

# 3

2015

## PLANNING CONTROLS FOR HAZARDOUS SUBSTANCES

# ■ circular



## **PUBLICATION DETAILS:**

1st Edition Published 24/11/2015

### **Publication Revisions Table**

	Date	Changes
1st Edition 1.0	24/11/2015	

### **Publication Updates Page**


# **Scottish Planning Series**

## **PLANNING CIRCULAR 3/2015**

# **Planning Controls for Hazardous Substances**

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ISSN 0141-514X

ISBN: 978-1-78544-841-6 (web only)

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Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street,  
Edinburgh EH6 5NA  
PPDAS60433 (11/15)

Published by the Scottish Government, November 2015



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## GLOSSARY

“the 1993 Regulations”	The Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 (SI 1993/ 323), which are replaced by <u>the 2015 Regulations</u> .
“the 2004 Act”	The Planning and Compulsory Purchase Act 2004 (Chapter 5).
“the 2015 Regulations”	The Town and Country Planning (Hazardous Substances) (Scotland) Regulations 2015 (SSI 2015/181).
“Aarhus Convention”	United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.
“the COMAH Regulations”	The Control of Major Accident Hazard Regulations 2015 (SI 2015/ 483).
“consultation distance”	A set area around an <u>establishment</u> notified to the planning authority by <u>HSE</u> or <u>ONR</u> , who must be consulted on applications for planning permission for certain development within their respective <u>consultation distance</u> . Such distances can also be notified in relation to pipelines or in relation to administrative arrangements around certain nuclear sites.
“controlled quantity”	The quantity specified in Schedule 1 to <u>the 2015 Regulations</u> at or above which hazardous substances consent is required (subject to any relevant exemption).
“the Directive”	Directive 2012/18/EU of the European Parliament and of the Council on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (OJ L197, 24.7.2012, p.1) – also known as the Seveso III Directive <sup>1</sup> .

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012L0018>



“the DMR”	The Town and Country Planning (Development Management Procedure (Scotland) Regulations 2013 (SSI 2013/155).
“DPEA”	Scottish Government Directorate for Planning and Environmental Appeals.
“the DPR”	Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (SSI 2008/426).
“the ER 2014”	The Explosives Regulations 2014 (SI 2014/ 1638)
“establishment”	For the purposes of the Circular, this has the same meaning as in <u>the Directive</u> , but also includes sites requiring hazardous substances consent for Hydrogen, Natural Gas (including Liquefied Natural Gas) and Liquefied Petroleum Gas at lower <u>controlled quantities</u> under <u>the Principal Act</u> and <u>the 2015 Regulations</u> . <u>The Directive</u> defines establishment as “the whole location under the control of an operator where dangerous substances are present in one or more installations, including common or related infrastructures or activities; establishments are either lower-tier establishments or upper-tier establishments”. Upper-tier and lower-tier relate to some substances having two levels of control placed on them depending on the quantity present.
“established presence”	Where substances were present legally without requiring hazardous substances consent prior to a change in legislation which changes the requirement for such consent. Such changes previously had transitional arrangements for established presence. The 2015 Regulations have an exemption subject to certain restrictions and requirements - see paragraph 12 of Schedule 2 to <u>the 2015 Regulations</u> .
“HSE”	The Health and Safety Executive.

“the HSWA”	The Health and Safety at Work etc. Act 1974 (Chapter 37).
“the Inquiry Session Rules”	The Town and Country Planning (Hazardous Substances Inquiry Session Procedure) (Scotland) Rules) 2015 (SSI 2015/ 182).
“the Listed Buildings Act”	The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (Chapter. 9).
“local review”	Where applications for planning permission for local development are delegated to an officer for decision, the applicant does not have right of appeal to Scottish Ministers but to a local review of the officer’s decision by the planning authority.
“the Local Review Regulations”	The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 (SSI 2013/ 157).
“neighbouring land”	Land (other than land forming part of a road) which, or part of which, is conterminous with or within 20 metres of the boundary of the land to which the application relates; and where storage or use of hazardous substances is to take place within a building, every other separately owned or separately occupied unit within that building. ‘Land’ includes any building on the land.
“new international standards”	The ‘Globally Harmonised System’ as adopted by European Regulation (EC) No. 1272.2008 on classification, labelling and packaging of substances and mixtures.
“ONR”	The Office for Nuclear Regulation.
“the Planning Act”	The Town and Country Planning (Scotland) Act 1997 (Chapter 8).
“the Planning Appeals Regulations”	The Town and Country Planning (Appeals) (Scotland) Regulations 2013 (SSI 2013/ 156).
“the Principal Act”	The Planning (Hazardous Substances) (Scotland) Act 1997 (Chapter 10).

“relevant nuclear site”	<p>A site which is—</p> <p>(a) a nuclear site within the meaning given in section 112(1) of the Energy Act 2013 (Chapter 32);</p> <p>(b) an authorised defence site within the meaning given in regulation 2(1) of the Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998/494);</p> <p>(c) a new nuclear build site (within the meaning given in regulation 2A of those 1998 Regulations).</p>
“SEPA”	The Scottish Environment Protection Agency.

Unless otherwise stated, a reference in this Circular to a regulation or a Schedule is a reference to a regulation or Schedule of the 2015 Regulations and a reference to a section is a reference to a section of the Principal Act. References to legislation such as directives, acts and regulations are references to the legislation as at the date of publication of this Circular (including any amendments which may have been made on or before that date). Terms which are underlined have entries in the glossary.

## INTRODUCTION

1. This circular describes the implementation of the land use planning elements of European Directive 2012/18/EU (The Directive) on the control of major accident hazards involving dangerous substances. The Directive aims to prevent major accidents and limit the consequences of such accidents. The land use planning elements require the aims of the Directive to be taken into account in planning policies and decisions, including through maintaining appropriate safety distances between major hazard sites and other development and protecting areas of natural sensitivity.
2. The Directive specifies named substances and generic categories of substance along with controlled quantities. Where substances are present at or above controlled quantities, the requirements of the Directive apply. These dangerous substances are referred to as 'hazardous substances' for the purposes of domestic planning legislation.

## Land Use Planning

3. In Scotland, land use planning aspects of the Directive are given effect through the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 2015 (the 2015 Regulations). These Regulations include:
  - requirements for consent for the presence of hazardous substances at or above controlled quantities (including using the addition rule);
  - procedures on making applications for such consent (including appeals);
  - enforcement procedures (including enforcement appeals) for breaches of hazardous substances control;
  - amendments to the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (the DPR) regarding the preparation of development plans and adopted supplementary guidance;
  - amendments to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (the DMR) regarding publicity and consultation requirements for applications for planning permission for the development of sites with hazardous substances in relevant quantities (referred to as establishments) or development near such sites;
  - requirements on the preparation of national planning policy;
  - public participation requirements on applications for planning permission, related local reviews and appeals and other mechanisms for granting planning permission for development relevant to the Directive;
  - public engagement requirements on certain plans and programmes; and
  - provisions enabling and governing electronic communication of information in relation to hazardous substances applications and appeals.

4. There are therefore requirements to obtain a 'hazardous substances consent' for the presence of such substances at a site. The application procedures for such consent, and those for planning permission for development involving establishments or for certain development near establishments, aim to ensure the risks to humans and the environment are taken into account. National planning policy and development plans and adopted supplementary guidance, which set the framework for decisions on such applications, must also take into account the aims of the Directive. Finally, public participation procedures are in place which also take into account requirements of the Directive in relation to public involvement in decision making, in line with the UNECE Aarhus Convention.

### **Previous Legislation**

5. The 2015 Regulations revoke and replace the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 (the 1993 Regulations). Key changes include the updating of the list of hazardous substances in line with the adoption of new international standards; and new provisions on public participation in decision making. We have also updated a number of the hazardous substances consent application and appeal procedures to the planning permission application and appeal procedures.

### **Control of Major Accident Hazards Regulations**

6. Much of the Directive is implemented through the Control of Major Accident Hazards Regulations 2015 (the COMAH Regulations), which apply to Great Britain as a whole. These Regulations deal with, for example, on-site safety measures, requirements for the preparation of on-site safety management systems and emergency plans and the inspection of sites. In Scotland the COMAH Regulations are enforced by a competent authority comprising the Health and Safety Executive (HSE) - or, for relevant nuclear sites, the Office of Nuclear Regulation (ONR) - and the Scottish Environment Protection Agency (SEPA) acting jointly. Guidance on the COMAH regime is available from the HSE and can also be found on their website (See Annex M).

### **Revocations**

7. This circular replaces The Scottish Office Environment Department Circulars 5/1993: Planning Control for Hazardous Substances, 11/1993: Planning Controls for Hazardous Substances - Consequential Amendments; and 16/1993: Hazardous Substances Consent - A Guide for Industry, which are now revoked. We are also taking the opportunity to withdraw Scottish Development Department Circular 13/1976: The Petroleum and Submarine Pipelines Act 1975 – Refinery Controls, as that Act was repealed some time ago.

## ANNEX A

### THE PREPARATION OF PLANNING POLICIES, PLANS AND PROGRAMMES

- A1. The Planning system is a plan led system and the Directive requires that land use planning policies take into account the aims of the Directive. This means addressing in policies the need to keep appropriate distances between establishments and areas where people are likely to be present and to protect areas that are environmentally sensitive. Policies should also address the taking of technical measures at existing establishments so as not to increase the risks to human health and the environment.
- A2. It is important that the public, planning authorities, those storing and/ or using hazardous substances and other developers engage in the preparation of planning policies and plans and programmes, to ensure their views are considered. These policies, plans and programmes will set the context for decisions on hazardous substances consent, planning permission and other aspects of planning.

#### ***National Planning Policies***

- A3. Regulation 21 requires Scottish Ministers to take into account relevant factors relating to the Directive when formulating the National Planning Framework or Scottish Planning Policy, namely:
- the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment; and
  - the need in the long term—
    - to maintain appropriate safety distances between establishments covered by the Directive and residential areas, buildings and areas of public use, recreational areas and, as far as possible, major transport routes;
    - to protect areas of particular natural sensitivity or interest in the vicinity of establishments, where appropriate through appropriate safety distances or other relevant measures; and
    - in the case of existing establishments, to take additional technical measures in accordance with Article 5 of the Directive so as not to increase the risks to human health and the environment.

#### ***Development Plans and Supplementary Guidance***

- A4. In considering hazardous substances consent applications authorities must have regard to material considerations - including the relevant provisions of the development plan - (section 7(2) of the Principal Act). With planning applications for development involving or in the vicinity of establishments, decisions are required to be made in line with the development plan unless

material considerations indicate otherwise (sections 25 and 37 of the Planning Act).

- A5. The DPR require strategic planning authorities and planning authorities, as appropriate, to take into account the matters listed in paragraph A3 above when preparing strategic development plans and local development plans and related main issues reports.
- A6. The requirements to take the matters set out in paragraph A3 into account also apply to the preparation of supplementary guidance which is to be adopted as part of a strategic development plan or a local development plan.
- A7. SEPA is among the key agencies specified in the DPR to engage in strategic and local development plan preparation. While HSE and ONR are not so specified, planning authorities whose area, or any part of whose area, may be affected by the presence of establishments or nuclear sites, should consult these bodies as part of their plan preparation or relevant supplementary guidance.

#### ***Plans and Programmes – Public Involvement***

- A8. There are requirements (regulation 22) for ensuring public participation in the preparation, modification or review of relevant plans and programmes; that is, those relating to the siting of new establishments or modification of establishments or development in the vicinity of establishments where the siting, modification or development may increase the risk or consequences of a major accident. These requirements do not apply where the plan or programme is subject to strategic environmental assessment, which has its own public participation requirements.

## ANNEX B

### REQUIREMENT FOR HAZARDOUS SUBSTANCES CONSENT

#### Requirement for Consent

- B1. The hazardous substances consent controls are designed to regulate the presence of hazardous substances so that they cannot be present at or above controlled quantities without consent or unless an exemption to the need for consent applies.
- B2. They complement, but do not override or duplicate, the requirements of the Health and Safety at Work Act 1974 (the HSWA) or regulations made under that Act, which are enforced by HSE. Even after all reasonably practicable measures have been taken to ensure compliance with the requirements of the HSWA, there can remain a residual risk of an accident which cannot entirely be eliminated. The hazardous substances consent controls (and related requirements regarding planning permission) ensure that this residual risk to persons in the surrounding area and to the environment is properly addressed by the land use planning system.
- B3. Requirements for hazardous substances consent also allow planning authorities to control the presence of such substances in light of potential future developments as indicated in the development plans for their areas.

#### Hazardous Substances Consent and Controlled Quantities

- B4. Hazardous substances consent is required for the presence of a hazardous substance on, over or under land (which includes presence in buildings and on structures) unless the aggregate quantity of the substance present is less than the controlled quantity for that substance (section 2(1) and (2) of the Principal Act).
- B5. The lists of categories of hazardous substance and named hazardous substances and controlled quantities for which hazardous substances consent is required are given in Schedule 1 to the 2015 Regulations. Categories of hazardous substances and named hazardous substances are listed in column 1 of Parts 1, 2 and 3 of the Schedule and the relevant controlled quantity is listed in column 2<sup>1</sup>. With three exceptions, the substances and controlled quantities are taken from Annex I to the Directive. Hydrogen, natural gas (including liquefied natural gas - LNG) and liquefied petroleum gas (LPG) in Part 2 have lower controlled quantities than specified in the Directive. This is because these substances are likely to be stored in locations across the UK where lower quantities than those specified in the Directive could have a major accident hazard potential.
- B6. Where a substance named in Part 2 of Schedule 1 to the 2015 Regulations also falls into a category of hazardous substances in Part 1 of that Schedule,

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<sup>1</sup> See also paragraphs B15 to B17 on the Addition Rule.



the controlled quantity in Part 2 must be used. For example, chlorine is a named substance in Part 2 with a controlled quantity of 10 tonnes. It also falls within the H2 Acute Toxic and E1 Hazardous to the Aquatic Environment categories of substances within Part 1 of Schedule 1 which have controlled quantities of 50 and 100 tonnes, respectively. In such cases, the controlled quantity of this substance will always be the controlled quantity listed in Part 2 of the Schedule, 10 tonnes in the case of chlorine (See the note at the start of Schedule 1 to the 2015 Regulations).

- B7. Where a substance which is not a named substance falls within more than one of the categories of substances in Part 1 of Schedule 1, the lowest controlled quantity will apply for that substance. (See Note 7 in the Notes to Parts 1 and 2 of Schedule 1).
- B8. Part 3 of Schedule 1 deals with the situation in which a hazardous substance that falls within a category in Part 1 or is named in Part 2 may be present in a quantity at or above the controlled quantity *during loss of control of a process (including storage activities)*. This is the kind of incident that gave rise to the Directive. An example of how Part 3 might apply is given below.

**Example: Part 3 of Schedule 1 to the 2015 Regulations**

- Substances W, X and Y may be used in a process to produce, under normal controlled operating processes, substance Z.
- Under such circumstances, the site operator would not need a hazardous substances consent if the substances either do not fall within Parts 1 or 2 of Schedule 1, or they do but they are not present at or above their controlled quantity.
- However, in the event of a loss of control of the process, substances W, X and Y might react differently to produce another substance, S, which is within Parts 1 or 2 of Schedule 1, and S might be produced at a quantity at or above its controlled quantity.
- For this reason a consent will be required for substances W, X and Y.

- B9. It is *not* intended that consent is required for the hazardous substances generated during a loss of control of a process (including storage). The requirement is for the site operator to obtain consent for the presence of the substance(s) which are used in that process. The controlled quantity for a process substance will be the quantity whose presence, alone or in combination with other substances used in the process, might lead to a substance within a category in Part 1 or named in Part 2 of Schedule 1 being generated at a quantity equal to or greater than its controlled quantity.

B10. Part 3 of Schedule 1 relates to “where it is reasonable to foresee” that a substance may be generated through a loss of control - see Annex M and link to [HSE guidance on the COMAH Regulations](#) and “loss of control”.

## **Exemptions**

B11. [The 2015 Regulations](#) specify exemptions from the requirement for hazardous substances consent (See Annex C). Site operators and planning authorities should check the criteria for exemptions carefully, especially as the specific elements of certain types of exemption have changed over the years.

## **Aggregate Quantities**

B12. Generally, a consent will be required when the aggregate quantity of a hazardous substance is present in an amount equal to or greater than its [controlled quantity](#) (see exemptions in Annex C).

B13. In determining the aggregate quantity of a category of hazardous substance or a named hazardous substance present on land (land A), account is also to be taken of the amount of the substance held on, over or under *other* land (land B) which is controlled by the same person and which, in all the circumstances (including in particular the purposes for which both areas of land are used) forms a single [establishment](#)<sup>1</sup> with land A. In other words the quantity of the hazardous substance present on land B must be included in any calculation to establish the aggregate quantity present. There is no precise limit to the distance that may exist between areas of land that may be considered to constitute a single [establishment](#) for the purposes of section 2(2)(aa) of [the Principal Act](#). In most cases it should be clear what constitutes the [establishment](#) having regard to all the circumstances.

B14. The person in control of the land may not necessarily be the legal owner; for example, a site may be under the control of a tenant rather than the owner. Any two bodies corporate are to be treated as being one person if one is a subsidiary of the other, or both are subsidiaries of the same body corporate (section 38(3) of [the Principal Act](#)).

## **The Addition Rule**

B15. Even where having aggregated all of a category of hazardous substance or named substance the [controlled quantity](#) has not been reached, hazardous substances consent may still be required. [The Directive](#), and [the 2015 Regulations](#), require categories of hazardous substance and named hazardous substances with similar properties present below their individual controlled quantities to be considered together.

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<sup>1</sup> See Section 2(2)(aa),(b) and (c) of [the Principal Act](#) which refer specifically to other land or structures which are within 500 metres of the land (for structures this includes any part which is within 500 metres).

- B16. To establish whether a consent is required in these circumstances, hazardous substances present in amounts less than their controlled quantities will be added together according to the addition rule (see Note 5 of the Notes to Parts 1 and 2 of Schedule 1). This involves expressing quantities of hazardous substances with similar hazards present as partial fractions of the controlled quantities and adding them together. If the sum is 1 or greater, then consent is required for **each** of the substances which have been included in the calculation. Up to three calculations may be required for each site as the hazards are grouped in Physical, Health and Environmental hazards. Only substances with similar properties should be aggregated, so toxic substances (Health) would not be aggregated with flammable substances (Physical). One substance may be included in more than one calculation if it has multiple hazardous properties.
- B17. If a substance is named in Part 2 of Schedule 1 then the quantity in column 2 of Part 2 should be used. For substances with quantities marked with an asterisk (hydrogen, natural gas (including LNG) and LPG), the controlled quantities specified in Note 5 in the Notes to Parts 1 and 2 in Schedule 1 should be used. This is because we have adopted lower controlled quantities than the Directive for the individual presence of these substances in Scotland (see paragraph B5).
- B18. An example of how the addition rule applies is set out below.

#### **Key Points: Requirements for Hazardous Substances Consent**

- Substances in Schedule 1 to the 2015 Regulations present at or above their controlled quantities require consent (subject to the exemptions in Schedule 2).
- In considering the need for consent, all the quantities of a substance present across all the land under the control of the same person and which forms a single establishment must be added together (aggregated).
- Schedule 1 sets out controlled quantities for named substances, generic categories of substance and for substances which it can reasonably be foreseen may cause another hazardous substance to be present as a result of a loss of control. Schedule 1 sets out which controlled quantity applies where substances may fall into more than one of these groupings.
- Where a number of substances are present below their individual controlled quantity, consent may still be required by virtue of the addition rule.
- The controlled quantities in the 2015 Regulations are taken from the Directive, except in relation to Hydrogen, Natural Gas (including Liquefied Natural Gas) and Liquefied Petroleum Gas – which has implications for the use of the addition rule.

## Example of the Addition Rule

The following substances are present together at the example establishment:

Substance/Category	Amount present	Controlled quantity	Fraction
Bromine	15.00 tonnes	20.00 tonnes	15/20
Chlorine	3.00 tonnes	10.00 tonnes	3/10
Ethylene oxide	2.00 tonnes	5.00 tonnes	2/5
Propylene oxide	1.00 tonnes	5.00 tonnes	1/5
H1 acute toxic	1.00 tonne	5.00 tonnes	1/5
H2 acute toxic	5.00 tonnes	50.00 tonnes	5/50
P8 oxidising liquids and solids	3.00 tonnes	50.00 tonnes	3/50

None of these substances is present in amounts equal to or greater than its individual controlled quantity. But substances that have similar hazard characteristics have to be considered together under the addition rule.

Bromine, chlorine and the acute toxic substances (H1 and H2) have similar characteristics (health hazards – Part 1, Section H) and therefore have to be added together. Expressed as fractions of their controlled quantities the sum is:

$$15/20 + 3/10 + 1/5 + 5/50 = 0.75 + 0.30 + 0.20 + 0.10 = 1.35.$$

The sum of these fractions is greater than 1, so for each of these four substances a hazardous substances consent would be required. Any consent granted by the hazardous substances authority will be in respect of the amount of the hazardous substance present.

Ethylene oxide, propylene oxide and the oxidising substance also have common characteristics (physical hazards – Part 1, Section P). They all have physical hazards. Expressed as fractions the addition is:

$$3/50 + 2/5 + 1/5 = 0.06 + 0.4 + 0.20 = 0.66.$$

Since the sum is less than 1, there is no need for a consent for any of these three substances.

## ANNEX C

### EXEMPTIONS FROM HAZARDOUS SUBSTANCES CONSENT REQUIREMENTS

- C1. Regulation 4 and Schedule 2 set out circumstances in which hazardous substances consent is not required as exemptions to normal requirements. Scottish Ministers also have powers in section 26 of the Principal Act to make directions creating temporary exemptions in certain circumstances – see “Emergencies” below.
- C2. Site operators and planning authorities should check the criteria for exemptions carefully, especially as the specific elements of certain types of exemption have changed over the years.
- C3. Two new exemptions were introduced through the 2015 Regulations relating to (a) presence of established substances and (b) minor changes to the types and quantities of substances.

#### **Military Establishments**

- C4. Hazardous substances consent is not required for hazardous substances present at military establishments, installations or storage facilities.

#### **Nuclear Sites**

- C5. The consent procedure does not apply to the presence of a hazardous substance which also creates a hazard from ionising radiation if present on, over or under land in respect of which a nuclear site licence has been granted or is required for the purposes of section 1 of the Nuclear Installations Act 1965 (Chapter 57). However, hazardous substances present at sites licensed under said section 1 which do not create hazards through ionising radiation, will require hazardous substances consent if they are present at or above the controlled quantities.

#### **Intermediate Presence Related to the Transport of Hazardous Substances**

- C6. Section 2(3) of the Principal Act provides that the temporary presence of a hazardous substance while it is being transported from one place to another is not to be taken into account. This exemption does not apply if the hazardous substance is unloaded or it is present on, over or under land with a hazardous substances consent for any substance, or in respect of which (not taking account of the substance being transported) there is required to be such a consent for any substance.
- C7. Where a consent is required for the presence at a site of any hazardous substance (excluding substances being transported) then those substances present on a temporary basis inside the site will also have to be taken into account in calculating the quantity of the substances present at the site.

- C8. The term "temporary presence" is not defined in the Principal Act. The question of whether a vehicle's presence is temporary or not will be a matter of fact and degree, depending on the particular circumstances. The planning authority may reach the view, for example, that a controlled quantity of a substance has been kept on a vehicle for a sufficiently long period in one particular place for it to amount to a storage use, which is outside the purpose of this exemption. Judgement may also be required in considering whether a substance has been "unloaded".
- C9. The exemption in paragraph 3 of Schedule 2 complements that in section 2(3) of the Principal Act by dealing with the situation where a hazardous substance has been unloaded while it is being transported from one place to another. This is intended to cover the situation where a substance has been taken off one vehicle or vessel for the express purpose of transferring it to another. As with the section 2(3) exemption, it will be a matter of judgement as to whether the presence is a temporary one. Moreover, there should be a clear intention to transfer the substance to another means of transport (as may be illustrated, for instance, by a transportation contract). Where a substance has effectively gone into storage it would not be covered by this exemption.

## **Pipelines**

- C10. The hazardous substances consent system does not apply to controlling the presence of substances in local or cross-country pipelines. Existing controls relating to such pipelines, as set out in the Pipe-lines Act 1962 (Chapter 58) and the Pipelines Safety Regulations 1996 (SI 1996/ 825) will continue to be relied upon. However, substances contained in that part of such a pipeline which is on, over or under an establishment should be aggregated with other substances on the site for the purposes of hazardous substances consent, because they should be regarded as part of the overall inventory of substances on that site. This is consistent with the COMAH Regulations. Substances contained in a pipeline which is wholly within a site should also be aggregated with other substances.

## **Minerals**

- C11. Hazardous substances consent is not required for the presence of hazardous substances in the exploitation, namely the exploration, extraction and processing, of minerals in mines and quarries, including by means of boreholes.
- C12. This exemption does not apply to hazardous substances present in:
- onshore underground gas storage in natural strata, aquifers, salt cavities and disused mines;
  - chemical and thermal processing operations and storage related to those operations; or
  - operational tailings disposal facilities, including tailing ponds or dams.

## Waste Land-fill Sites

- C13. Hazardous substances present at waste land-fill sites are exempt from the requirement for consent. The presence of such substances may of course be subject to controls exercised through the waste management licence issued by SEPA. The exemption only applies to hazardous substances at a waste land-fill site and not to substances present at other disposal sites e.g. incinerators.
- C14. This exemption does not apply to hazardous substances present in:
- a site used for the storage of metallic mercury pursuant to Article 3(1)(b) of Regulation (EC) No 1102/2008 of the European Parliament and of the Council on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury;
  - onshore underground gas storage in natural strata, aquifers, salt cavities and disused mines;
  - chemical and thermal processing operations and storage related to those operations; or
  - operational tailings disposal facilities, including tailing ponds or dams.

## Emergency Unloading from Ships

- C15. The situation may arise where a ship or other sea-going craft containing a hazardous substance is allowed to enter a harbour in a dangerous condition or where, in the interests of health or safety, the harbour master waives the usual requirements for advance notice. The substance may need to be removed and stored as a matter of urgency. To cater for this, paragraph 9, subject to certain criteria, exempts from requirements for hazardous substances consent the presence of a substance removed from such a vessel, for a period of up to 14 days from when it is unloaded. This will allow time for suitable alternative storage arrangements to be made, if necessary.

## Explosives

- C16. Hazardous substances consent is not required **in certain cases** for the presence of an explosive, within the meaning of regulation 2(1) of the Explosives Regulations 2014 (SI 2014/ 1638), where a licence is required and has been granted under those regulations by HSE or ONR.
- C17. Hazardous substances consent is also not required where an explosive licence within the meaning of regulation 2(1) of the Dangerous Substances in Harbour Areas Regulations 1987 (SI 1987/ 37) has been issued (see paragraphs F32 to F34 of Annex F).
- C18. Explosives present at stores licensed by local authorities under the provisions of the Explosives Regulations 2014 are **not** covered by this exemption. The quantity of explosives licensed by local authorities is substantially less than the controlled quantity for either of the generic categories of explosives the

substances may fall within, so there should be no question of a hazardous substances consent being required for the presence of these explosives alone. However, it is possible that in aggregation with other hazardous substances present at a site they could combine to make it necessary for them to be subject to a consent.

### **Presence of Established Substances**

C19. There is an exemption in relation to substances which were present at a site legally without hazardous substances consent prior to 1 June 2015 and which, purely as a result of changes in the 2015 Regulations, would require consent were it not for this exemption.

C20. The exemption applies if:

- the substance was present at any time in the 12 month period prior to 1 June 2015;
- hazardous substances consent was not required for the substance at the time it was present during that 12 month period;
- such consent would have been required if the 2015 Regulations had been in force at the time the substance was present
- the quantity of substance present on or after 1 June 2015 does not exceed the maximum quantity which was present at the site at any time during the 12 month period prior to 1 June 2015.

C21. Regulation 63 (notification of other establishments) requires the person in control of the land relying on this exemption to give written notice to the planning authority containing:

- details of the person in control of the land;
- details of the location of the land;
- the maximum amount of any hazardous substance which is subject to the exemption which was held at the site in the 12 months prior to 1 June.

C22. The purpose of the notification requirement is to ensure that decisions on applications for planning permission for development in the vicinity of establishments with hazardous substances take into account the presence of such establishments. The planning authority needs to know where hazardous substances, which would require hazardous substances consent in the absence of this exemption, are present. Regulation 63 also requires the planning authority to pass a copy of the notice to HSE or ONR, as appropriate, and to SEPA, which may result in a consultation distance being created for the site.

C23. A copy of the notification of the use of this exemption is required to go on the hazardous substances consents register (regulation 41(7)).



## Presence of Small Quantities of Substances ("2% Rule")

C24. Small quantities of a hazardous substance may be disregarded when calculating the quantity of hazardous substances present at a site. Amounts not exceeding 2% of the relevant controlled quantity of a substance may be disregarded if their location at the site is such that they cannot act as an initiator of a major accident elsewhere on the site. The responsibility for determining whether such small quantities of hazardous substances are in a location which cannot act as an initiator of a major accident elsewhere on a site is, in the first instance, one for the site operator. Site operators are reminded of their responsibilities under the Management of Health and Safety at Work Regulations 1999 (SI 1999/ 3242), which requires risk assessments to be made of the danger arising from the presence of these substances at the site and for the assessments to be submitted to HSE. Site visits by HSE inspectors should ensure the exemption is not being abused.

## Minor Changes to Types and Quantities of Substances

C25. The Directive requires that there should be controls on changes in the nature or quantity of hazardous substances held which could have significant consequences for major accident hazards, or could result in a lower-tier establishment becoming an upper-tier establishment or vice versa. In those circumstances there is an exemption for changes which are not significant.

C26. Paragraphs 16 and 17 of Schedule 2 set out the exemption and the conditions which must be complied with. The exemption only applies if details of the proposed change (including details of how hazardous substances are to be kept and used as a result of that change) are sent to the planning authority by HSE or ONR and SEPA, along with confirmation that the change does not represent a "safety hazard change" and will not result in the establishment changing from upper tier<sup>1</sup> to lower tier or vice versa. In addition, the hazardous substances in question must be kept and used in accordance with the submitted details. Implicit in this is that the site operator has furnished HSE or ONR, as appropriate, and SEPA with details of the proposed change.

C27. Details of minor modifications sent to planning authorities by HSE/ ONR and SEPA should be recorded on the hazardous substances register (regulation 41(8)(b)).

C28. A "safety hazard change" in this context is a change to an area notified to the planning authority by HSE or ONR for the purposes of consultation on planning applications under the DMR (also known as consultation distances). Minor modifications could be made unless and until the cumulative effect of

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<sup>1</sup> the Directive sets two levels of qualifying quantity for substances. Sites with quantities at or above the lower qualifying quantities are designated lower tier sites and those with quantities at or above the higher qualifying quantity are upper tier sites. Additional requirements apply under the COMAH Regulations to upper tier sites.

these represented a “safety hazard change” or a change in tier.

C29. The hazardous substances consent itself is not amended.

## **Emergencies**

C30. Section 26 of the Principal Act gives Scottish Ministers a power to suspend the need for hazardous substances consent in cases of emergency. Where it is considered necessary for the provision of essential services or commodities for a hazardous substance to be present on, over or under land Scottish Ministers may make a direction that the presence of that substance does not constitute a contravention of hazardous substances control. Such a direction, which may be subject to conditions or exceptions, will be valid for a maximum of three months but may be withdrawn at any time, or renewed. The HSE or ONR and SEPA will normally be consulted before these powers are used.

### **Key Points: Exemptions**

- Planning authorities and site operators should check exemptions carefully as the terms of some may have changed over the years.
- The exemption for the established presence of substances requires site operators to notify planning authorities that the exemption is being relied on and give certain details relating to the substances present.
- The exemption for minor modifications relies on site operators passing information to HSE/ ONR and SEPA and these bodies then passing details to the planning authority indicating there is no “safety hazard change”.

## ANNEX D

### THE HAZARDOUS SUBSTANCES CONSENT PROCESS

#### Pre-application Discussions

D1. Prospective applicants are encouraged to engage with planning authorities and statutory consultees, in particular HSE or ONR, as appropriate, and SEPA, prior to making applications for hazardous substances consent. Likewise planning authorities, SEPA, HSE and ONR are encouraged to respond helpfully to such approaches. The aim is to identify and possibly resolve potential issues early in the process and to try to ensure all the necessary information is submitted with a hazardous substances consent application.

#### The Content of an Application

D2. There are three basic types of hazardous substances applications:

- Applications for hazardous substances consent (regulation 6);
- Applications for removal of conditions (regulation 7); and
- Applications for continuation of hazardous substances consent (regulation 8)

D3. **Regulation 7** applies where a hazardous substances consent is in place but the site operator wants a change in the conditions (e.g. alteration or removal of conditions) attached to that consent (section 11 of the Principal Act). If the planning authority thinks that no conditions should be imposed, or that different conditions should be imposed, it must grant a new unconditional consent or a consent with revised conditions. However, the authority's consideration is limited (section 11(2)) to the issue of whether there should be conditions or whether different conditions should apply – it cannot overturn the original decision to grant consent.

D4. Such applications may be made either before or after the original consent is relied on. For example, consent may have been given subject to a condition restricting the storage of a substance to a particular location, and it may be desired later on to re-locate the substance; or a condition may require the removal of a substance by a certain date and the applicant may subsequently have good reasons for continuing to use that substance after that date.

D5. Where the planning authority decides that the conditions attached to the consent should not be changed, the application must be refused, and the original consent remains.

- D6. These provisions apply to the standard conditions attached to a deemed consent<sup>1</sup> as well as to conditions attached to a consent specifically granted by a planning authority. So, if a site operator wishes to secure a change to a deemed consent condition, for instance to enable variation or removal of a restriction on the manner in which or the location where a substance may be present, the application should be made under regulation 7.
- D7. Where there is consent for more than one substance the planning authority may have regard to a condition relating to a substance to which the application does not relate only to the extent that it has implications for a substance to which the application does relate (section 11(5)). An example may be where a condition relates to the location of another substance on a site and it is desirable to ensure that the two substances are kept apart. The Principal Act makes similar provision where two or more consents have been granted in respect of the same land (section 11(6)).
- D8. **Regulation 8** relates to the specific situation where there is a change in control of part of the land to which an existing hazardous substances consent relates. Paragraphs D50 to D54 of this Annex contain more information on these applications. Other than on the content of applications, the main difference with these applications is that where an application under regulation 8 is not determined within the statutory period, or any extended period agreed upon in writing by the applicant and the planning authority, the application **is deemed to be granted**. It is important therefore that planning authorities deal with such cases timeously.
- D9. Applications under **regulation 6** cover all other situations where a new or replacement hazardous substances consent is required.
- D10. Each regulation specifies the particular information required to be submitted as part of or accompanying a particular type of application. HSE is developing an electronic form to assist with providing the more technical aspects of the information specified in the regulations 6 to 8. This form will be available to view or download from the HSE web site (see Annex M for the link). HSE have interim forms available on their web site at the time of publication. Planning authorities may want to prepare their own forms indicating the information to be included in an application, and incorporate the HSE form on the more technical aspects of an application when it is available.
- D11. Applicants should also provide a brief summary of information for use in public notices and consultations – see paragraphs D19 and D25 and Annex L.

### **Statutory Publicity Requirements for Applications**

- D12. Applicants for hazardous substances consent are required (regulation 5) to notify anyone who is an owner of the land to which the application relates

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<sup>1</sup> With the introduction of the 1993 Regulations, and certain amendments to these Regulations, deemed consents were granted for the established presence of substances. Schedule 3 to the 1993 Regulations specified conditions to be attached to such deemed consent. Regulation 62 of the 2015 Regulations retains these conditions in relation to deemed consent previously granted.

(other than themselves). Specifically this applies to those who are owners at the beginning of a 21 day period ending with the day the application is submitted.

- D13. The form of the notice is specified in Schedule 3.
- D14. The applicant must certify that either: they were the only owner; or that they have notified all owners (other than themselves); or that they have notified such other owners as they were able to identify, but that this is not all of the owners. Where other owners are involved, the applicant must specify in the certificate the name of every person on whom notice was served and the address at and date on which it was served. Where there are other owners whom the applicant has been unable to notify, the applicant must certify that they have taken reasonable steps to ascertain the names and addresses of these parties and specify what steps they took.
- D15. This certificate must accompany the application for hazardous substances consent.
- D16. The planning authority is required (regulation 9) to carry out neighbour notification on premises on neighbouring land. The term 'neighbouring land' is defined in regulation 9, which also sets out what must go in the notice.
- D17. The planning authority is required (regulation 10) to place a newspaper notice for all applications for hazardous substances consent. The form of the notice is specified in Schedule 4.
- D18. Planning authorities should aim to align the dates, specified in neighbour notification and newspaper notices, by which representations on the application can be made to the authority. Such notices should not be served or appear in newspapers unless the contents of the application are available on the public register of hazardous substances consent applications (See paragraphs D47 to D49 in this Annex).
- D19. It is important that these notices include sufficient information for the public and others to understand the potential land use implications (as part of the public participation requirements of the Directive), without publicising information which is security sensitive. Applicants should ensure applications include brief summaries of proposals which can be used for such publicity requirements. Only the generic categories of the substances involved should be used in such notices. See Annex L for further information.

### **Validation Date, Acknowledgement and Further Information**

- D.20 An application for hazardous substances consent is taken to have been made on the date the last of the information specified in regulations 6, 7 or 8, as appropriate, has been received by the planning authority (the 'validation date' – regulation 11). This date has implications for the time periods for determining applications and making appeals on the grounds of non-determination. It is the date of the receipt of the required information, not, for

example, the date when the authority acknowledges that an application has been received (unless the two dates coincide). Nor is it the date when any further information beyond that required by regulations 6, 7 or 8, such as information the authority requires to be provided under regulation 13, is submitted.

- D21. Where all the information required by regulation 6, 7 or 8 is received, the planning authority must send an acknowledgement to the applicant or to the agent acting on the applicant's behalf. The acknowledgement must include information on the time periods for issuing a decision notice (See paragraph D26 to D28 of this Annex) and the applicant's right of appeal.
- D22. If the application and information falls short of the requirements of regulation 6, 7 or 8, as appropriate, the planning authority must write to the applicant/ agent identifying the missing information, documents or fee which must be submitted.
- D23. As indicated, planning authorities have power to require the production of further information (regulation 13) which they consider they need to determine the application in addition to that specified in regulation 6, 7 or 8. Requests for such further information and its submission do not affect the validation date.

## **Consultation**

- D24. Regulation 14 lists bodies that must be consulted on applications, including HSE or ONR, as appropriate, and SEPA. It also reflects the wider public participation requirements of Article 15 of the Directive. Regulation 14(3) contains a requirement to consult other persons and parties, including any non-governmental organisation promoting environmental protection, known to the authority, who are affected, likely to be affected or have an interest in the proposal but who are unlikely to have seen the owner or neighbour notification or newspaper notice.
- D25. Regulation 14(4) contains specific requirements as to the information to be sent to consultees in line with the Directive (see Annex L on Security and Confidentiality issues). At least 28 days must be allowed for responses.

## **Time Period for Determination**

- D26. Planning authorities have two months from the validation date in which to issue a decision notice (or notice of referral of the application to Scottish Ministers – also known as “call-in” of the application) on hazardous substances consent applications (regulation 17). This period can be extended by an agreement in writing between the applicant and the planning authority. However, no decision can be issued until after the time periods for representations and responses specified in the owner and neighbour notifications (regulations 5 and 9), newspaper notices (regulation 10) and consultation notice (regulation 14).

- D27. The applicant can appeal to the Scottish Ministers on the grounds of non-determination of the application where no decision notice (regulation 18), or notice that an application has been referred to the Scottish Ministers (regulation 20), is issued within the two month period or any agreed extension. The applicant has 3 months from the date of expiry of the two month period, or agreed extension, to make such an appeal.
- D28. The exception to this right of appeal is an application under regulation 8 for continuation of hazardous substances consent, where consent is deemed to be granted if no decision is issued within the 2 month period or any agreed extension.

### **Making a Decision**

- D29. Planning authorities can grant consent, grant it with conditions or refuse consent – though see paragraphs D34 to D37 on notification of applications and D50 to D54 on applications under regulation 8 for continuation of consent. Section 8 of the Principal Act provides that conditions on how a hazardous substance is to be kept or used are limited to those HSE or ONR have advised should be imposed.
- D30. Where an application relates to more than one hazardous substance, different decisions can be made in relation to each substance.
- D31. The role of HSE, ONR and SEPA is to advise the planning authority on the risks arising from the presence of hazardous substances. HSE and ONR have the expertise to assess the risks arising from the presence of a hazardous substance to persons in the vicinity and advise the planning authority accordingly; SEPA has the expertise to assess and advise upon the likely risks arising to the environment. However, the decision as to whether the risks associated with the presence of hazardous substances, either to persons or to the environment, are tolerable in the context of existing and potential uses of neighbouring land is one which should be made by the planning authority.
- D32. Section 7 of the Principal Act refers to the need to have regard to material considerations, and lists a number of those, including the development plan and advice from the HSE or ONR. However, the list of considerations in section 7 is not exhaustive. In addition, regulation 15 provides that planning authorities must take into account representations made in relation to applications, unless the representations have subsequently been withdrawn.
- D33. In view of their acknowledged expertise in assessing the risks presented by the presence of hazardous substances, any advice from SEPA, HSE or ONR that hazardous substances consent should be refused, or conditions attached to a grant of consent, should not be overridden without the most careful consideration.

## **Notification and Call-in of Applications to Scottish Ministers**

- D34. Regulation 16 requires planning authorities to notify applications for hazardous substances consent to the Scottish Ministers where the authority intends to grant consent contrary to the advice of HSE, ONR or SEPA. That is, where HSE, ONR or SEPA have advised against granting consent or have advised that conditions should be attached to a grant of consent which the authority does not intend to attach.
- D35. Notification allows Scottish Ministers to consider whether there are any grounds to justify call-in of the application for their determination. The planning authority cannot grant consent unless a 28 day time period (or any extended period notified to the authority by Scottish Ministers) has elapsed or Scottish Ministers have notified the authority that they do not intend to call-in the application.
- D36. Scottish Ministers have a general power under section 18 to intervene in the determination of a hazardous substances consent application and would do so only where it appears there may be some matter of genuine national interest at stake, such as a safety issue of exceptional concern. Such an application could also be called in because an associated application for planning permission had been called-in and it makes sense to consider the two together. In practice, Ministers will exercise this power very sparingly, recognising and respecting the important role of local authorities in making decisions on the future development of their areas.
- D37. Where an application is called-in, the planning authority is required to give notice to the applicant in accordance with regulation 20. See Annex E on Appeals and Called-in applications.

## **Decision Notices**

- D38. Under section 7, decision notices must include a description of the land to which the consent relates, the hazardous substance or substances to which it relates and the maximum quantity of each substance permitted to be present at any one time.
- D39. Regulation 18 has further requirements on what a decision notice must include, for example: the address of the site; any conditions attached to a grant of consent; the reference number given to the application by the planning authority; rights of appeal and where information on appeals can be found. There are also requirements for information on the parties consulted, the representations made, how the latter were taken into account and the reasons for the decision.
- D40. On rights of appeal and information on such appeals, the decision notice should include information about the means of challenge available. In relation to regulation 18(5)(b), this is specifically the applicant's right of appeal under section 19. Regulation 18(4)(d) relates to wider rights of appeal by any party, primarily the availability of proceeding with a petition for judicial review of the



determination would need to be mentioned. In all of these scenarios the statement should also provide information about the general circumstances of application and where further information on such means of challenge and the procedures for these can be found (such as the Scottish Courts Service or through the Citizens Advice Scotland – see Annex M).

- D41. Please note that the requirements on the content of decision notices vary slightly depending on the nature of the application and the decision.
- D42. SEPA and, as appropriate, HSE or ONR must be sent copies of the decision notice on an application (in part this allows HSE and ONR to set consultation distances). Other parties who made written representations must be notified of the decision and of where a copy of the decision notice is available for inspection (see Annex L on Security and Confidentiality). Regulation 18 makes provision for dealing with documents which contain representations from multiple parties, such as petitions, so that it is only necessary to notify one of the parties.

### **Applications for Approval of Matters Specified in Conditions**

- D43. A hazardous substances consent may contain conditions requiring that the further consent, agreement or approval of the planning authority be obtained in relation to certain matters. There is no specified content for applications for such consent, agreement or approval, nor are they subject to publicity and consultation requirements.
- D44. However, the 2015 Regulations provide that such applications must be acknowledged (regulation 12), that they can be the subject of requests for further information (regulation 13) and that a decision notice must be issued when they are determined (regulation 19). There are rights of appeal against decision on these applications (section 19 of the Principal Act)

### **Fees for Applications**

- D45. Fees for applications for hazardous substances consent are set out in regulation 55. Applications under regulation 6 for consent for a quantity of substance which is more than twice the controlled quantity for that substance attract a higher fee, as the greater off-site risks are likely to need more detailed consideration.

### **Applications by Planning Authorities**

- D46. Where a planning authority wishes to obtain a hazardous substances consent itself, the application must be made to the Scottish Ministers. Regulation 56 describes how the 2015 Regulations and the Principal Act apply to such applications. Amongst other things, requirements for neighbour notification, publicity and consultation apply.

## Registers

- D47. Regulation 41 lists all the information that must be kept in the register of hazardous substances consents. This includes: decisions under the various procedures, such as appeals, modification and revocation orders; and any other decisions in relation to a grant of hazardous substances consent. It also requires that the register contain information on notices on the presence of established substances (regulation 63) and notices of minor modifications (paragraph 17 of Schedule 2).
- D48. It is important that registers are updated quickly with information. No publicity procedures specifying the availability of information for inspection should be initiated unless and until the information is on the public register.
- D49. Hazardous substances registers should be made available for inspection on request at the planning authority's offices, but for security reasons should not be made available online. The register may be held electronically. Security sensitive information must not be removed by visiting members of the public (see Annex L).

## Applications to Continue a Consent after Change in Control of Part of the Land

- D50. Section 15 of the Principal Act is designed to ensure that when the control of part of the land to which a consent relates is conferred on another person, a sensible arrangement is made as to the right to keep hazardous substances. Normally a hazardous substances consent will run with the land (as would a planning permission), but where there is a change in control of part of the land to which it relates the consent will be revoked unless an application for its continuation has previously been made under section 15.
- D51. This provision is designed to avoid inappropriate results. For example, a site operator has a consent to keep hazardous substances at a site that includes a staff sports ground. The sports ground is at the outer perimeter of the site, well-removed from the process plant and no hazardous substances are ever present there. If the site operator sells only the sports ground it may be inappropriate that the consent should be split proportionally between the owners. In many cases the consent will impose conditions controlling the particular location within a site where the substances are to be kept or used, but that may not always be the case.
- D52. Section 16(1) of the Principal Act empowers the planning authority to modify or revoke a consent which is the subject of a section 15(1) application. Where the authority does modify or revoke the consent, section 17 entitles the person who controlled the whole of the land before the change in control to be compensated for any loss or damage sustained and directly attributable to the modification or revocation. It is likely that a planning authority will at least need to modify the description of the land to which the consent relates, and modifications of conditions may be necessary. It should, however, rarely be appropriate to use these powers to impose significantly more onerous

conditions on a consent or to revoke it. In a typical case, where the consent has to be modified to refer to only one part of a property that has been divided, it seems unlikely that a sensible modification will normally give rise to any claim for compensation.

- D53. Although a consent or deemed consent will already have been granted in these cases, applications for continuation could give rise to issues of no less significance than applications for a new consent. The same publicity and consultations procedures as for applications for a new consent therefore apply. These applications may also be called in under section 18 of the Principal Act. See Annex E for details on rights of appeal in relation to these applications.
- D54. It is important to note that where an application under regulation 8 is not determined within the statutory period, or any extended period agreed upon in writing by the applicant and the planning authority, the application **is deemed to be granted**. It is important therefore that planning authorities deal with such cases timeously.

**Key points on applications for continuation of consent:**

- If no application for continuation of the consent (regulation 8) is made prior to a change to the person in control of part of the land, revocation of the consent is automatic and there is no compensation payable under section 17 of the Principal Act; and
- If an application for continuation of consent is not determined within the statutory period or an agreed extension to this period, the application is deemed to be granted.

### **Other Procedures Granting Hazardous Substances Consent**

- D55. Scottish Ministers also have powers to direct that hazardous substances consent is deemed to be granted when authorising projects which involve hazardous substances under other consent procedures. Such a direction can specify conditions to which the grant of hazardous substances consent is subject. Section 10(1) to (2A) of the Principal Act allow for such directions to be made when Scottish Ministers<sup>1</sup>:

- authorise development by a local authority or statutory undertaker;
- grant consent under section 36 of the Electricity Act 1989; or

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<sup>1</sup> While Section 10 also applies to certain development authorised by the UK Government under its Nationally Significant Infrastructure Planning procedures, these are not subject to requirements in the 2015 Regulations.

- make an order under section 1 of the Transport and Works (Scotland) Act 2007

D56. While there are separate application procedures for each of these types of authorisation, consent or order, regulation 23 sets out public participation requirements in such cases to ensure compliance with the Directive. Where the requirements of decision making procedures have equivalent requirements to regulation 23 which have been complied with, there is no need to carry out the requirements again. Section 10 and regulation 23 also require consultation with HSE or ONR (as appropriate) and SEPA.

#### **Key Points: Applications for Hazardous Substances Consent**

- There are three types of applications for hazardous substances consent;
  - applications for consent;
  - applications for a replacement consent with different conditions; and
  - applications for continuation of consent where there has been a change in the person in control of part of the land.
- Where there is a change in the person in control of part of the land to which consent relates, such consent will be revoked in the absence of an application for continuation of consent.
- HSE provides a downloadable form to assist with the technical information required as part of an application.
- Procedures for processing applications are broadly similar to those for applications for planning permission, though there are differences to ensure compliance with the Directive.
- There are rights of appeal to Scottish Ministers against a planning authority's failure to determine applications for consent.
- However, a planning authority's failure to determine an application for continuation of consent results in a deemed approval.
- Given SEPA, HSE and ONR's expertise on off-site risks from hazardous substances, their advice should not be overridden without the most careful consideration.
- Requirements to notify applications to Scottish Ministers apply where the planning authority wishes to grant consent contrary to HSE, ONR or SEPA advice.

## ANNEX E

### HAZARDOUS SUBSTANCES CONSENT – APPEALS AND CALLED-IN APPLICATIONS

#### Rights of Appeal

- E1. There are no local review procedures for applications for hazardous substances consent, or for applications for consent, agreement or approval required by a condition attached to a hazardous substances consent. Appeals relating to such applications are made to the Scottish Ministers (section 19 of the Principal Act).
- E2. Appeal forms are available from the Directorate for Planning and Environmental Appeals (DPEA), or can be downloaded from the appeal section of the Scottish Government web site (see link in Annex M for contact details and links).

#### ***Applications for hazardous substances consent (regulation 6) or changes to conditions on hazardous substances consent (regulation 7)***

- E3. Applicants for hazardous substances consent under regulations 6 and 7 have a right of appeal to the Scottish Ministers against a refusal of such consent by the planning authority or against any condition attached to a grant of consent (section 19 of the Principal Act). In the absence of a decision notice or notice that the application has been referred to the Scottish Ministers (also known as “called-in”), they can also, after the expiry of the period allowed for determination (see paragraph E12 below), appeal on the grounds of non-determination.

#### ***Application for continuation of consent (regulation 8)***

- E4. An applicant under regulation 8 for the continuation of hazardous substances consent upon a change in the person in control of part of the land to which consent relates has a right of appeal against refusal of such an application (section 19 of the Principal Act).
- E5. There is no right of appeal on the grounds of non-determination of the application in such cases. If no decision or notice of call-in by Scottish Ministers has been issued within the period of 2 months after the validation date, or any extension to that period agreed upon in writing by the applicant and the planning authority, the continuation of consent is deemed to be granted.

#### ***Application for consent, agreement or approval required by a condition attached to hazardous substances consent***

- E6. An applicant for consent, agreement or approval required by a condition attached to a hazardous substances consent also has a right of appeal under section 19 against a refusal by the planning authority or against conditions

attached to an approval, agreement or consent. There is no right of appeal on the grounds of non-determination in such cases.

### **Right to be Heard**

- E7. In any appeal under section 19 of the Principal Act in relation to hazardous substances consent or consent, agreement or approval required by a condition attached to such consent, the appellant and planning authority have a right to appear before and be heard by a person appointed by the Scottish Ministers (a 'right to be heard'). Where the appellant or the planning authority wish to exercise their right to be heard in relation to certain matters by making oral submissions, those matters will be considered via one or more hearing sessions and/or one or more inquiry sessions.
- E8. It will be for the person appointed by Scottish Ministers to determine the appeal to decide which of these procedures, alongside any other further processing of the case, are appropriate in a specific case.

### **Appeal Procedures**

- E9. The appeal procedures in Part 5 of the 2015 Regulations, and the related Town and Country Planning (Hazardous Substances Inquiries Session Procedure) (Scotland) Rules 2015, are very similar to those for planning permission. A major difference is the above mentioned (paragraph E7) "right to be heard" in hazardous substances consent appeal procedures.

### ***Notice of Appeal***

- E10. An appeal to Scottish Ministers must be made in writing. Regulation 24 requires the notice to be given in a form obtained from Scottish Ministers (see paragraph E2 above and link to appeal forms in Annex M).
- E11. The notice of appeal must be served within a period of three months beginning with the date of the decision notice or, in the case of an appeal against non-determination, beginning with the date of expiry of the period allowed for determining the application. For example, if the date of the planning authority's decision notice were 1 September, an appeal would have to be received by DPEA on or before 30 November. An appeal submitted on 1 December would be out of time and not accepted. If the period within which the planning authority had to make a decision expired on 17 March, without one being issued, an appeal on the grounds of failure to determine would need to be made by 16 June. There is no discretion to accept late appeals<sup>1</sup>.
- E12. The period allowed for determining an application is specified in regulation 24(3) and is two months after the validation date of the application. Where the applicant and planning authority agree in writing to an extension to this statutory period, the extended period counts as the period allowed for determination.

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<sup>1</sup> Not appealing on the grounds of non-determination does not affect the right of appeal against the planning authority's eventual decision.

- E13. Regulation 24 sets out what must be contained in or accompany a notice of appeal to Scottish Ministers, namely:
- the name and address of the appellant;
  - the date of the notice and reference number of the relevant application;
  - the name and address of any representative of the appellant for correspondence purposes;
  - a statement setting out full particulars of the appeal including a note of what matters the appellant considers should be taken into account in determining the appeal and by which procedure (or combination of procedures) the appellant would prefer the appeal to be conducted;
  - in relation to the above, a statement as to whether the appellant wants to exercise their right to appear before and be heard by an appointed person and, if so, on which matters he or she wishes to be heard; and
  - where the appeal is against the planning authority's decision, a copy of the decision notice.
- E14. The appeal form provided by the Scottish Ministers will prompt the provision of all of this information. While DPEA will request any missing information, if the statutorily required information is not submitted within the period for making the appeal, the appeal will not be accepted.
- E15. Regulation 24(5) provides that all matters that the appellant intends to raise in the appeal must be set out in the notice of appeal or in the accompanying documents. All documents, material and evidence the appellant intends to use to support the appeal must also accompany the notice of appeal.
- E16. Regulation 24(6) provides that the appellant may only raise additional matters or submit further documents, materials or evidence in accordance with:
- regulation 25, in commenting on the planning authority's response to the appeal;
  - regulation 26, in commenting on the interested parties' responses to the appeal;
  - regulation 32, where the appointed person seeks further written submissions;
  - the Hearing Session Rules (Schedule 7); or
  - the Inquiry Session Rules.
- E17. These requirements are intended to ensure that the relevant matters and items of information are provided efficiently at the start of the appeal process, rather than at varying points throughout the process.

### ***Intimation to the Planning Authority***

E18. At the same time that the appellant gives notice of appeal to Scottish Ministers, the appellant must also inform the planning authority. Regulation 25 requires that the appellant sends to the planning authority a copy of the notice of appeal and a list of all documents, materials and evidence which the appellant intends to rely upon and which accompanied the notice of appeal. There is no need for the appellant to send to the planning authority copies of documents that the appellant has already submitted to that authority. The appellant must, however, also send to the planning authority a copy of any documents, materials and evidence which had not already been provided to the planning authority while it had been considering the application.

### ***Planning Authority Response***

E19. Having received the notice of appeal from the appellant, regulation 25(2) requires the planning authority to provide a response within 21 days, beginning with the date of receipt. It is important that authorities meet this deadline as any delay at this stage has a particularly detrimental effect on the running of the appeal as a whole. The planning authority should send to Scottish Ministers and the appellant:

- a note of the matters that the planning authority considers should be taken into account in determining the appeal and by what procedure (or combination of procedures) the authority thinks these should be examined;
- in relation to the above, a statement of whether or not the authority wants to exercise its right to appear before, and be heard by, an appointed person and the matters on which the authority wishes to be heard;
- a copy of the documents (other than those specified by the appellant in their list of documents, materials and evidence) which were taken into consideration by the planning authority in making its decision; and
- the conditions that the planning authority considers should be imposed in the event that consent is granted.

E20. Regulation 25(3) allows that, having received the planning authority's response, the appellant can, within 14 days beginning with the date of receipt, send to Scottish Ministers and to the planning authority any comments on matters raised by the planning authority which had not previously been addressed in the decision notice<sup>1</sup>. At the same time, the appellant can also provide any documents, materials or evidence in support of those additional comments. Planning authorities are expected to provide full reasons in their decision notice and so this provision should not normally be needed. This is not intended to be a chance for appellants to add to their response to issues raised in the decision notice.

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<sup>1</sup> Decision notice in this paragraph includes the notices of decision for applications for consent, agreement or approval required by a condition on hazardous substances consent.



E21. There is no provision in the 2015 Regulations giving the planning authority an opportunity to respond to the appellant's additional comments, although the appointed person may specifically request further submissions from the appellant, planning authority and any other specified party through a subsequent procedure notice (see paragraphs E28 to E54).

### ***Notification to Interested Parties***

E22. Regulation 26 requires planning authorities to give interested parties notice of the appeal within 14 days of the authority being notified of the appeal. "Interested parties" are those consulted by the planning authority under regulation 14 and any other persons who made representations (which were not subsequently withdrawn) to the planning authority during the authority's consideration of the application.

E23. Regulation 26(3) covers the content of such a notice. This includes details of the appellant, the proposal, the site address/ location and statements advising interested parties of where the notice of appeal can be inspected, that the representations they previously made will be sent to Scottish Ministers and the appellant by the planning authority and details of how to make any further representation at this stage.

E24. As representations previously made and lodged with the planning authority by interested parties will be taken into account before a decision is reached on the appeal, there is no need or expectation for the same matters to be raised again with Scottish Ministers. Nevertheless, regulation 26(4) allows that interested parties may make further representations to Scottish Ministers in respect of the appeal within 14 days beginning with the date notice of the appeal is given to interested parties. In turn, the 2015 Regulations require Scottish Ministers to send a copy of any representations received by them to the appellant and to the planning authority, each of whom are provided with an opportunity to respond within a specified period, being not less than 14 days after the copies were sent.

E25. The planning authority is to make all the relevant appeal papers available for inspection at an office of the planning authority (regulation 27). The legislation does not rule out making the information available in electronic form. However, such information should not be made available on the internet (see Annex L on Security and Confidentiality).

### ***Deadlines for Provision of Statements and Other Evidence***

E26. As noted above, the 2015 Regulations set a number of statutory deadlines for the submission of:

- the planning authority's response to the appeal (21 days);
- the appellant's comments on the planning authority's response (14 days);
- the planning authority's notification to interested parties (14 days);

- further representations from interested parties (14 days); and
- the appellant's and planning authority's comments on representations from interested parties (a specified date not less than 14 days after they are sent a copy of any further representations from interested parties).

E27. In the interests of efficiency in decision-making, the Scottish Government expects parties to provide responses, comments, notifications and representations at the earliest opportunity.

### ***Procedure for Determination***

E28. Once the above exchange of information is completed, regulation 28 allows the person appointed to decide the appeal, where they conclude they have sufficient information, to proceed to a decision without any further evidence gathering procedure. This does not apply where either the appellant or the planning authority wishes to exercise their right to be heard.

### ***Further Evidence***

E29. If the appointed person decides that further information or additional representations are required to allow the appeal to be determined, the appeal is to be conducted by one of, or by a combination of, the procedures set out in regulation 30(3) (further written submissions, hearing sessions, inquiry sessions or site inspections). The appointed person will identify each of the matters on which further information is needed, and also the procedure to be used to obtain it. This will be clearly set out to the parties involved in a procedure notice. Where the appellant or the planning authority exercise their right to make oral submissions in relation to any matter, the appointed person will decide whether such submissions should be made at a hearing session or an inquiry session, or a combination of these.

### ***Opt-in Notice***

E30. Where further procedure is required, regulation 29 allows the appointed person to write to interested parties inviting them to confirm if they wish to be involved in such further procedure (e.g. hearing or inquiry sessions). Interested parties will be given a specified period (being at least 14 days from when notice is given) within which to give confirmation. In the event that they do not wish to be involved in the further procedure, their original representation will still be given due consideration and they will be informed of the decision on the appeal in due course.

E31. The intention is that this "opt-in" procedure would be used in those cases where there are a significant number of interested parties; for example, where a large number of representations had been made by petition or by standard letter. The aim is to identify those interested parties who wish to play an active role in any further procedure in the appeal and to avoid repeatedly sending information about the progress of an appeal to people who, though

they may be interested in the case and want their original views to be considered, do not want to be involved in any further appeal procedure.

### ***Site Inspections***

- E32. The appointed person may, at any stage of an appeal, decide to carry out an inspection of the site to which the appeal relates. Regulation 33 sets out details about site inspections. These may be either unaccompanied or accompanied. Where the appointed person intends to make an unaccompanied inspection of the site they will inform the appellant and the planning authority. If, for any reason, the appointed person considers that an accompanied site inspection would be appropriate, then the appellant, the planning authority and all interested parties (subject to any “opt-in” procedure – see paragraphs E30 to E31) will be informed of the arrangements, including the date and time. The appointed person is not obliged to defer the site inspection if any of the parties or interested persons are not present or available on the set date.
- E33. The purpose of the site inspection, even if accompanied, is to allow the appointed person to see the site and is not an opportunity for parties to discuss with the appointed person the merits of the case.

### ***Pre-examination Meetings***

- E34. In some instances it will be helpful for the appointed person to hold a pre-examination meeting to consider how the appeal or a particular stage of it can be conducted most efficiently and expeditiously. Regulation 31 provides a procedure for this and for involving the appellant, the planning authority and any interested party who wishes to participate in further procedure (see paragraphs E30 to E31). The arrangements for holding and giving notice of such a meeting and for deciding the matters to be discussed are for the appointed person to determine. It is likely that pre-examination meetings will only be required in a small number of complex cases.

### ***Written Submissions***

- E35. Regulation 32 sets out the procedure for seeking further written submissions on an appeal. The appointed person may, by written notice, request that additional representations or information from the appellant, the planning authority or from any other person should be provided by means of written submissions (a procedure notice). The procedure notice will specify those matters on which written submissions are required and by what date and will provide details of those who have been requested to provide the additional information.
- E36. Parties providing such further information (a procedure notice response) to the appointed person should at the same time send copies to all parties specified in the procedure notice, including the appellant and the planning authority. All of these parties then have an opportunity to send comments on a procedure notice response to the appointed person within 14 days from the date they

received it, again providing copies to the appellant, planning authority and others specified in the procedure notice. The timetables for the provision of this information must be observed.

### ***Hearing Sessions***

- E37. Schedule 7 to the 2015 Regulations sets out the Hearing Session Rules. These provide the appointed person with some scope to determine what procedure should be followed at a hearing on the matters specified in a procedure notice. The hearing is to take the form of a discussion led by the appointed person. Formal cross-examination of participants is not allowed. While the rules provide discretion for the procedure the appointed person thinks appropriate to follow during the hearing, they also provide a framework to ensure that the relevant parties have clear notice of the hearing session, the other participants in the process and clarity about the issues and evidence to be considered.
- E38. Where the appointed person intends to hold a hearing session, they must give written notice (a procedure notice) to: the appellant; the planning authority; those parties who made representations on the specified matters who wish to participate in further procedure (see paragraphs E30 to E31); and any person the appointed person wishes to submit further representations or information. Any party intending to participate in the hearing session must inform the appointed person within 14 days of the date of the written notice. As only those matters specified in the procedure notice will be considered at the hearing, only those who made related representations are required to be given notice of the hearing.
- E39. It is for the appointed person to give those entitled to appear notification of when and where the hearing is to take place, and to give whatever notice they consider to be reasonable in the circumstances (rule 3). Those who are entitled to appear at a hearing session may be required to send a hearing statement and any supporting documents to the other parties entitled to appear at the hearing and to the appointed person (rule 4). This will not be required in every case and will be for the appointed person to determine. A hearing statement is a written statement which fully sets out the case relating to the specified matters on which the appointed person has sought information in the procedure notice, together with a list of supporting documents to be relied upon and a list of any persons who are to speak at the hearing session, including the matters to be covered by each person and their relevant qualifications. The rules are intended to ensure that all parties are clear on the issues and evidence to be considered at the hearing session.
- E40. At the start of the hearing session, the appointed person is to explain the procedure that they intend to adopt, taking into account submissions made by any of the parties entitled to appear. Parties may be represented or, where two or more persons have a similar interest, one or more may appear for the benefit of some or all. The appointed person may proceed with the hearing in the absence of anyone entitled to appear.

## ***Inquiry Sessions***

- E41. The Town and Country Planning (Hazardous Substances Inquiry Session Procedure) (Scotland) Rules 2015 set out the Inquiry Session Rules. In common with the procedure for hearing sessions, the inquiry sessions will examine only those matters specified in the procedure notice issued under rule 4. The parties entitled to appear at inquiry sessions will be:
- the appellant;
  - the planning authority;
  - any interested party who made representations in relation to specified matters and wishes to participate in further procedure; and
  - those whom the appointed person wishes to make representations on the specified matters.
- E42. Those provided with written notice of the inquiry session by the appointed person must confirm their intention to attend the session within 14 days of the date of the notice.
- E43. Rule 6 requires the appointed person to provide such notice of the date, time and place fixed for holding the inquiry session as they consider reasonable to those parties entitled to appear at the inquiry session. However the appointed person may also require the planning authority to take one or more of the following additional steps to publicise the inquiry session:
- publish notices in a local newspaper and on a website not less than 14 days before the inquiry session; or
  - serve notice of the inquiry session in a form and on such parties as the appointed person specifies.
- E44. Where required to by notice from the appointed person, those entitled to appear at the inquiry session must provide copies of an inquiry statement to the appointed person and to the appellant and planning authority. This should contain a written statement with the particulars of the case relating to the specified matters, a list of documents to be relied upon and a list of any witnesses who are to speak at the inquiry session (including the matters to be covered by each person and their relevant qualifications). The appointed person will provide those entitled to appear at the inquiry session with details of when information should be submitted.
- E45. The appointed person's notice will also specify the date by which the documents listed in the inquiry statement must be submitted to the appointed person and to the appellant, planning authority and other persons entitled to appear at the inquiry session. It will also specify the date for submission of precognitions setting out the evidence to be given by the witnesses listed in the inquiry statement. The Inquiry Session Rules require that precognitions should not exceed 2,000 words in length.

- E.46 The Rules provide the appointed person with scope to determine the procedure at the inquiry session but they are to state at or before the commencement of the session what the procedure will be, taking account of submissions from those entitled to appear. The Rules require the appointed person to state the order in which specified matters are to be considered and the order in which those entitled to appear are to be heard. Parties may be represented or, where two or more persons have a similar interest, one or more may appear for the benefit of some or all.
- E47. Those entitled to appear at an inquiry session may call evidence, cross-examine witnesses and make closing statements. However, the appointed person can refuse to permit the giving of evidence, cross-examination or the presentation of any other matter which they consider to be irrelevant or repetitious.

### ***New Evidence***

- E48. Where, following conclusion of any further procedure, such as a hearing session or inquiry session, the appointed person intends to take into account new evidence, the 2015 Regulations (regulation 34) require that the appellant, the planning authority and other relevant parties described in the 2015 Regulations be given an opportunity to make representations on the new evidence before a decision can be made on the appeal. Regulation 34 defines “relevant party”. Where new evidence relates to a specified matter which was the subject of a hearing or inquiry session, everyone entitled to appear at that session is a relevant party. Where new evidence relates to a matter on which further written representations or information was sought by a procedure notice under regulation 32, a relevant party is anyone to whom the procedure notice was sent.

### ***Further Copies of Documents***

- E49. Regulation 35 enables the appointed person to require any party who has submitted documents, materials or evidence under the 2015 Regulations to provide them or other parties with such additional copies as the appointed person specifies. The appointed person may also require the planning authority to make copies of the documents, materials or evidence available for inspection at an office of the planning authority until the appeal is determined and to allow anyone reasonable opportunity to inspect the documents.

### ***Compliance with Notification and Consultation Procedures***

- E50. Under regulation 36 the appointed person must comply with any consultation and publicity requirements in relation to the application where this has not already been done by the planning authority.

### ***Appointment of Assessors***

- E51. Scottish Ministers may appoint an assessor to sit with the appointed person at a hearing session or at an inquiry session to advise on such matters as

Scottish Ministers may specify (regulation 37). Where this happens Scottish Ministers must notify every person entitled to appear at the inquiry or hearing session of the name of the assessor and of the matters that the assessor is to advise upon.

### ***Decision Notice***

- E52. Under regulation 38 the Scottish Ministers must give a copy of the decision notice to the applicant (or agent), planning authority, HSE or ONR, as appropriate, and SEPA. In addition they must notify all those who made, and did not withdraw, representations on the appeal, indicating where a copy of the decision can be viewed.
- E53. The decision notice must contain the decision on the appeal, indicating any change to the decision of the planning authority. In addition, it must identify any parties consulted, explain the reasons for the decision, contain a statement of the numbers of representations received on the appeal, a summary of the main issues raised in these representations and explain how they were taken into account in the decision, and contain information on the right to challenge the validity of the decision and the procedures for doing so.

### ***Non-delegated Appeals***

- E54. Some appeals are not delegated to an appointed person, for example where they are recalled by the Scottish Ministers for their decision. Part 5 of the 2015 Regulations, the Hearing Session Rules and Inquiries Session Rules all apply to such appeals. Regulation 40 applies modifications to the 2015 Regulations and the Hearing Session Rules in such cases.

### ***Called-in Applications***

- E55. Under section 18 of the Principal Act, the Scottish Ministers can require an application for hazardous substances consent to be referred to them for determination – see paragraph D35 to D37.
- E56. As described in paragraphs D35 to D37 of Annex D, planning authorities are required to notify applications to Scottish Ministers where they are minded to grant consent, or not to impose a condition, contrary to the advice of HSE, ONR or SEPA.
- E57. As with appeals, where applications are called-in, the applicant and the planning authority have a right to appear before and be heard by a person appointed by the Scottish Ministers.
- E58. Regulation 39 provides that Part 5 of the 2015 Regulations, except regulations 24 to 27 (which deal with certain appeal specific requirements), apply to applications for hazardous substances consent called-in for determination by Scottish Ministers. It also applies the Hearing Session Rules (Schedule 7) to such cases. The Inquiry Session Rules also apply to called-in applications.

- E59. Modifications to the applied provisions are made by regulation 39(2) and rule 10 of the Inquiry Session Rules, as applications rather than appeals are involved and decisions will be by Scottish Ministers, not delegated to an appointed person.
- E60. Regulation 36 as modified requires that Scottish Ministers must comply with notification, publication and consultation requirements in respect of an application insofar as these have not been complied with by the applicant or the planning authority.

**Key Points: Hazardous substances consent appeals and called-in applications**

- There are no local review procedures in relation to hazardous substances consent applications
- The procedures for appeals and called-in applications for hazardous substances consent are substantially the same as those for planning permission.
- The main difference is that with hazardous substances consent cases, the applicant and the planning authority still have a right to appear before and be heard by a person appointed by the Scottish Ministers (the right to be heard).
- Where the planning authority or applicant/appellant exercise their right to be heard on certain matters, the appointed person will decide whether this will be by hearing session(s) or inquiry session(s) or combination of these.
- Other than in relation to the right to be heard, the appointed person will decide whether further processing is required and in what form (hearing sessions(s), inquiry session(s), written submissions or site inspection or combination of these).



## ANNEX F

### PLANNING PERMISSION AND MAJOR ACCIDENT HAZARDS

#### Introduction

- F1. While the planning hazardous substances consent regime covers the presence of hazardous substances and modifications to the presence of such substances, there are also requirements for planning permission for development in relation to establishments and modifications to establishments. The main role of the procedures for applications for planning permission with regard to hazardous substances is to consider the risks of siting other development in the vicinity of an establishment (but see paragraphs F46 to F48 below).
- F2. This Annex considers:
- the particular and additional requirements on consultation and public participation in these cases (note especially the cross cutting requirements of regulation 23);
  - the roles of certain consultees;
  - some related statutory arrangements in relation to pipelines and explosives and administrative arrangement in relation to the potential for radiation emergencies at nuclear sites;
  - deciding applications;
  - appeals and local reviews; and
  - dealing with related applications for hazardous substances consent and planning permission.

#### Publicity and Consultation Requirements for Planning Applications under the DMR

- F3. The DMR have some specific requirements in relation to applications for development of, or in the vicinity of, establishments. These requirements must be considered alongside those of regulation 23, as set out below.

#### *Publicity*

- F4. Regulations 20(1) and (2)(e) of the DMR contains requirements to advertise applications for planning permission for development described in paragraphs 3, 3A or 4 of Schedule 5 to the DMR. Regulation 20A of the DMR contains specific adjustments to the public notice for such applications in order to comply with the Directive.
- F5. Where a notice under regulations 20(1) and (2)(e) of the DMR is required, there is no need to publish a notice under regulations 20(1) and (2)(a) to (d). Where notice is required under Regulation 20(1) and (2)(e) of the DMR, the exemption in regulation 20(4), where notice is required under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, does not apply.

## Consultation

F6. Regulation 25 and paragraphs 3, 3A and 4 of Schedule 5 to the DMR require the planning authority to consult:

Para 3 HSE where the development is within an area which has been notified to the planning authority by HSE for the purpose of paragraph 3 of Schedule 5 because of the presence within the vicinity of toxic, highly reactive, explosive or inflammable substances (otherwise than on a relevant nuclear site) and which involves the provision of–

- (a) residential accommodation;
- (b) more than 250 square metres of retail floor space;
- (c) more than 500 square metres of office floor space; or
- (d) more than 750 square metres of floor space to be used for an industrial process,

or which is otherwise likely to result in a material increase in the number of persons working within or visiting the notified area.

Para 3A ONR for development described in ‘Para 3’ where the development is within an area which has been notified to the planning authority by ONR because of the presence within the vicinity of toxic, highly reactive, explosive or inflammable substances on a relevant nuclear site.

Para 4 Scottish Natural Heritage, HSE and SEPA are to be consulted where development–

- (a) involves the siting of new establishments;
- (b) consists of modifications to existing establishments which could have significant repercussions on major accident hazards<sup>1</sup>; or
- (c) includes transport routes, locations of public use and residential areas in the vicinity of an establishment, where the siting or development may be the source of or increase the risk or consequences of a major accident,

and, in relation to development falling with Para 4(c), any person who is, according to the hazardous substances consent register, the person who is in control of the land on which the establishment is located.

F7. Terms used in ‘Para 4’ of Schedule 5 to the DMR, set out above, which are also in the Directive have the same meaning in ‘Para 4’ as they have in the Directive, e.g. ‘establishment’ and ‘major accident’.

F8. As with hazardous substances consent (see paragraph D1), the Scottish

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<sup>1</sup> The wording in the DMR refers specifically to modifications covered by Article 11 of the Directive.

Government is keen to encourage pre-application discussions on applications for planning permission. With regard to considerations around the major accident hazard impacts associated with development of or near establishments, the focus is on the views of HSE or ONR, as appropriate, and SEPA (see paragraphs F15 to F16 and F24 to F30). See Annex M for links and contact details as regards pre-application advice and discussions.

### **Public Participation - Regulation 23 (Other planning approvals for projects)**

- F9. Regulation 23 contains generic requirements on public participation in order to implement the Directive. It applies to various mechanisms for granting planning permission (including planning permission in principle), in particular applications for planning permission and related local reviews and appeals processed under, respectively, the DMR, the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 (The Local Review Regulations) and the Town and Country Planning (Appeals) (Scotland) Regulations 2013 (the Planning Appeals Regulations).
- F10. Regulation 23 applies where development would fall within the descriptions in paragraphs 3, 3A or 4 of Schedule 5 to the DMR, that is cases which require consultation with HSE or ONR, as appropriate, and/or SEPA and Scottish Natural Heritage because of major accident hazard potential. Its requirements relate to various public notices inviting comments on proposals, consultation with certain parties, making information publicly available, taking views into account in decision making and making information on the decision itself publicly available.
- F11. Where the requirements of decision making procedures have equivalent requirements to regulation 23 which have been complied with, there is no need to carry out the requirements again<sup>1</sup>. For example, the DMR have a number of specific requirements which would meet some of the requirements of regulation 23, but not all; so to the extent steps taken under the DMR meet regulation 23 requirements they need not be repeated.
- F12. As well as applications for planning permission and related appeals and local reviews mentioned above, regulation 23 also applies where planning permission may be granted through other procedures in relation to:
- Urgent Crown development (section 242A of the Planning Act);
  - Purchase notices (section 92(2)(a) and (3) of the Planning Act);
  - Government authorisation of projects (section 57(1) to (2B) of the Planning Act; and
  - Listed building purchase notices (Section 31(5) of the Listed Buildings Act).
- F13. It also applies to the making of:

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<sup>1</sup> Note that the cost of newspaper notices for applications for planning permission is rechargeable to applicants only where required under the DMR, not regulation 23.

- Special development orders (section 30(2) of the Planning Act);
- Simplified planning zone schemes (section 50 of the Planning Act);
- Enterprise zones designation orders (section 179 etc. under the Local Government , Planning and Land Act 1980); and
- Discontinuance orders (section 71 of and paragraph 1 of Schedule 8 to the Planning Act).

F14. Again, with regard to these other mechanisms, regulation 23 applies where planning permission is being granted in relation to development which falls within the descriptions in paragraphs 3, 3A or 4 in Schedule 5 to the DMR.

### **The Role of HSE**

F15. HSE provide planning authorities with advice on the nature and severity of the risks presented by major hazards to people in the surrounding area. In this way, any risks can be given due weight and balanced against other relevant planning considerations by planning authorities in making planning decisions.

F16. HSE provides a pre-application advice service for developers, through its agency, the Health and Safety Laboratory, and charges for some elements of the advice that is provided. Further information about HSE's land-use planning pre-application advice, the different options and associated pricing structure, and how to access this service, can be found on its web site (See Annex M).

### ***Consultation Distances (“the area which has been notified to the planning authority”)***

F17. HSE will establish a consultation distance around sites that represent a potential major accident hazard – the “area which has been notified” referred to in paragraphs 3 and 3A of Schedule 5 to the DMR (see paragraph F6). In practice, this will cover all establishments subject to the COMAH Regulations; sites subject to the 2015 Regulations; and pipelines notified to HSE under the Pipelines Safety Regulations 1996. Distances must also be notified in relation to sites licensed under the Explosives Regulations 2014 (ER 2014) and the Dangerous Substances in Harbour Areas Regulations 1987, when licenses are granted or varied in a way that affects the required separation distance which needs to be maintained (See paragraphs F32 to F34). The consultation distance is the limit of the area where HSE considers there to be a significant off-site risk to people.

F18. HSE will keep the consultation distances under review and will inform the planning authority if changes are appropriate. Similarly, the planning authority should liaise with HSE if it becomes aware of changed circumstances that might affect the consultation zone.

F19. The existence and calculation of consultation distances relies on planning authorities complying with regulations 18 and 63 as regards sending to HSE copies, respectively, of decision notices and notifications of exemptions for established substances.

F20. With the introduction of an exemption for established substances (see paragraphs C19 to C23 of Annex C), there may be a period when no consultation distance is in place for establishments using this exemption. However, as well as the specific requirement to consult HSE on proposals within consultation distances under paragraph 3 of Schedule 5 to the DMR, there is also the additional requirement to consult them, and other bodies, under paragraph 4 of that Schedule. Regulation 63 requires site operators using this exemption to inform the planning authority.

### ***HSE Advice***

F21. For each type of development HSE's advice to planning authorities will take account of the maximum quantity of a hazardous substance permitted by a hazardous substances consent and any conditions attached to it. Site operators should consider this when applying for hazardous substances consent and planning authorities when deciding whether to grant consent.

F22. With regard to any development likely to result in a material increase in the number of persons working within or visiting the notified area, particular regard should be had to developments involving the most vulnerable sections of the community, such as the very young, the sick or the elderly; hotels and other developments where people may be unfamiliar with their surroundings; and leisure and recreational developments which may result in a large number of people congregating in one place.

F23. Further information on HSE's policy on advising on development proposals in the vicinity of establishments and on the operation of on-line mechanisms for consulting HSE can be found on its website (See Annex M).

### **The Role of ONR and Nuclear Installations**

F24. There are two sets of arrangements in relation to consulting ONR on development near nuclear sites: firstly, statutory provision in relation to major accident hazards arising from the presence of hazardous substances at relevant nuclear sites; secondly, administrative arrangement in relation to certain radiation emergencies from nuclear sites more generally.

F25. ONR has a similar role to HSE in relation to potential major accident hazards arising from hazardous substances at relevant nuclear sites. Like HSE they will notify consultation distances around such sites, must be consulted in accordance with paragraph 3A of Schedule 5 to the DMR and need to be sent relevant decision notices and notifications of exemption for established substances under regulations 18 and 63 respectively.

F26. In practice, especially given the exemptions in relation to military establishments and nuclear sites in Schedule 2 to the 2015 Regulations, not every relevant nuclear site will have a consultation distance requiring consultation under paragraph 3A of the DMR, or such a consultation

distance may not extend beyond the boundary of the relevant nuclear site.

F27. ONR have also put in place administrative arrangements which continue to apply for development management advice from ONR on those nuclear sites (i.e. not just relevant nuclear sites) where a radiation emergency is reasonably foreseeable under the Radiation (Emergency Preparedness and Public Information) Regulations 2001 (SI 2001/ 2975). ONR provides all planning authorities with details of 'nuclear safeguarding' (consultation) zones, and related consultation criteria for the nuclear installation within their planning area. In these cases, ONR's planning advice will take into account the nature of development (commercial, industrial or residential), the size in terms of the population involved, and proximity to the nuclear installation. The above constraints are intended to ensure that residential, industrial and commercial developments are so controlled in an attempt to preserve and maintain the general characteristics of the site similar to those that existed at the time of licensing throughout the entire life cycle of the nuclear installation.

F28. A relevant nuclear site could have either a consultation distance in relation to hazardous substances consented on site or a consultation zone for radiation emergencies, or both or neither.

F29. Further information on ONR's role in relation to land use planning can be found on its website (see Annex M).

## **SEPA and SNH**

F30. SEPA is the main source of advice on risks to the environment, however SNH may also have views on the implications of development which may contribute to major accident hazards and their effects on the environment. Neither of these organisations currently uses a formal system of consultation distances to trigger consultation regarding development of or near establishments.

## **Consultation - Pipelines**

F31. Where it is proposed to construct a pipeline that will carry a dangerous fluid as defined in schedule 2 of the Pipelines Safety Regulations 1996 (SI 1996/ 825), the planning authority should consult HSE. Where dangerous fluids will be present in a pipeline, HSE will again establish a consultation distance and notify it to the planning authority.

## **Consultation - Licensed Explosives Facilities**

F32. Explosives present at sites controlled in certain circumstances<sup>1</sup> by licences issued by HSE or ONR in accordance with ER2014, or at ports controlled by licences issued by HSE under the Dangerous Substances in Harbour Areas Regulations 1987, are not subject to hazardous substances consent

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<sup>1</sup> See paragraph 10 of Schedule 2 (Exemptions) to the 2015 Regulations

requirements. This is because HSE and ONR issued licenses are based on suitable separation distances, for the types and quantities of explosives present, being in place prior to the granting of the licence. The existence of a licence does not of itself prevent development within the separation distances, however where such development does take place the licence for the site will be reviewed and the type and/ or quantity of explosives may be amended to ensure that appropriate separation is maintained. This review may impact on the ongoing viability of operations on the explosives site. Licensees are usually alert to any development which occurs or is proposed in the vicinity of their site and which may impact on their operations.

- F33. Applications for development within the separation distances notified to planning authorities in relation to these licensed explosives sites need to be the subject of consultation with HSE or ONR as appropriate on the same basis as the requirements in paragraphs 3, 3A and 4 of Schedule 5 of the DMR.
- F34. Licensees who are licensed under the Explosive Regulations 2014 are required to notify the planning authority of the relevant consultation distances around the explosives site within 28 days of licence being granted or varied in a way which affects the separation distances that need to be maintained. Similar notification requirements are required where sites are licensed under the Dangerous Substances in Harbour Areas Regulations 1987. The plans specifying these distances will have three lines; Purple, Yellow and Green. The purple line defines the extent of the consultation distance; Band 3 lies between the purple and yellow lines; Band 2 between the yellow and green lines; Band 1 between the green line and the boundary of the explosive building or berth. Planning authorities should use the HSE's planning advice web app to obtain initial advice – see Annex M for link.
- F35. Explosives present at sites licensed by local authorities under the ER 2014 are subject to the hazardous substances consent requirements. It is unlikely that the amount of explosives present at these sites will be at or above the controlled quantity for explosive substances, and the presence of these substances on their own should not normally require a hazardous substances consent. However, if they are present with other hazardous substances it is possible there will be a need for a hazardous substances consent.

### **Determining the Planning Application**

- F36. In view of their acknowledged expertise in assessing the risks presented by the use of hazardous substances, any advice from HSE or ONR and SEPA that planning permission should be refused for development at or near to a hazardous installation or pipeline, or conditions attached to a grant of consent, should not be overridden without the most careful consideration.

### ***Notification to Scottish Ministers***

- F37. Where a planning authority is minded to grant planning permission to a proposal against the advice of HSE it is required by the terms of the Town and

Country Planning (Notification of Applications) (Scotland) Direction 2009<sup>1</sup> (included in Circular 3/2009), to notify the planning application to Scottish Ministers. Once notified, Scottish Ministers will seek the views of HSE on whether or not the application should be called in. It will then be for Scottish Ministers to decide whether the planning application should be called in for their determination or cleared back to the planning authority for them to deal with. The terms of the Notification Direction also apply where a planning authority wishes to grant planning permission as a result of a local review.

- F38. At the time of publication of this circular the notification direction does not apply to situations where the planning authority intends to grant planning permission contrary to advice from ONR or SEPA regarding development of or near hazardous installations. Planning authorities should inform these bodies prior to a decision being issued of their intention to grant permission contrary to their advice.
- F39. Scottish Ministers have a general power to intervene in the determination of a planning application and would do so only where it appears there may be some matter of genuine national interest at stake, such as a safety issue of exceptional concern. In practice, Ministers will exercise this power very sparingly, recognising and respecting the important role of local authorities in making decisions on the future development of their areas.
- F40. HSE and ONR will normally consider their roles to be discharged when satisfied that the planning authority is acting in full understanding of the advice received and the consequences that could follow. They will consider recommending call-in action only in cases of exceptional concern or where important policy or safety issues are at stake.

### ***Decision notice***

- F41. Regulation 28 of the DMR requires planning authorities to give notice of their decision on an application for planning permission to those who made representations on that application. This is of particular importance as regards giving notice to HSE, ONR and/or SEPA where they have been consulted on development involving or in the vicinity of establishments.

### **Planning Permission Appeals and Local Reviews**

- F42. Unlike appeals in relation to hazardous substances consent, local reviews and appeals in relation to planning permission do not have a right for the applicant or planning authority to require to appear before and be heard by a person appointed by the Scottish Ministers. The nature of the further processing of such a local review or appeal (i.e. written submissions, hearings, site inspection or, in the case of an appeal, inquiry sessions, or some combination of these) will be a matter for the body or person conducting the review or appeal.

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<sup>1</sup> This direction is being reviewed and consideration given to adding a notification requirement as regards ONR and SEPA advice on developments of or near establishments.



### ***Local Review Bodies***

- F43. Where an applicant seeks a local review of the planning officer's delegated decision on a planning application for a local development, the case will be dealt with under the Local Review Regulations (see also paragraphs F9 to F14 on regulation 23). Where HSE, ONR, SEPA or SNH have made representations on an application, and have not withdrawn these, they will be an "interested party" in the case and the local review body will give them notice of any local review case.
- F44. Where a local review body wishes to grant planning permission contrary to the views of HSE then the Town and Country Planning (Notification of Applications) (Scotland) Direction 2009 will apply. Cases should be notified as appropriate to the Scottish Minister who will decide whether to call-in the case or clear it back to the planning authority.

### ***Appeals to Scottish Ministers***

- F45. Where applications for major or national development are involved, or a local development where the application is not delegated to an officer for a decision, the local review procedures do not apply, and the applicant can appeal to the Scottish Ministers against the decision of the planning authority. Such an appeal will be dealt with under the Planning Appeals Regulations (see also paragraphs F9 to F14 on regulation 23). All the documents which were before the planning authority and which it took into account in reaching a decision, including relevant responses from HSE, ONR, SEPA or SNH, must be included in the planning authority's response to notice of the appeal. Where any of these bodies have made representations and have not withdrawn these, then they will be an interested party to the appeal and notified of it by the planning authority.

### **Planning Permission for Hazardous Development**

- F46. The requirement for hazardous substances consent does not override the need for planning permission to be obtained where development of land is also involved. This may arise, for instance, where it is proposed to erect buildings for the storage or processing of hazardous substances. Where both planning permission and hazardous substances consent are required, two separate applications will be necessary and the respective statutory requirements must be followed. It may not be possible, or practicable, to act upon one authorisation without having obtained the other. Developers and planning authorities will, so far as is possible, wish to ensure that related applications for hazardous substances consent and for planning permission are dealt with together. This will help ensure speedier resolution of the applications and will avoid unnecessary duplication in providing information.
- F47. This does not necessarily mean that similar decisions need be given on both applications, as there may be considerations which are material to one application but not to the other. For example, an authority may decide, having considered the potential risks to the local community arising from the proposed

presence of a hazardous substance, that there is no good reason for withholding consent. But in their role as planning authority they may consider that planning permission should be refused for associated development because of a wider planning consideration e.g., the adverse effect of a proposed building on amenity, or inadequate access arrangements. In such circumstances, it would be perfectly proper for contrasting decisions to be made on the different applications.

F48. Planning authorities will however wish to ensure that any such related decisions are not mutually inconsistent, such as could arise from the imposition of conditions containing conflicting requirements. Furthermore, even where planning permission conditions do not actually conflict with hazardous substances consent conditions, differences in the detailed requirements may cause confusion. So far as possible, it will generally be desirable and appropriate for detailed control over the manner in which a hazardous substance is to be kept or used to be regulated by hazardous substances consent conditions.

**Key Points on applications for planning permission:**

- Despite requirements for hazardous substances consent, planning permission will still be required for development of or at an establishment.
- Particular procedures apply under the DMR and regulation 23 to applications for planning permission in these cases and for applications for development in the vicinity of establishments.
- HSE, ONR and SEPA are reliant on planning authorities passing them decisions on applications for planning permission, as well as hazardous substances consents and notification of established substances (regulations 18 and 63), to fulfil their duties on major accident hazards, including the calculation of consultation distances.
- Consultation under paragraph 4 of Schedule 5 to the DMR, which is not reliant on a consultation distance being in place, will be potentially of more significance with the introduction of an exemption for the established presence of hazardous substances.
- Given HSE, SEPA and ONR's expertise on off-site risks from hazardous substances, their advice should not be overridden without the most careful consideration.
- Requirements are in place in certain circumstances to notify applications for planning permission with major accident hazard implications to Scottish Ministers

## ANNEX G

### ENFORCEMENT

#### Introduction

- G1. Sections 21 to 25 of the Principal Act and Part 7 of the 2015 Regulations deal with enforcement in relation to hazardous substances consent.
- G2. The circumstances in which there is a contravention of hazardous substances control are specified in section 21(2), namely:
- the absence of a necessary hazardous substances consent;
  - substances present above the maximum quantity permitted by hazardous substances consent; or
  - failure to comply with a condition attached to hazardous substances consent.

#### Offences

- G3. Section 21(1) provides that if there is a contravention of hazardous substances control the appropriate person is guilty of an offence. The rest of the section: specifies when there is a contravention of control; defines “appropriate person”; specifies penalties; and provides for appropriate defences.
- G4. Where a hazardous substance is present at or above the controlled quantity without consent, or where the quantity of the substance present exceeds the maximum permitted by a consent, the occupier of the land or any person who knowingly causes, or who allows, the substance to be present is guilty of an offence. Where there is a failure to comply with a condition attached to a consent, the occupier of the land is guilty of an offence. It should be noted that where the person committing an offence is a body corporate, section 273 of the Planning Act (as applied by section 36 of the Principal Act) provides that a director, manager, secretary or other similar officer of that body whose consent, connivance or negligence contributed to the commission of the offence is, as well as the body corporate, guilty of the offence and may also be prosecuted.
- G5. The maximum penalty on summary conviction for an offence under section 21 of the Principal Act is £20,000, and the penalty on conviction on indictment is an unlimited fine. Subsections (6), (7) and (8) of section 21 provide statutory defences in the event of any proceedings under that section.
- G6. It is also an offence not to comply with a hazardous substances contravention notice (see paragraph G10)

## Methods of Enforcement

- G7. There are a number of ways of dealing with a contravention of hazardous substances control in the Principal Act. Under section 21, a contravention of hazardous substances control is an offence. Section 22 provides for the issue of a hazardous substances contravention notice specifying the steps to be taken to rectify a contravention of control. Furthermore, section 25 enables the planning authority to apply for an interdict in respect of an actual or expected contravention of control.
- G8. Where a planning authority has identified a breach of control it should, before issuing a hazardous substances contravention notice, consider first of all whether it is expedient to do so, having regard to any material consideration. For more serious breaches of control, the planning authority may consider seeking prosecution or interdict. Or there may be instances - for example, where a breach of control has been unintentional - where the planning authority may be able to secure early remedial action without recourse to statutory action (if need be, by drawing the offender's attention to the powers available to them). Since the controlled quantities of hazardous substances have been set at amounts at or above which it is considered that major hazards could arise to persons in the surrounding area, or to the surrounding environment itself, authorities should be mindful of the serious risks that may arise if prompt and effective action is not taken.

## Hazardous Substances Contravention Notices - General

- G9. Section 22 of the Principal Act, as amended, gives planning authorities the power to issue a hazardous substances contravention notice where there has been a contravention of control, specifying the alleged contravention and requiring such steps as may be specified in the notice to be taken to remedy wholly or partly the contravention (except where it appears that the contravention could be avoided only by the taking of action which amounts to a breach of a statutory duty - see section 22(3)).
- G10. An offence is committed if a contravention notice is not complied with (regulation 50). The contravention notice cannot take effect until at least 28 days after the date on which the notice is served. There may be delays, though, before a notice comes into effect because the procedure includes a right of appeal to Scottish Ministers against the notice on specified grounds. As the unauthorised presence of a hazardous substance could have serious and immediate consequences, the offence provided by section 21 of the Principal Act enables the planning authority to refer a case to the Procurator Fiscal to determine whether to initiate a criminal prosecution.
- G11. The provisions of section 22 of the Principal Act are similar to those in sections 127 and 128 of the Planning Act on planning enforcement notices. The provisions applying to appeals against hazardous substances contravention notices and determination of such appeals are also similar to

those for planning enforcement notice appeals<sup>1</sup>.

- G12. The 2015 Regulations (regulations 47 to 52) apply the provisions of sections 130 to 138 (with the exception of section 136A) and (regulation 53) 147, of the Planning Act with appropriate modifications.

### **Enforcement - Liaison with HSE, ONR and SEPA**

- G13. Enforcement of hazardous substances consent controls is the responsibility of planning authorities. They should liaise with HSE or ONR as appropriate where:

- hazardous substances appear to be present in contravention of the controls in circumstances that give rise to health and safety concerns, where HSE or ONR may wish to consider whether enforcement action is also appropriate under the Health and Safety at Work etc. Act 1974;
- it is necessary to establish that the requirements of a hazardous substances contravention notice would not conflict with the requirements of health and safety legislation; or
- the action to be taken may be influenced by HSE or ONR's advice on the residual risk (see paragraph B2).

- G14. The planning authority should also liaise with SEPA on hazardous substances enforcement issues for their environmental interests, including any related breaches of controls administered by SEPA.

- G15. In any event, where a hazardous substances contravention notice is issued, authorities are requested to send a copy of the notice to the HSE Area Office, SEPA Area Office or ONR for information – See Annex M.

### **Issue and Service of Hazardous Substances Contravention Notice**

- G16. By virtue of section 22 of the Principal Act and regulation 42, a hazardous substances contravention notice must:

- identify the land to which it relates, whether by reference to a plan or otherwise;
- specify the alleged contravention of hazardous substances control;
- specify the steps required by the authority to be taken to remedy, wholly or partly, the contravention of control (which may include the removal of a substance from the land);
- specify the date on which it is to take effect, which must be not less than 28 days from the date of service of copies of the notice; and specify a further period within which each required remedial step is to be taken.

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<sup>1</sup> Previous rights to appeal on the grounds that hazardous substances consent should be granted for any breach of control have, as is the case with planning permission enforcement, been removed.

- G17. Service of the notice must be accompanied by a statement setting out the planning authority's reasons for issuing the notice, and giving information about the right of appeal to Scottish Ministers.
- G18. Section 22 and regulation 42 provide that a copy of a hazardous substances contravention notice must be served on the following persons:
- the owner, lessee and occupier of the land to which it relates;
  - all persons having an interest in the land who, in the planning authority's opinion, are materially affected by the notice.
- G19. Under section 22(8), the planning authority may withdraw a notice at any time before or after it takes effect. Where it does so, it should immediately notify the withdrawal to every person who was served with a copy of the notice, or who would be so served if the notice were re-issued.

### **Appeals Against Hazardous Substances Contravention Notices**

- G20. A person on whom a hazardous substances contravention notice is served or any other person having an interest in the land to which the notice relates may appeal to Scottish Ministers against the notice. Regulations 43 to 47 deal with appeals. See Annex M for link to downloadable appeal form.
- G21. The appeal must be made before the notice takes effect, and may be made on any of the grounds set out at regulation 43(1)(a).
- G22. Regulation 43 covers the making of an appeal, the content of the notice of appeal and the documents required to accompany that notice, the limitations on introducing new matters and the application of the appeal procedures in Part 5 of the 2015 Regulations to such appeals.
- G23. Regulation 44 sets out the requirements on the appellant to inform the planning authority, the requirements governing the planning authority's response and the ability of the appellant to then comment on the planning authority's response. It also contains requirements on the planning authority to make information on the appeal available for public inspection.
- G24. The planning authority must, under regulation 45, give notice of the appeal to the other parties on whom the contravention notice was served.
- G25. Regulation 46 describes what decisions Scottish Ministers may make on the appeal, including correcting or varying the contravention notice, dismissing the appeal or allowing the appeal and quashing the notice.

### **Key Points: Enforcement of Hazardous Substances Control**

- It is an offence not to have the necessary hazardous substances consent or to breach the maximum quantities specified in or conditions attached to such consent.
- It is also an offence not to comply with a hazardous substances contravention notice.
- Planning authorities can choose to pursue a number of enforcement measures depending on circumstances: contravention notices, interdicts or prosecution.
- The recipient of a contravention notice has a right of appeal to the Scottish Ministers.

## ANNEX H

### REVOCAION OR MODIFICATION OF HAZARDOUS SUBSTANCES CONSENT

- H1. Section 12 of the Principal Act gives planning authorities the power to make an order revoking or modifying a hazardous substances consent. Scottish Ministers must confirm such an order before it can take effect. Subsection (1) gives a general power to authorities to revoke or modify a consent where they, having regard to any material consideration, consider it expedient to do so; subsection (2) sets out other circumstances in which a consent may be revoked. An important distinction is that with orders made under subsection (1) (but not orders made under subsection (2)) a person suffering damage as a result may be entitled to compensation in the circumstances described in section 14 of the Principal Act.
- H2. As with planning permission, hazardous substances consent provides an entitlement that runs with the land. It may be undesirable for a hazardous substances consent which has fallen into disuse to continue to have effect; as it could restrict unnecessarily the uses to which neighbouring land can be put. Moreover, a hazardous substances consent for the presence of a substance in connection with a particular use of land may not necessarily be apt in respect of other uses. When there is a material change in the use of the land it may therefore be undesirable for a hazardous substances consent to continue to have effect.
- H3. The general effect of section 12(2) of the Principal Act is that where a consent has not been relied on for 5 years, or the use of the land has changed materially since the consent was granted, the consent may be revoked without compensation being payable. The requirement in subsection (4) that an order must specify the grounds on which it is made will enable a potential claimant to know whether the revocation or modification is one in relation to which compensation may be payable.
- H4. Planning authorities are encouraged to review hazardous substances consents from time to time with a view to revoking redundant ones. This can help to avoid the situation where, for example, an installation is no longer on a site, but the hazardous substances consent is in place and therefore so is the consultation distance. The consultation distance triggers consultation with HSE, whose advice on development proposals in the vicinity will be based on the fact such a hazardous substances consent is in place.
- H5. Section 13 of the Principal Act sets out the procedures for the confirmation of revocation and modification orders. These are modelled on the procedures for confirming orders that revoke or modify planning permission where objections have been made to the order. Subsection (2) enables Scottish Ministers to confirm an order with or without changes. Subsection (3) requires the planning authority to serve notice of an order on any person who is an owner, occupier or lessee of the whole or any part of the land to which the order relates and any person who in their opinion will be affected by the order. Those served with the notice must be given at least 28 days in which they can require Scottish



Ministers to afford them and the planning authority an opportunity of being heard before an appointed person. In effect, this provision will ensure that an opposed order will normally be considered at a public hearing or inquiry.

**Key Points: Revocation and Modification Orders**

- Where hazardous substances consents are still in place but not being used they can still affect advice and planning decisions.
- Planning authorities should consider revocation of such consents.
- Revocation and modification orders have compensation provisions attached.
- Such compensation is not payable where the order relates to consents for substances which have not been present for at least 5 years or where there is a material change in the use of the land for which consent was previously granted.

## ANNEX I

### HEALTH AND SAFETY REQUIREMENTS AND HAZARDOUS SUBSTANCES CONTROL DECISIONS

11. By virtue of section 28 of the Principal Act, no hazardous substances consent or contravention notice may require or allow anything to be done in contravention of any of the 'relevant provisions' or any 'prohibition notice' or 'improvement notice' served under or by virtue of any of those provisions (These terms are defined in Section 28 – see paragraphs 13 and 14). To the extent that such a consent or contravention notice purports to require or allow any such thing to be done, it will be void; and it will need to be revoked, or if part of the consent or notice is rendered void then it will need to be modified to render it wholly operative.
12. Where a planning authority has reason to believe (perhaps as a result of representations from a site operator) that a consent or contravention notice, or part of it, is rendered void, it must consult the HSE as soon as is reasonably practicable. If HSE advises that the consent or notice is rendered wholly void, the planning authority must revoke it; if the advice is that part of the consent or notice is rendered void, the planning authority must so modify it as to render it wholly operative. Since revocations or modifications under section 28 are made for overriding safety reasons they do not attract any entitlement to compensation.
13. The term 'improvement notice' means a notice served under section 21 of the HSWA or given under paragraph 3 of Schedule 8 to the Energy Act 2013 (the 2013 Act). The term 'prohibition notice' means a notice served under section 22 of the HSWA or given under paragraph 4 of Schedule 8 to the 2013 Act.
14. The term 'relevant provisions' means means—
  - (a) the relevant statutory provisions within the meaning of Part 1 of the HSWA; and
  - (b) the relevant statutory provisions within the meaning of Part of the 2013 Act other than—
    - (i) the provisions of the Nuclear Safeguards Act 2000; and
    - (ii) any provision of nuclear regulations identified in accordance with section 74(9) of the 2013 Act as being made for the nuclear safeguards purposes.

## ANNEX J

### CROWN LAND

- J1. Crown immunity from the requirements of planning hazardous substances legislation was removed in 2006 by the changes made to the Principal Act by the Planning and Compulsory Purchase Act 2004 (the 2004 Act) - see in particular sections 90-94 and Schedule 5 to the 2004 Act.
- J2. In line with the Directive, the 2015 Regulations contain an exemption (regulation 4, and paragraph 1 of Schedule 2) so that hazardous substances consent is not required for the presence of a hazardous substance in, on, over or under land at military establishments, installations or storage facilities.
- J3. Section 30A of the Principal Act (inserted by section 90 of the 2004 Act) specifies that that Act binds the Crown, with certain exceptions: sections 6(3), 21, 25, 34 and 35(2) of the Principal Act, which relate to offences, interdicts and rights of entry. Subject to the exemption for military establishments, the Crown, like other site operators, is obliged to obtain and comply with hazardous substances consent.
- J4. Sections 30B and 30C of the Principal Act (inserted by section 94 of the 2004 Act) make provision in relation to enforcement in relation to the Crown. While the offence provisions do not apply to the Crown, a planning authority could seek a declaration from the Court of Session as to the unlawfulness of any act or omission committed by the Crown. Also, the agreement of the appropriate authority<sup>1</sup> is required before steps for enforcement are taken, though that does not include the serving of a hazardous substances contravention notice. To the extent that an interest in land is a Crown interest, anything which requires or is permitted to be done by or in relation to the owner of the interest in land must be done by or in relation to the appropriate authority.
- J5. Section 35A of the Principal Act (inserted by Schedule 5 to the 2004 Act) relates to entry to Crown land, and again requires the permission of the appropriate authority or other person entitled to give permission.
- J6. Section 15 of the Principal Act (revocation of hazardous substances consent on change in control of the land) has a new subsection (3) (inserted by Schedule 5 to the 2004 Act) which specifies this section does not apply where the change in control of the land is from one emanation of the Crown to another.
- J7. There was also a transitional arrangement allowing a deemed consent to be claimed where there was an established presence of hazardous substances which as a result of the removal of Crown immunity would require consent<sup>2</sup>. These deemed consents were subject to the standard conditions in

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<sup>1</sup> See Section 31 of the Principal Act.

<sup>2</sup> The Planning and Compulsory Purchase Act 2004 (Transitional Provisions) (Scotland) Order 2006 (SSI 2006/ 269).

Schedule 3 to the 1993 Regulations. Regulation 62 preserves these standard conditions on deemed consents despite revocation of the 1993 Regulations.

- J8. The 2004 Act revoked subsections (1) and (2) of section 31 of the Principal Act (exercise of powers in relation to Crown land) and it amended subsections (3) and (5). Section 32 of the Principal Act (Application for hazardous substances consent in anticipation of disposal of Crown land) was also revoked by the 2004 Act.

## **ANNEX K**

### **TRANSITIONAL AND RELATED PROVISIONS**

#### **Presence of Established Substances**

K1. This relates to substances present at sites legally prior to 1 June 2015 without the need for hazardous substances consent, but which, purely as a result of the changes in Schedule 1 to the 2015 regulations, would now require such consent. See paragraph C19 to C23 of Annex C on Exemptions for more information.

#### **Interpretation of existing consents**

K2. Regulation 61 applies in relation to hazardous substances consents granted prior to 1 June 2015 for hazardous substances or categories of substances which are described or categorised differently in the 2015 Regulations than they were in the 1993 Regulations. Any reference to such a substance or category of substance in such a pre-1 June 2015 consent is to be interpreted in accordance with the 1993 Regulations.

#### **Conditions attached to existing deemed consents**

K3. Previous changes to the hazardous substances consent regime allowed deemed consent to be claimed, and standard conditions applied to such consent. These standard conditions continue to apply by virtue of regulation 62.

#### **Applications etc. made prior to 1 June 2015, but not determined by that date**

K4. Regulations 60 and 65 determine the extent to which the new requirements in the 2015 Regulations apply to applications for hazardous substances consent and appeals made before 1 June 2015 but not determined by that date. Regulation 66 has similar provision with regard to applications for continuation of consent called in by Scottish Ministers before 1 June 2015 but not determined by that date.

#### **Period for making an appeal against the decision, or failure to take a decision, on a hazardous substances consent application**

K5. The period for making an appeal was reduced from 6 months to 3 months by the 2015 Regulations. Regulation 64 saves the 6 month period for applications where the date of the notice of the decision on the application or the date by which a decision should have been made was before 1 June 2015.

### **Applications for planning permission (within scope of the Directive) not determined prior to 1 June 2015.**

- K6. Applications to which paragraphs 3, 3A and 4 of Schedule 5 to the DMR, as amended by the 2015 Regulations (Schedule 8), apply are within the scope of the provisions in the Directive which impose duties with regard to publicity and consultation.
- K7. The DMR as amended and regulation 23 of the 2015 Regulations implement those provisions of the Directive with regard to applications for planning permission, but regulation 23 does not apply if the requirements are required to be carried out under other legislation.
- K8. Planning authorities should consider the extent to which the procedures carried out under the previous regime have already met the requirements of the new regime.

### **Appeals and called-in planning applications not determined prior to 1 June 2015**

- K9. See paragraphs K6 to K8.

### **Development plans and supplementary guidance**

- K10. Paragraph 2 of Schedule 8 to the 2015 Regulations amends the requirements on development plan preparation, reflecting the slightly revised wording of the Directive. The amendments relate to the taking account of the objectives of the Directive on human health and the environment and of the more specific issues of maintaining appropriate safety distances between major hazards sites and other development or sensitive environments (or other relevant measures in relation to protecting the latter) and to taking additional technical measures in relation to establishments. These do not represent a significant change from the previous requirements for local and strategic development plans.
- K11. These requirements now apply to the preparation of supplementary guidance where it is to form part of the development plan.

## ANNEX L

### SECURITY AND CONFIDENTIALITY

#### Security

- L1. Detailed information about hazardous substances, for example where and how they will be present or stored on a site and in what quantities, could be security sensitive and pose a risk to the public if not handled carefully. Planning authorities must ensure arrangements for disclosing such information for all purposes (from the initial notices and wider consultation to enabling public inspection) adequately reflects any potential security concerns.
- L2. There are a number of measures planning authorities can put in place so that all relevant information is made available, while also ensuring that access to security sensitive information is handled appropriately. This approach is reflected throughout the guidance, but there are a number of examples:
- a) Applicants should provide brief summaries of proposals for inclusion in neighbour notification and public notices, as well as for relevant consultations. This information should allow public participation but without publicising information that is security sensitive. References in such notices and consultations should be to the generic categories of the substances involved. Such notices must include reference to where further information is available (namely hazardous substances registers). See paragraphs D11, D19, D25 and E25.
  - b) In compliance with regulation 18, all bodies and persons who made written representations on an application should be notified of the decision/outcome and informed where they are able to access a full copy of the decision notice(which may include security sensitive information) for further inspection<sup>1</sup>. Copies of the decision notice will be available for public inspection on the register.
  - c) Hazardous substance registers should not be made available on-line and sensitive information must not be removed by members of the public taking access to such registers in planning offices. Planning authorities may wish to house this register separately from other planning registers so that access can be monitored.
- L3. HSE intend to provide guidance to planning authorities on what information in relation to hazardous substances could be security sensitive.

#### Confidentiality

- L4. Planning authorities should bear in mind the provisions of section 28 of the Health and Safety at Work etc. Act 1974 which imposes restrictions on the

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<sup>1</sup> Note: Regulation 18 requires the planning authority to send a copy of the decision notices on applications for hazardous substances consent to HSE or ONR, as appropriate, and SEPA. Regulation 38 requires the same of Scottish Ministers as regards appeal decisions.

disclosure of certain information without the consent of the person by whom the information was furnished. HSE has advised that, based on the experience of recent years, there are unlikely to be many occasions when the disclosure of information will give rise to problems. Nevertheless, if an authority is uncertain whether these restrictions applied to particular information at the time when it was provided by HSE, advice should be sought from HSE.



## **ANNEX M**

### **USEFUL CONTACT DETAILS AND WEB LINKS**

#### **Citizen's Advice Scotland**

Contact Citizen's Advice Scotland for advice or to find the contact details of the nearest Citizen's Advice Bureau.

Tel. 0808 800 9060

<http://www.cas.org.uk/>

#### **Directorate for Planning and Environmental Appeals**

4 the Courtyard,  
Business Park,  
Callender Road,  
FALKIRK FK1 1XR

Tel. 01324 696400

E-mail [DPEA@scotland.gsi.gov.uk](mailto:DPEA@scotland.gsi.gov.uk)).

Web page for hazardous substance consent appeal forms: <http://www.scotland.gov.uk/Topics/Built-Environment/planning/Appeals/whatwedo/otherappeals/hazardoussubstances>

Making appeals to Scottish Ministers on-line (Planning permission only): [www.eplanning.scotland.gov.uk](http://www.eplanning.scotland.gov.uk)

#### **Health and Safety Executive**

HSE website (Land Use Planning):  
<http://www.hse.gov.uk/landuseplanning/>

#### ***Hazardous Substances Consent***

For Hazardous Substances Consent related issues the designated address and email is:

Hazardous Substance Consents  
HID CEMHD5  
2.2 Redgrave Court  
Merton Road  
Bootle  
Merseyside L20 7HS

E-mail: [HazSubCon.CEMHD5@HSE.gsi.gov.uk](mailto:HazSubCon.CEMHD5@HSE.gsi.gov.uk)

Downloadable form for Hazardous Substances Consent information:  
<http://www.hse.gov.uk/landuseplanning/> - see further link on this page to application forms for hazardous substances consent

### ***Planning Permission***

HSE's web application for consultations on applications for planning permission (for potential applicants and planning authorities):  
<http://www.hse.gov.uk/landuseplanning/planning-advice-web-app.htm>

For questions about the web application and other land use planning advice from HSE:

E-mail: [lupenquiries@hsl.gsi.gov.uk](mailto:lupenquiries@hsl.gsi.gov.uk)

### ***Control of Major Accident hazards***

<http://www.HSE.gov.uk/comah/>

<http://www.hse.gov.uk/pubns/books/l111.htm> - A Guide to COMAH Regulations (See paragraphs 50-63 of this Guide for advice on hazardous substances present as a result of a loss of control)

### **Office of Nuclear Regulation**

ONR website - land use planning:  
<http://www.onr.org.uk/land-use-planning.htm>

ONR Contact details:

Office for Nuclear Regulation (ONR)  
Land Use Planning (LUP)  
Redgrave Court  
Merton Road  
Bootle  
L20 7HS

Tel. Switchboard + 44 (0)151 951 4000

E-Mail: [ONR.land.use.planning@onr.gsi.gov.uk](mailto:ONR.land.use.planning@onr.gsi.gov.uk)

## **Scottish Courts Service**

Petition Department,  
Court of Session,  
Parliament House,  
Edinburgh  
EH1 1RQ

( Tel: 0131 240 6747)

## **Scottish Environment Protection Agency (SEPA)**

SEPA website - land use planning:

<http://www.SEPA.org.uk/environment/land/planning/>

SEPA website – COMAH:

<http://www.SEPA.org.uk/regulations/control-of-major-accident-hazards-comah/>

SEPA local planning

teams: [http://www.sepa.org.uk/media/159226/planning\\_service\\_contact\\_list.pdf](http://www.sepa.org.uk/media/159226/planning_service_contact_list.pdf)

Contact Details: <http://www.SEPA.org.uk/contact/>



**The Scottish  
Government**  
Riaghaltas na h-Alba

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ISBN: 978-1-78544-841-6 (web only)

Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

Produced for The Scottish Government by APS Group  
Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS60433 (11/15)

Published by the Scottish Government, November 2015

[www.gov.scot](http://www.gov.scot)