EXECUTIVE NOTE

THE PLANNING (CONTROL OF MAJOR-ACCIDENT HAZARDS) (SCOTLAND) REGULATIONS 2009

S.S.I. 2009/378

Introduction

1. The above instrument was made in exercise of the powers conferred by sections 2, 3 and 39(1) of the Planning (Hazardous Substances) (Scotland) Act 1997 (the 1997 Act), sections 8(1)(b) and 16(2)(b) of the Town and Country Planning (Scotland) Act 1997. The instrument is subject to negative resolution procedure.

Background

2. These Regulations amend the Town and County Planning (Hazardous Substances)(Scotland) Regulations 1993 (the 1993 Regulations) to increase the range of dangerous substances for which consent must be obtained for storage or processing; the definition of these substances; and the amounts allowed before consent must be obtained. They also amend the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (the Development Planning Regulations) to extend the requirement for plan making authorities to include public buildings and major transport routes when taking into account the need to maintain appropriate distances between sites storing and processing dangerous substances.

3. These Regulations implement the amendments to Article 12 of European Directive 96/82/EC (the Directive) on the control of major accidents involving dangerous substances made by Council Directive 2003/105/EC (2003 amendment).

4. Article 12 contains the land-use planning aspects of the Directive, the purpose of which is to prevent major accidents which involve dangerous substances and limit their consequences for man and the environment.

5. Article 12 contributes to this by ensuring that there are appropriate land-use policies and procedures in place which take account of the need to maintain appropriate distances between establishments storing and processing dangerous substances and residential/public buildings and areas, including major transport routes and recreational areas.

6. Article 12 was amended following a spate of industrial accidents and, in particular, an accident in Romania which led to a cyanide spill in the Danube. It was also amended in responses to studies on carcinogens and substances dangerous for the environment carried out by the Commission.

7. Under the the 1997 Act and the 1993 Regulations, consent for the storage and processing of hazardous substances must be obtained. The Health and Safety Executive (HSE) are consulted on all such applications for consent. Under section 7 of the 1997 Act, in determining such applications for consent, the planning authority have to take into account planning permissions already granted, the way that land is

already used and any plans for the future development of land as well as the HSE's concerns.

8. The consent regime already in place for hazardous substances under the 1997 Act and 1993 Regulations ensures that account is taken of the need to maintain appropriate distances in accordance with the Directive. Schedule 1 to the 1993 regulations sets out the list of hazardous substances and controlled quantities of these substances to which the consent regime applies. This Schedule is being replaced to transpose the tighter controls on the controlled quantities of these substances required by the changes to the Directive. The 2003 amendments to the Directive required changes to be made by 1 July 2005, however due to issues over suitable transitional arrangements for operators this has been delayed.

Policy Objectives

9. These Regulations amend the planning regulations for Scotland to make them fully compliant with Article 12 of the Directive, as amended by Directive 2003/105/EC.

10. The principal changes made by these regulations are the amendments made to the Development Planning Regulations and the amendment of the list of hazardous substances, and their qualifying quantities (the threshold that triggers the requirement for hazardous substances consent), so that it is compliant with the amended list, as set out in the Directive.

11. There is also provision for transitional arrangements for site operators with existing hazardous substances consent whose inventories include hazardous substances at or beyond the quantities stated in the amended list. Existing hazardous substances consents which cover substances which are renamed or re-categorised by the new regulations remain valid and there is no need to obtain a new consent because of these changes in name or category of substance.

12. The Regulations also allow a period of six months for the making of applications for hazardous substances consent by those site operators who hold substances which will require consent as a result of the amendments.

13. Unless these Regulations are made (along with their equivalents for England, Northern Ireland and Wales), the UK will not be compliant with the Directive and could be subject to fines as a result of infraction proceedings by the European Commission.

14. Due to the specialist and sector-specific nature of these Regulations, the level of public interest is relatively limited. However, within the sectors affected by the changes these Regulations are significant,

Consultation

15. A full public consultation on the new draft regulations was undertaken in August 2005. In total 17 responses were received to the consultation, broken down as follows:

- 8 from local authorities
- 1 from a Structure Plan Joint Committee
- 3 from Industry
- 1 from an environmental agency
- 4 from professional and other organisations

16. The majority of respondents expressed support for the proposed amendments, or raised specific concerns about individual elements of the proposals. A key concern related to the proposal not to provide for transitional arrangements for those businesses already operating within the Directive. We have now reviewed the need for such arrangements and have made provision for transitional arrangements as far as reasonable, given the requirements of the Directive, in the attached draft regulations. As this key concern was now provided for in the new regulations, a decision was made not to consult any further as the original purpose of the regulations (the implementation of the Directive) had not changed.

17. The majority of the Directive is implemented through the, non-planning, Control of Major Accident Hazards Regulations 1999 (COMAH regime) which place requirements for on-site safety measures for sites holding substances specified in the Directive. As a result of the amendments to the Directive 3 Scottish sites were subject to the COMAH regime for the first time. We will be contacting those companies to inform them of the new legislation in relation to hazardous substances consent and also informing planning authorities of the changes. Some existing sites operating within the COMAH regime may also be affected and may have to obtain additional consents for other substances they may hold, which did not previously require hazardous substances consent.

Financial Impacts and RIA

18. A Regulatory Impact Assessment accompanies these Regulations. The Regulations will only affect those businesses which involve the storage, manufacture or distribution of hazardous materials. The main impact will be on those businesses that will be brought into the hazardous substances consent regime as a result of the Regulations and who will need to apply to the hazardous substances authority for express consent.

TRANSPOSITION NOTE: ARTICLE 12 OF DIRECTIVE 96/82/EC AS AMENDED BY COUNCIL DIRECTIVE 2003/105/EC

This transposition note has been prepared by the Scottish Government to demonstrate how Article 12 of Directive 96/82/EC (as amended by Article 1(7)(a) of Directive 2003/105/EC) has been transposed in relation to land use planning by the Planning (Control of Major-Accident Hazards) (Scotland) Regulations 2009.

The purposes of Article 12 of Directive 96/82/EC as amended is to ensure that land-use policies and procedures for implementing them take account of the need to maintain appropriate distances between establishments storing and processing dangerous substances and residential/public buildings and areas, including the extended categories of buildings in public use, major transport routes and recreational areas. This is to prevent major accidents which involve dangerous substances and limit their consequences for man and the environment.

The scope of the Directive 96/82/EC was also extended by the Directive 2003/105/EC amendments to Annex 1 to Directive 96/82/EC. The amendments to Annex 1 to Directive 96/82/EC increased the number of dangerous substances listed and made changes to the ways in which they are categorised and the amounts allowed to be processed or stored without consent.

These Regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply.

Articles	Objectives	Implementation
Article 12 as amended	To ensure that land-use policies and the procedures for implementing them take account of the need to maintain appropriate distances between establishments storing and processing dangerous substances and residential areas/public areas as well as the following extended categories: buildings in public use, major transport routes as far as possible, and recreational areas. This is with the overall aim of preventing major accidents involving hazardous substances	This has already been implemented by the Planning (Control of Major-Accident Hazards) Regulations 2000 and the consent regime as set out in the Planning Hazardous Substances (Scotland) Act 1997 and the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993. However, the new thresholds set out in Annex I to the Directive (as amended) determine the application of article 12 and so the implementation of both are linked . Regulation 2 of these regulations amends the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 to give effect to these 'extended categories' and to ensure their consideration when plans are created.

Annex 1 as amended	To set quantity thresholds for listed dangerous substances, at or above which consent must be obtained for the storage or processing of such substances. This is in order to ensure high levels of protection throughout the Community in a consistent and effective manner.	Regulation 3 of these regulations amends the Planning (Hazardous Substances) (Scotland) Regulations 1993 by updating Schedule 1 to those Regulations to reflect the new lists and categories for dangerous substances as set out in the amended Annex 1 to Directive 96/82/EC. Transitional provision is made at regulation 4 for establishments with existing hazardous substances consents. These consents shall continue to have effect notwithstanding the renaming or recategorisation of a hazardous substance in Annex 1 to the Directive (as amended). Transitional provision is made at regulation 5 to protect establishments, which did not require consent before these Regulations come into force, from prosecution and contravention proceedings for failing to have consent. A period of 6 months from the coming into force of these regulations is allowed for the making of applications for consent.

Regulatory Impact Assessment

The Town and Country Planning (Control of Major-Accident Hazards) Regulations 2009

Introduction and Summary

1. This is a Regulatory Impact Assessment (RIA) of the proposals for amendments to the Town and Country Planning (Hazardous Substances) Regulations 1993 (the 1993 Regulations) and the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (the 2008 regulations) to comply with the requirements of Council Directive 96/82/EC (the Seveso II Directive) on the control of major accident hazards involving dangerous substances as amended by Council Directive 2003/105/EC. Failure to do so puts the UK at risk of incurring infraction fines.

2. The assessment examines the impact of the proposed regulations on business and other interests. It considers the additional costs that may be imposed by the legislative changes and seeks to assess the wider benefits which may be brought by the changes.

3. The proposals for the regulations, and a draft of this assessment, were published for public consultation in Summer 2005. The draft regulations and the responses to this raised a number of concerns from the sector regarding a lack of transitional arrangements and the effect and cost this might have on the industry – we have been working to resolve these issues and the regulations now address the issue of transitional arrangements.

Background

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

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

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

7. We have given effect to the land-use planning requirements of the Seveso II Directive by way of amendment to planning legislation relating to hazardous substances consents, preparation of development plans and on consultation before granting planning permission. The effect is that sites that fall within scope of the Seveso II Directive have to obtain hazardous substances consent from the relevant planning authority and where planning applications are submitted for development, within certain distances of a site with hazardous substances consent, the planning authority has to consult the Health and Safety Executive on issues relating to the risks of an accident at the site before determining the application. In addition, planning authorities also had to take into account the issue of major accident hazards and maintaining appropriate distances between hazard sites and other developments when preparing their development plans.

8. Council Directive 2003/105/EC further extended the scope of Seveso II Directive. With regard to land use planning issues, it made changes to the way in which some substances and preparations are classified or defined, and to some qualifying quantities that determine whether an establishment falls within scope of the Seveso II Directive. It also added to the specified lists of other developments relevant to the requirements on the preparation of development plans referred to in the previous paragraph.

9. To fully comply with these changes, to the Directive we are proposing to amend the 2008 Regulations and to make further amendments to the 1993 Regulations.

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

Consultation

Within Government

11. The Scottish Government Directorate for the Built Environment has consulted with colleagues in:

- Solicitors: Local Authorities and Development Division

Public consultation

12. A full public consultation on new draft regulations was undertaken in August 2005. In total 17 responses were received to the consultation, broken down as follows:

- 8 from local authorities
- 1 from a Structure Plan Joint Committee
- 3 from Industry
- 1 from an environmental agency
- 4 from professional and other organisations

13. The majority of respondents expressed support for the proposed amendments, or raised specific concerns about individual elements of the proposals. A key concern related to the proposal not to provide for transitional arrangements for those businesses operating within the COMAH regime. We have now reviewed the need for such arrangements and have made provision for transitional arrangements, consistent with the requirements of the Seveso II Directive as amended, in the attached draft regulations. As this key concern was now provided for as far as possible in the new regulations a decision was made not to consult any further as the original purpose of the regulations (the implementation of the Directive) had not changed.

Options

14. The Scottish Government considered options for implementing Directive 96/82/EC (the Seveso II Directive): The options identified were:

- Option 1 : Do nothing. The current process would be maintained.
- Option 2 : Introduce amendments to the regulations to accord with the Directive

Groups Affected

15. The Seveso II Directive applies only to sites where dangerous chemical substances and preparation are present. The sites affected by the amendments are operated by businesses in the chemical, petroleum, electricity and water supply sectors and those involved in the manufacture and storage of explosives. These Regulations will affect those businesses that use or store substances that will be brought into the hazardous substances consent regime as a result of the changes made to the quantities and substances listed in Schedule 1. Where affected those operators will need to apply to the hazardous substances authority for express consent.

Benefits

16. Option 1: Do nothing

No economic, social or environmental benefits derive from doing nothing

17. Option 2: Introduce amendments to the regulations to accord with the Directive

This option avoids the risk of infraction proceedings being brought against the UK for non-compliance of the Seveso Directive. Although instances of fines being imposed are relatively rare, the European Court of Justice can impose very heavy fines. However, it is not possible to anticipate the lump sum penalty rate, as this is set by the EC according to the seriousness of the infringement and the situation. The maximum daily fine is €530,000, which equates to approximately £486,000. If a fine of this

magnitude was imposed by the European Court of Justice it would lead to an annual fine of over £170m.

Requiring relevant operators without hazardous substances consent to apply for a hazardous substances consent will bring additional health and safety benefits. These are providing the public with extra reassurance that adequate controls are being exercised over the use and storage of hazardous substances and preparations in establishments where they are present; and that such controls are effective in maintaining public health and safety, and in protecting the environment. Land-use planning controls cannot themselves prevent a major accident. But by ensuring that proposed development within the vicinity of dangerous establishments is authorised only after the public health and safety issues have been fully taken into account, they mitigate the consequences of any major accident minimising damage that may be caused to property or injury to persons or loss of life.

Costs

18. Option 1: Do nothing

Option 1 would mean that the UK would be in non-compliance with the Seveso II Directive. This risks infraction proceedings being brought against the UK non-compliance. The failure to properly transpose and enforce a EU obligation can eventually lead to a fine. The maximum fine that could be imposed on the UK is some €530,000 (£486,000) per day.

There are no other costs associated with this option.

19. Option 2: Introduce amendments to the regulations to accord with the Directive

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

20. It is thought that the amendments will affect approximately 53 sites across the UK. It is understood that only a very small number of sites in Scotland will be directly affected by this legislation. When similar changes were made to the lists of substances in the Control of Major Accident Hazards (COMAH) Regulations 1999 in 2005, 3 sites in Scotland were notified under these Regulations for the first time. It is of course possible that existing sites with hazardous substances consents and in the COMAH regime may have to obtain additional consents for other substances they hold. The operators of these sites will need to bear the costs of applying to the local authority for a consent. The cost of an application is either £200 for a new consent, £400 if the quantity of substance for which consent is sought exceeds twice the controlled quantity and £250 in any other case. The cost to industry should therefore be minimal. There is however a possibility that an operator applying for a first time consent may be refused even though they have stored substances for a long time. Where an application for hazardous substances consent is refused, the applicant has the right to appeal to Scottish Ministers.

The new regulations include a 6 month period for sites requiring to obtain hazardous substances consent as a result of the changes during which they will not be in breach of the hazardous substances regulations.

Small/Micro firms Impact Test

21. Based on discussions with the Health and Safety Executive, we estimate only a small number of sites would come within scope of planning controls for the first time as a result of the proposed changes. Due to the nature of the substances involved, we believe it more likely these changes will impact principally on the larger and medium sized business

Implementation of the regulations

22. The regulations will be laid before Parliament on 30 October with a coming into force date of 23 November 2009.

Guidance on the use of the powers

23. The Scottish Government aim to produce an updated circular on hazardous substances consent in 2010.

Enforcement, sanctions and monitoring

24. The Planning (Hazardous Substances) (Scotland) Act 1997 and the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 have existing provisions for enforcement and sanctions against any breach in planning control. Failure to comply may result in the issuing of contravention notices by the planning authority and if found guilty under section 21 of the Planning (Hazardous Substances) (Scotland) Act 1997 subject to a fine.

25. The Health and Safety Executive is a statutory consultee for all applications for hazardous substances consent. HSE collates information on the number of consents, substance and quantities. We will be reviewing the consent procedure with the HSE on an ongoing basis to ensure that it continues to provide a balance between the need to provide the public with reassurance on health and safety issues and the need to minimise burdens on industry. We will also in accordance with Scottish Government policy, review this legislation within 5 years of it coming into force.

26. The Seveso II Directive also requires Member States to provide the European Commission every 3 years with a report on a range of information relating to the implementation of the Directive.

Summary and recommendation

27. The Town and Country Planning (Control of Major-Accident Hazards) (Scotland) Regulations 2009 will ensure that land- use planning aspects of the SEVESO II Directive are transposed into Scottish Law.

28. In view of the above, it is recommended that option 2 be implemented and that the regulations are introduced into Scottish law.

Declaration and publication

29. I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed ……..

Date ……

Stewart Stevenson MSP
Minister For Transport, Infrastructure and Climate Change