonium nitrate.

⁽¹⁴⁾ S.I. 2003/1082.

⁽¹⁵⁾ 15.75 per cent nitrogen content by weight as a result of ammonium nitrate corresponds to 45 per cent ammonium nitrate.

2. Ammonium nitrate: fertiliser grade

This applies to straight ammonium nitrate-based fertilisers and to ammonium nitrate-based compound/composite fertilisers in which the nitrogen content as a result of ammonium nitrate is

- more than 24.5 per cent by weight, except for mixtures of ammonium nitrate with dolomite, limestone and/or calcium carbonate with a purity of at least 90 per cent,
- more than 15.75 per cent by weight for mixtures of ammonium nitrate and ammonium sulphate,
- more than 28 per cent⁽¹⁶⁾ by weight for mixtures of ammonium nitrate with dolomite, limestone and/or calcium carbonate with a purity of at least 90 per cent,

and which satisfy the detonation resistance test described in Schedule 2 to the Ammonium Nitrate Materials (High Nitrogen Content) Safety Regulations 2003.

3. Ammonium nitrate: technical grade

This applies to

- ammonium nitrate and preparations of ammonium nitrate in which the nitrogen content as a result of the ammonium nitrate is
 - between 24.5 per cent and 28 per cent by weight, and which contain not more than 0.4 per cent combustible substances,
 - more than 28 per cent by weight, and which contain not more than 0.2 per cent combustible substances,
- aqueous ammonium nitrate solutions in which the concentration of ammonium nitrate is more than 80 per cent by weight.

4. Ammonium nitrate: “off-specs” material and fertilisers not fulfilling the detonation test

This applies to

- material rejected during the manufacturing process and to ammonium nitrate and preparations of ammonium nitrate, straight ammonium nitrate-based fertilisers and ammonium nitrate-based compound/composite fertilisers referred to in Notes 2 and 3, that are being or have been returned from the final user to a manufacturer, temporary storage or reprocessing plant for reworking, recycling or treatment for safe use, because they no longer comply with the specifications of Notes 2 and 3; and
- fertilisers referred to in Note 1, first indent, and Note 2 which do not satisfy the detonation resistance test described in Schedule 2 to the *Ammonium Nitrate Materials (High Nitrogen Content) Safety Regulations 2003*.

5. Potassium nitrate: composite potassium-nitrate based fertilisers composed of potassium nitrate in prilled/granular form.**6. Potassium nitrate: composite potassium-nitrate based fertilisers composed of potassium nitrate in crystalline form.**

⁽¹⁶⁾ 28 per cent nitrogen content by weight as a result of ammonium nitrate corresponds to 80 per cent ammonium nitrate.

7. Polychlorodibenzofurans and polychlorodibenzodioxins

The quantities of polychlorodibenzofurans and polychlorodibenzodioxins are calculated using the following factors:

International Toxic Equivalent Factors (ITEF) for the congenors of concern (NATO/CCMS)			
2,3,7,8-TCDD	1	2,3,7,8-TCDF	0.1
1,2,3,7,8-PeDD	0.5	2,3,4,7,8-PeCDF	0.5
		1,2,3,7,8-PeCDF	0.05
1,2,3,4,7,8-HxCDD	0.1	1,2,3,4,7,8-HxCDF	0.1
1,2,3,6,7,8-HxCDD	0.1	1,2,3,7,8,9-HxCDF	0.1
1,2,3,7,8,9-HxCDD	0.1	1,2,3,6,7,8-HxCDF	0.1
		2,3,4,6,7,8-HxCDF	0.1
1,2,3,4,6,7,8-HpCDD	0.01		
OCDD	0.001	1,2,3,4,6,7,8-HpCDF	0.01
		1,2,3,4,7,8,9-HpCDF	0.01
		OCDF	0.001

(T = tetra, Pe = penta, Hx = hexa, Hp = hepta, O = octa)

8. Entry number 67

The controlled quantity of 25 tonnes in column 2 of entry 67 refers, in the case of a mixture of substances, to the quantity of substances within that mixture held above their boiling point (measured at 1 bar absolute).

PART B
**CATEGORIES OF SUBSTANCES AND PREPARATIONS NOT SPECIFICALLY
 NAMED IN PART A**

<i>Column 1</i> <i>Categories of hazardous substances</i>		<i>Column 2</i> <i>Controlled Quantity (Q) in tonnes</i>
1.	VERY TOXIC	5.00
2.	TOXIC	50.00
3.	OXIDIZING	50.00
4.	EXPLOSIVE (see Note 2) where the substance, preparation or article falls under UN/ADR Division 1.4, excluding those for which a licence granted by the Health and Safety Executive under the Manufacture and Storage of Explosives Regulations 2005 ⁽¹⁷⁾ (where HSE is the licensing authority by virtue of paragraph 1(c) of Schedule 1 to those Regulations) is required or those licensed under the Dangerous Substances in Harbour Areas Regulations 1987 ⁽¹⁸⁾	50.00
5.	EXPLOSIVE (see Note 2) where the substance, preparation or article falls under any of: UN/ADR Divisions 1.1, 1.2, 1.3, 1.5 or 1.6 or risk phrase R2 or R3	10.00
6.	FLAMMABLE (where the substance or preparation falls within the definition given in Note 3(a))	5000.00
7.	HIGHLY FLAMMABLE (where the substance or preparation falls within the definition given in Note 3(b)(i) and (b)(ii))	50.00
8.	HIGHLY FLAMMABLE liquids (where the substance or preparation falls within the definition given in Note 3(b)(iii))	5000.00
9.	EXTREMELY FLAMMABLE (where the substance or preparation falls within the definition given in Note 3(c))	10.00
10.	DANGEROUS FOR THE ENVIRONMENT risk phrases: (i) R50: "Very toxic to aquatic organisms" (including R50/53); (ii) R51/53: "Toxic to aquatic organisms; may cause long term adverse effects in the aquatic environment"	100.00 200.00
11.	ANY CLASSIFICATION not covered by those given above in combination with risk phrases: (i) R14: 'Reacts violently with water' (including R14/15); (ii) R29: 'in contact with water, liberates toxic gas'	100.00 50.00

⁽¹⁷⁾ S.I. 2005/1082.

⁽¹⁸⁾ S.I. 1987/37.

NOTES TO PART B

1. Substances and preparations shall be classified for the purposes of this Schedule according to regulation 4 of the Chemicals (Hazard Information and Packaging for Supply) Regulations 2002⁽¹⁹⁾ (“CHIP”) whether or not the substance or preparation is required to be classified for the purposes of those Regulations or, in the case of a pesticide approved under the Food and Environment Protection Act 1985⁽²⁰⁾ in accordance with the classification assigned to it by that approval.

2. An “explosive” means:

- a substance or preparation which creates the risk of an explosion by shock, friction, fire or other sources of ignition (risk phrase R2),
- a substance or preparation which creates extreme risks of explosion by shock, friction, fire or other sources of ignition (risk phrase R3), or
- a substance, preparation or article covered by Class 1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (UN/ADR), concluded on 30 September 1957, as amended, as transposed by Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road⁽²¹⁾.

Included in this definition are pyrotechnics, which for the purposes of these Regulations are defined as substances (or mixtures of substances) designated to produce heat, light, sound, gas or smoke or a combination of such effects through self-sustained exothermic chemical reactions.

Where a substance or preparation is classified by both UN/ADR and risk phrase R2 or R3, the UN/ADR classification shall take precedence over assignment of risk phrases.

Substances and articles of Class 1 are classified in any of the divisions 1.1 to 1.6 in accordance with the UN/ADR classification scheme. The divisions concerned are:

Division 1.1: Substances and articles which have a mass explosion hazard (a mass explosion is an explosion which affects almost the entire load virtually instantaneously).

Division 1.2: Substances and articles which have a projection hazard but not a mass explosion hazard.

Division 1.3: Substances and articles which have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard:

(a) combustion of which gives rise to considerable radiant heat; or

(b) which burn one after another, producing minor blast or projection effects or both.

Division 1.4: Substances and articles which present only a slight risk in the event of ignition or initiation during carriage. The effects are largely confined to the package and no projection of fragments of appreciable size or range is to be expected. An external fire shall not cause virtually instantaneous explosion of virtually the entire contents of the package.

Division 1.5: Very insensitive substances having a mass explosion hazard which are so insensitive that there is very little probability of initiation or of transition from burning to detonation under normal conditions of carriage. As a minimum requirement they shall not explode in the external fire test.

Division 1.6: Extremely insensitive articles which do not have a mass explosion hazard. The articles contain only extremely insensitive detonating substances and demonstrate a negligible probability of accidental initiation or propagation. The risk is limited to the explosion of a single article.

⁽¹⁹⁾ S.I. 2002/1689.

⁽²⁰⁾ 1985 c.48.

⁽²¹⁾ OJ L 319, 12.12.1994, p. 7. Directive as last amended by Commission Directive 2003/28/EC (OJ L 90, 8.4.2003, p. 45).

Included in this definition are also explosive or pyrotechnic substances or preparations contained in articles. In the case of articles containing explosive or pyrotechnic substances or preparations, if the quantity of the substance or preparation contained is known, that quantity shall be considered for the purposes of these Regulations. If the quantity is not known, then, for the purposes of these Regulations, the whole article shall be treated as explosive.

3. In categories 6, 7, 8 and 9, ‘flammable’, ‘highly flammable’, and ‘extremely flammable’ mean—

- (a) flammable liquids means substances and preparations having a flash point equal to or greater than 21 °C and less than or equal to 55°C (risk phrase R 10), supporting combustion;
- (b) highly flammable liquids means—
 - (i) substances and preparations which may become hot and finally catch fire in contact with air at ambient temperature without any input of energy (risk phrase R 17); and
 - (ii) substances and preparations which have a flash point lower than 55°C and which remain liquid under pressure, where particular processing conditions, such as high pressure or high temperature, may create major-accident hazards;
 - (iii) substances and preparations having a flash point lower than 21 °C and which are not extremely flammable (risk phrase R 11, second indent);
- (c) extremely flammable gases and liquids means—
 - (i) liquid substances and preparations which have a flash point lower than 0 °C and the boiling point (or, in the case of a boiling range, the initial boiling point) of which at normal pressure is less than or equal to 35 °C (risk phrase R 12, first indent), and
 - (ii) gases which are flammable in contact with air at ambient temperature and pressure (risk phrase R12, second indent), which are in a gaseous or supercritical state, and
 - (iii) flammable and highly flammable liquid substances and preparations maintained at a temperature above their boiling point.

NOTES TO PART A AND B

1. Mixtures and preparations shall be treated in the same way as pure substances provided they remain within the concentration limits set according to their properties under the relevant provisions specified in CHIP, unless a percentage composition or other description is specifically given.

2. In the case of substances and preparations with properties giving rise to more than one classification the lowest thresholds shall apply.

3. Where a substance or group of substances listed in Part A also falls within a category of Part B, the controlled quantities set out in Part A must be used.

4. In the case of an establishment where no individual substance or preparation is present in a quantity above or equal to the relevant controlled quantity for that substance or preparation, the addition of hazardous substances to determine the controlled quantity shall be carried out according to the following rule:

If the sum—

$$q_1/Q + q_2/Q + q_3/Q + q_4/Q + q_5/Q + \dots \geq 1$$

(where q_x = the quantity of hazardous substance x (or category of substance) present, Q = the relevant controlled quantity (Q) from Part A or Part B, except for those substances for which column 3 of Part A contains a quantity Q^* , in which case the quantity Q^* shall be used in place of the controlled quantity Q in column 2)

then the controlled quantity of each of the substances which are added together in accordance with each of paragraphs 5(a) to (c) below shall be deemed to be present for the purposes of sections 4(2), 14(2)(c), 23(2)(a) and of section 181 (enforcement notice to have effect against subsequent development) of the principal Act as substituted by paragraph 8 of Schedule 4.

5. The additional rule in paragraph 4 will apply for the following circumstances:—
- (a) for the addition of substances and preparations named in Part A and classified as toxic or very toxic, together with substances and preparations falling into categories 1 or 2 of Part B;
 - (b) for the addition of substances and preparations named in Part A and classified as oxidising, explosive, flammable, highly flammable, or extremely flammable, together with substances and preparations falling into categories 3, 4, 5, 6, 7, 8 or 9 of Part B;
 - (c) for the addition of substances and preparations named in Part A and classified as dangerous for the environment (R50 (including R50/53) or R51/53), together with substances and preparations falling into categories 10(i) or 10(ii).

PART C

SUBSTANCES USED IN AN INDUSTRIAL CHEMICAL PROCESS

<i>Column 1</i>	<i>Column 2</i>
<p>Hazardous substances Where it is believed that a substance, which is within Part A or Part B, may be generated during loss of control of an industrial chemical process (“HS”), any substance which is used in that process (“S”).</p>	<p>Controlled quantity The amount of S which it is believed may generate, on its own or in combination with other substances used in the relevant industrial chemical process, the controlled quantity of the HS in question.</p>

NOTES TO PART C

1. The expression “which it is believed may be generated during loss of control of an industrial chemical process” has the same meaning as in the Directive.
2. Where a substance falling within Part A or B also falls within Part C, the classification with the lowest controlled quantity shall apply, subject to note 3 to the notes to Part A and B.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement, in relation to town and country planning in England, Article 12 of Directive 96/82/EC on the control of major accident hazards involving dangerous substances (O.J. No. L. 10, 14.1.1997, p.13) (the COMAH Directive), as amended by Council Directive 2003/105/EC (O.J. No. L. 345 31.12.2003, p.97) (the 2003 Directive).

Article 12 of the COMAH Directive requires that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in land-use policies; and that these objectives are achieved through controls and the requirement to ensure that planning authorities set up appropriate consultation procedures to facilitate the implementation of these and other policies established under the Article. It also requires Member States to take account of the need, in the long term, to maintain appropriate distances between establishments covered by the Directive and residential areas, areas of public use, and areas of natural sensitivity or interest. The 2003 Directive extends this requirement to include buildings in public use, major transport routes as far as possible, and recreational areas.

The amendments made by the 2003 Directive also extend the scope of the COMAH Directive by amending Annex I to the COMAH Directive (application of the COMAH Directive). Annex I applies to the presence of dangerous substances (including mixtures and preparations) at any establishment. In so doing, Annex I determines the application of Article 12. The new Annex I increases the range of dangerous substances, and revises the definitions and qualifying quantities of dangerous substances that were listed in Annex I of the COMAH Directive. Among those dangerous substances now included by virtue of the amendments made by the 2003 Directive are those associated with risks arising from certain storage and processing activities in mining.

Regulation 2 amends the Planning (Hazardous Substances) Regulations 1992 (the Hazardous Substances Regulations) by substituting a new Schedule 1 prescribing the substances which are hazardous substances and their controlled quantities, in order to implement the amendments made to Annex I of the COMAH Directive by the 2003 Directive. Regulation 2 also makes some minor amendments to reflect the substitution of the new Schedule 1.

Regulation 3 makes transitional provision to ensure that pre-existing hazardous substances consents are not treated as invalid because hazardous substances have been re-categorised.

Regulation 4 makes transitional provision for deemed consents for hazardous substances for which a hazardous substances consent was not required before these Regulations came into force.

Regulation 5 confers transitional immunity from prosecution and contravention proceedings for a period of six months from the day these Regulations came into force. During this time deemed consent may be claimed.

Annex 2

Summary: Intervention & Options

Department /Agency:

Title:

Communities and Local
GovernmentImpact Assessment of Changes to Hazardous Substances
Regulations

Stage: Consultation

Version: 1

Date: December 2008

Related Publications: Consultation Document:

Available to view or download at:

<http://www.communities.gov.uk>

Contact for enquiries: Andrew Gough

Telephone: 0207 944 6511

What is the problem under consideration? Why is government intervention necessary?

The *Planning (Hazardous Substances) Regulations* need to be amended in order to comply with the requirements of Council Directive 96/82/EC, as amended (the Seveso II Directive) on the control of major accident hazards involving dangerous substances. Failure to do so puts the UK at risk of incurring infraction fines – an unacceptable risk to the UK taxpayer.

What are the policy objectives and the intended effects?

To amend the regulations to give effect (in England) to fully accord with the requirements of Directive 2003/15/EC (Seveso II Directive) on the control of major accident hazards involving dangerous substances.

What policy options have been considered? Please justify any preferred option.

- A. Do nothing. The regulation would remained unchanged.
- B. Introduce amendments to the *Planning (Hazardous Substances) Regulations* to accord with the requirements of the Directive.
- Option B is preferred. Choosing Option A runs the risk of the being infringed for non-compliance with an EU Directive.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be revisited as required when the Directive is revised by the EU. This is expected within the next 3 years.

Ministerial Sign-off For Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option:

B

Description: Introduce amendments to the Planning (Hazardous Substances) Regulations to accord with the requirements of the EU Seveso Directive.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' A number of hazardous substances site operators will have to pay one-off application fees when applying for deemed planning consent. The other groups affected are hazardous substance authorities (usually local planning authorities); and the Health and Safety Executive. However costs to these groups have not been monetised
	One-off (Transition)	Yrs	
	£13,000–21,000	1	
	Average Annual Cost (excluding one-off)		
£		Total Cost (PV)	£13,000–21,000
Other key non-monetised costs by 'main affected groups' There may be a small cost to industry of familiarisation with planning regulations, but this is not expected to be significant.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The key monetised benefit stems from the avoidance of heavy infraction fines. An estimate of the potential fine is provided in the main text below based on previous fines imposed and the maximum daily fine possible.
	One-off	Yrs	
	£122.5m – 174m	1	
	Average Annual Benefit (excluding one-off)		
£		Total Benefit (PV)	£122.5m – 174m
Other key non-monetised benefits by 'main affected groups'			

Key Assumptions/Sensitivities/Risks: A key assumption is that there will be very little change as a result of amending the Regulations to accord with the Directive. The majority of operators are already subject to the regulations; those that are not are relatively few in number; and the deemed consent procedure proposed should ensure certainty for the industry.

Assumptions about the level of a potential EU fine are key to the benefits.

Price Base	Time Period	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)
Year 2009	1	£122.5m – £173.9m	£148.2m

What is the geographic coverage of the policy/option?	England			
On what date will the policy be implemented?	May 2009			
Which organisation(s) will enforce the policy?	Local Authorities			
What is the total annual cost of enforcement for these organisations?	£0			
Does enforcement comply with Hampton principles?	N/A			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£0			
What is the value of changes in greenhouse gas emissions?	£0			
Will the proposal have a significant impact on competition?	Yes/No			
Annual cost (£–£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)		(Increase – Decrease)	
Increase of	£0	Decrease of	£0
		Net Impact	£0

Key: **Annual costs and benefits: Constant Prices**

(Net) Present Value

Evidence Base (for summary sheets)

Background

In December 1996, Council Directive 96/82/EC on the control of major-accident hazards (Seveso II Directive) was adopted. This replaced its predecessor, Council Directive 82/501/EEC (the first Seveso Directive).

Seveso II introduced some important changes. Its focus incorporated protection of the environment, and consequently covered substances considered dangerous for the environment, in particular aquatoxics. It introduced new requirements relating to safety management systems, emergency plans and land-use planning and tightened up the provisions on inspections and public information.

The Directive is applicable to any establishment where dangerous substances are present – or likely to be produced as a result of an accident – in quantities equal to/in excess of those quantities listed in the Annex. In addition, the scope of the Directive was both broadened and simplified. The list of named substances in the Annex was reduced from 180 to 50, but is accompanied by a list of categories of substances, which in practice broadens the scope.

We have given effect to the requirements of this Directive by way of amendment to planning legislation relating 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.

In 2003, Council Directive [2003/105/EC](#) further extended the scope of the Seveso II Directive. It 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. There were also some administrative changes.

It is in order to fully comply with these changes to the Directive that we are proposing to make further amendments to the *Planning (Hazardous Substances) Regulations*.

The Directive applies throughout the United Kingdom. Planning is a devolved responsibility so these amendments will be transposed separately in Scotland, Wales and Northern Ireland.

Sectors and groups affected

- applicants/appellants (hazardous substances site operators)
- hazardous substance authority (usually the local planning authority)
- Health and Safety Executive

Policy options considered and preferred option

Option A – Do nothing

The current process would be maintained.

Option B – Introduce amendments to the regulations to accord with Directive

We propose that changes be made to the legislation so that the list of hazardous substances and their qualifying quantities accord with that of the Directive.

Preferred option

Option B is our preferred option.

Costs and Benefits

Option A – Do nothing

Costs

Option A means the UK would be in non-compliance with Directive 96/82/EC (the Seveso II Directive). This risks the UK being infracted for non-compliance. The failure to properly transpose and enforce an EU obligation can eventually lead to a fine. The maximum fine that could be imposed on the UK is some €530,000 (£477,544)²² per day.

There are no other costs associated with this option.

Benefits

There are no benefits associated with this option.

Option B – Introduce amendments to the regulations to accord with Directive

Costs

Costs arise from the need for hazardous substance consent to be obtained as a result of the extension of the hazardous substance list to include substances which are currently held on sites and for which consent is currently not required.

It is thought that the amendments will affect approximately 53 sites²³ across England, Wales and Scotland. It has not been possible to disaggregate this figure for England. The operators of these sites will need to bear the costs of applying for deemed consent including an application fee of between £250 and £400 and the associated administrative process. Currently, for applications where no one substance exceeds twice the controlled quantity, the fee is £250. For proposals involving the presence of a substance in excess of twice the controlled quantity, the fee is £400. Where an application is for the removal of conditions attached to a grant of consent, or for

²² Based on exchange at 14th January 2009 of £1 to €1.11.

²³ Health and Safety Executive estimation of affected sites across England, Wales and Scotland.

the continuation of consent upon partial change in ownership of the land, the fee is £200.

Total costs to these additional sites will range from approximately £13,000 to £21,000 depending on the fee paid. This is a one-off cost.

The relevant hazardous substances authorities will face the costs of processing the deemed consent applications. These costs will vary but as the applications are made on the basis of deemed consent, this will shorten the process. In addition, it is expected that any administrative costs borne by hazardous substances authorities will be accounted for by the fees they receive from applicants. As the amendments are thought to apply to just 53 sites across the country (including Wales and Scotland), this is not expected to amount to a significant burden. The maximum number of authorities affected would be 53.

Once deemed consent is granted the Health and Safety Executive would need to undertake an assessment and configure the appropriate consultation distances. This would affect the resources of HSE. However, as the number of additional sites that would require an assessment is relatively low, the costs are not thought to be significant.

Benefits

This option avoids the risk of the UK being infracted for non-compliance of the Seveso Directive. This is a substantial cost saving. Although instances of fines being imposed are relatively rare (presumably because Member States take action before infraction proceedings get that far), the European Court of Justice can impose very heavy fines (a Member State was recently fined a lump sum of €20m, plus €58m for every six months it failed to comply with a judgment of the ECJ – a total of €136m per year or £122m). However, it is not possible to anticipate the lump sum penalty or monthly penalty rate, as this is set by the EC according to the seriousness of the infringement and the situation. As stated above, the maximum daily fine is €530,000, which equates to approximately £480,000. If a fine of this magnitude was imposed by the European Court of Justice it would lead to an annual fine of over £170m.

Furthermore, requiring relevant operators without hazardous substances consent to apply for deemed consent will bring additional health and safety benefits.

Specific Impact Tests

Small Firms Impact Test

Based on discussions with the Health and Safety Executive, we estimate that only 53 sites would come within the scope of planning controls for the first time as a result of the proposed changes *Planning (Hazardous Substances) Regulations* to fully accord with the Seveso II Directive.

Due to the nature of the substances involved, we believe it more likely these changes will impact principally on the larger and medium sized businesses, rather than small firms.

Competition assessment

The competition filter was applied to this proposal. We do not consider that this 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.

Environmental impact

This proposal would not result in any significant environmental impacts.

Although there is also the health and safety benefit of fully adopting the requirement of the Directive.

Race, disability and gender equality impacts

The Seveso II Directive applies only to sites where dangerous chemical substances and preparation are present. The sites affected by the amendments are operated by businesses in the chemical, petroleum, electricity and water supply sectors and those involved in manufacture and storage of explosives.

We do not consider that the proposed amendments to will be the cause of disproportionate impacts to different groups from this proposal in terms of race, disability or gender equality.

Rural, health and other social effects

We have considered these possible effects. We do not consider that there would be disproportionate impacts to different groups from this proposal in terms of rural, health or other social effects.

Human Rights

The proposed amendments do not have any impact on human rights and therefore do not have any ECHR implications.

Other impact tests

We have considered other impact tests – legal aid, sustainable development, and carbon assessment, and consider that there would be no demonstrable impact arising from this proposal in these areas.

Enforcement, sanctions and monitoring

The Planning (Hazardous Substances) Act and Regulations have existing provisions for enforcement and sanctions. These will apply as normal.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

1. Type of testing undertaken	2. Results in Evidence Base	3. Results annexed?
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annex 3

About this consultation

This consultation document and consultation process have been planned to adhere to the Code of Practice on Consultation issued by the Department for Business Enterprise and Regulatory Reform and is generally in line with the seven consultation criteria, which are:

1. Formal consultation should take place at a stage when there is scope to influence the policy outcome;
2. This consultation will last for 8 weeks. This is a shorter-than-usual timescale; consultations usually last for 12 weeks. However, since there was a consultation in 2005 which broadly covered the same subject, and since those impacted by the proposed changes are relatively few in number and we have made contact with the appropriate industry representatives, there is no need for this consultation to be 12 weeks.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
4. Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach;
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained;
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation;
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this consultation has followed these criteria?

If not or you have any other observations about how we can improve the process please contact Communities and Local Government Consultation Co-ordinator

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