

Development Management

Practice Note

PRACTICE NOTE

6

Hazardous Substances Controls

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An Roinn

Bonneagair

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Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the legislative requirements for the control of hazardous substances and deals primarily with procedures as well as good practice. It forms part of a series of practice notes stemming from the **Planning Act (Northern Ireland) 2011 (2011 Act)** and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be highlighted.

Where appropriate this practice note may highlight:

- Relevant legislation;
- Procedural guidance;
- Definitions;
- Best practice examples / relevant case law.

This guidance is not intended to replace the need for judgement by planning officers and those making planning applications. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between the Practice Note and legislation the provisions of the legislation will prevail¹.

¹ Please ensure you are viewing the most up to date version of Practice Note 6.

1.0 Introduction

1.1 The purpose of this practice note is to explain the additional planning legislative requirements to safely access and mitigate the on-shore major-accident hazards associated with hazardous substances. This is achieved by controlling the storage and use of hazardous substances which, in quantities at or above prescribed controlled limits (aggregated or single), present a major risk to the environment and human health.

2.0 Legislative background

2.1 **Directive 2012/18/EC**, commonly referred to as the **Seveso III Directive**, came into force on 1 June 2015 and is the current European Directive dealing with the control of major-accident hazards involving dangerous substances. The Directive sets the parameters for land use planning which are intended to prevent major accidents and must be applied in the same way in all member states based on the 'duty of loyalty' as defined in **Article 4(3) of the Treaty on European Union**, the latest version of which is commonly referred to as the Lisbon Treaty (December 2007).

2.2 In addition to the legislative provisions covering the processing of planning applications, **section 108(1) of the 2011 Act** requires consent to be sought from the council² when a hazardous substance is present on, over or under land (i.e. hazardous substances consent (HSC)) and requires the Department³ by regulation to specify the substances that are hazardous and to detail the threshold quantity for the substances that must be controlled. **The Planning (Hazardous Substances) (No. 2) Regulations (Northern Ireland) 2015** (Hazardous Substances Regulations)⁴ details the provisions required under the 2011 Act for implementing the European Union (EU) Directive in Northern Ireland. The regulations cover:

² Council means a district council unless otherwise stated.

³ Department means the Department for Infrastructure unless otherwise stated.

⁴ Amended by The Planning (Hazardous Substances) (No.2) (Amendment) Regulations (Northern Ireland) 2016.

- Advice on the meaning and correct use of various aspects of the assessment;
- What is a hazardous substance;
- When is a consent required;
- The assessment of major–accident hazards;
- Notifications of major-accident hazards;
- The implications for land-use planning;
- Appeal mechanisms; and
- Public participation in the process.

2.3 For land use planning the list of categories of hazardous substances and the controlled quantities are detailed in **Schedule 2** of the Hazardous Substances Regulations.

2.4 **Section 119(1)** of the 2011 Act denotes that nothing in a granted, or deemed to be granted, HSC requires or allows anything to be done in contravention of any of the relevant statutory provisions regarding health and safety. HSC does not replace or override compliance requirements under health and safety legislation, in particular, **The Control of Major Accident Hazards Regulations (Northern Ireland) 2015** (COMAH Regulations), which covers all but the land use planning aspects of the Seveso III Directive. This aspect is administered jointly by the Health and Safety Executive for Northern Ireland (HSENI) and the Northern Ireland Environment Agency (NIEA)⁵. The Directive sets out two levels of qualifying quantities for substances, upper and lower tiers. Additional requirements apply under the COMAH Regulations for upper tier sites as per the Directive.

2.5 To aid access to information on the processing and determination of a HSC, **section 242(1)(a)** of the 2011 Act requires the council to hold a register for every HSC for its area.

⁵ NIEA is an executive agency of the Department of Agriculture, Environment and Rural Affairs (DAERA).

3.0 Hazardous Substances Consent

3.1 Section 108(1) of the 2011 Act denotes that HSC is required when the aggregate quantity of the substance is over the controlled quantity in the following circumstances:

- (a) On, over or under the land;
- (b) On, over or under other land which is controlled by the same person and which, in all the circumstances (including in particular the purpose for which the land and the land mentioned in paragraph (a) is used, forms with the land so mentioned a single establishment;
- (c) On, over or under land which is within 500m of the land mentioned in paragraph (a) and controlled by the same person; or
- (d) In or on a structure controlled by the same person any part of which is within 500 metres of the land mentioned in paragraph (a).

3.2 When calculating the quantity of a substance, **section 108(2)** states that if a substance falls into more than one category of section 108(1) then it shall only be counted once. **Section 108(3)** covers the temporary presence of substances when they are being transported from one place to another and states that they do not need to be taken into account unless they are unloaded, present on lands where an HSC for any substance is in situ or regardless of the quantity being transported there is a requirement for HSC for that substance.

3.3 The list of categories of hazardous substances and named hazardous substances with their controlled quantities are found in Schedule 2 of the Hazardous Substances Regulations. The list in the Schedule is in three parts each with two separate columns denoting the hazard and the controlled quantity;

- **Part 1:** categories of hazardous substances and controlled quantities;
- **Part 2:** named substances and controlled quantities; and

- **Part 3:** substances used in processes that it is reasonable to foresee may generate a controlled amount of hazardous substance.

Controlled Quantities

- 3.4 The **controlled quantity** is the quantity specified in Schedule 2 of the Hazardous Substances Regulations at or above which HSC is required, subject to any relevant exemption⁶ detailed in regulation 4. Where a substance named in Part 2 to Schedule 2 to the Hazardous Substances Regulations also falls into a category of hazardous substances in Part 1 to Schedule 2, the controlled quantity in Part 2 must be used to determine if HSC is required. For example, chlorine is a named substance in Part 2 to Schedule 2 with a controlled quantity of 10 tonnes. It also falls within the Part 1 categorisation of substances H2 Acute Toxic and E1 Hazardous to the Aquatic Environment, which has a controlled quantity of 50 and 100 tonnes, respectively. In these circumstances the controlled quantity will always be the controlled quantity denoted in Part 2 Column 2 to Schedule 2 i.e.10 tonnes in the case of the example.
- 3.5 In circumstances where the substance is not named and it falls into more than one of the categories in Part 1 to Schedule 2, the lowest controlled quantity will apply⁷.
- 3.6 Part 3 to Schedule 2 deals with the situation where hazardous substances may be present in a quantity at or above controlled quantities only as a result of a loss of control of an industrial chemical process (Including storage activities). Part 3 Column 1 relates to where it is reasonable to foresee that a substance falling within Part 1 or Part 2 may be generated during a loss of control. It may be difficult to predict the type and quantity of substance which may be generated, however, it is important that they attempt to do so and obtain necessary consent.

⁶ Section 4.0 of this document outlines exemptions from hazardous substances requirements under the Hazardous Substances Regulations.

⁷ See Note 7 to Part 4 to Schedule 2 of the Hazardous Substances Regulations.

- 3.7 This may, for example, apply to substances W, X and Y where under normal controlled operating processes they are used to produce substance Z. If the substances are not covered in Part 1 or 2 to Schedule 2 or are not present on or above their specified control quantity, then consent would not be needed. If, however, there is a loss of control of substances W, X and Y and they react differently to produce substance S at a quantity on or above its controlled quantity then consent will be required for substances W, X and Y. The requirement is for the site operator to obtain consent for the presence of the substances which are used in that process. The controlled quantity for a process substance is, therefore, 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 to Schedule 2 being generated at a quantity at or greater than its controlled quantity.
- 3.8 The controlled quantities stated in Schedule 2 are taken from Annex 1 of the Seveso III Directive, with the exception of those in column 2 of Part 2 to Schedule 2 denoted by an asterisk. These have lower controlled quantities as they are likely to be stored in locations within the UK where lower quantities as specified in the Directive would have a mass accident hazard potential.

Aggregate Quantities

- 3.9 It may be the case that the individual amounts of substances are below the controlled quantities level, but **section 108(1)(b), (c), (d)** requires the consideration of hazardous substances on other lands forming part of the establishment or lands or buildings controlled by the same person within 500m, the **aggregate quantity**. However, there is no theoretical limit to the distance which may exist between areas of land which may be considered to constitute an establishment. An establishment is defined in the Seveso III Directive as, 'the whole location under the control of an operator where dangerous substances are present in one or more installations, including common or related infrastructure or activities.' In most cases it should be clear what constitutes the establishment. However, the person in control of

the land may not always be the same person as the legal owner. Two adjoining sites may be under the ownership of two different companies but both may be controlled by the same parent company which is in effect control of operations on both sites. As per Note 4 to Part 4 to Schedule 2 in the Hazardous Substances Regulations, the controlled quantities set out in Parts 1 – 3 to Schedule 2 relate to each establishment. Generally, a consent will be required when the aggregate quantity of a hazardous substance present in an amount equal to or greater than its controlled quantity.

The Addition Rule

- 3.10 Even when having aggregated all of a category of hazardous substance or named substance and the controlled quantity has not been reached, HSC may still be required. The Directive and the regulations both require categories of hazardous substance and named hazardous substances with similar properties present below their individual controlled quantities to be considered together. To determine whether consent is required for an establishment in circumstances where hazardous substances are present in amounts less than their controlled quantities they will be added together as per the **addition rule** outlined in Note 5 to Part 4 to Schedule 2 to the Hazardous Substances Regulations.
- 3.11 This involves expressing hazardous substances with similar hazards present as partial fractions of the controlled quantities and adding them together. The hazards are grouped into health hazards, physical hazards and environmental hazards and the addition rule must be used to assess each of these hazards. Only substances with similar properties should, therefore, 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 hazard properties, for example, a toxic substance with Health and Environmental hazard properties. If the sum is one or greater, then consent is required for each of the substances which have been included in the calculation.

- 3.12 If a substance is named in Part 2 to Schedule 2 then the quantity in column 2 of Part 2 should be used. For those substances marked with an asterisk (Hydrogen, Natural Gas (Including LNG) and LPG), the controlled quantities specified in Note 5 to Part 4 to Schedule 2 should be used as they reflect the lower controlled quantities adopted by the UK for these substances⁸.
- 3.13 Examples of the addition rule are contained in Annex A.

4.0 Exemptions from Hazardous Substances Requirements

- 4.1 The criteria for exemptions should be checked carefully especially as the specific elements of certain types of exemption have changed over the years. Exemptions are contained in the both the 2011 Act and Hazardous Substances Regulations but the Department can also issue a direction.

Temporary presence during transportation

- 4.2 Section 108(3) of the 2011 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 and, therefore, no HSC is required. This exemption does not apply if the hazardous substance is unloaded at the appropriate destination. The exemption does not apply when the transported load is on or under land with HSC or on lands that require the appropriate consent.
- 4.3 Where consent is required for the presence at a site of any hazardous substances (excluding substances being transported) then those substances present on a temporary basis inside the site will have to be taken into account in calculating the quantity of the substances present at the site.

⁸ Some derogations from EU Legislation are permitted allowing larger amounts of hazardous substances to be stored.

4.4 The term temporary presence is not defined in the 2011 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. A view may be reached, 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 the exemption. Judgement may also be required in considering if a substance has been unloaded. It may be appropriate to consider unloading to have taken place when it is divested of its load, even if the substance remains in a container or packaging.

4.5 **Regulation 4(1)** of the Hazardous Substances Regulations complements the provisions in section 108(3) of the 2011 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 purposes of transferring it to another. It will be a matter of judgement as to whether this is temporary, but there should be a clear intention to transfer the substance to another means of transport (as could be illustrated by a transport contract). Where a substance has effectively gone into storage it would not be covered by this exemption.

Military

4.6 **Regulation 4(2)** of the Hazardous Substances Regulations exempts a need to have HSC for hazardous substances present at military establishments, installations or storage facilities.

Pipelines

4.7 **Regulation 4(3)** of the Hazardous Substances Regulations does not require HSC for the presence of hazardous substances where it is being transported in a pipeline, including a pumping station, outside of any land in respect of which there is a HSC for any substance or there is required to be such a

consent for any substance. 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 HSC as they should be regarded as part of the overall inventory of substances on that site.

Emergency Unloading from Ships

- 4.8 **Regulation 4(4) and (5)** of the Hazardous Substances Regulations allows for a ship or other sea going craft containing a hazardous substance to enter a harbour in a dangerous condition or where, in the interests of health and safety, the harbour master waives the usual requirements for advance notice. The regulations permit the unloading of a hazardous substance and for it to be stored as a matter of urgency without the requirement for HSC for up to a period of 14 days from the day of unloading. This is to allow suitable alternative storage arrangements to be made, if necessary.

Waste Land-fill Sites

- 4.9 **Regulation 4(6)** of the Hazardous Substances Regulations provides an exemption for the requirement for HSC over or under land at a waste landfill site, including underground storage. This only applies to hazardous substances at waste landfill sites and not to substances present at other disposal sites such as incinerators. **Regulation 4(7)** provides that the 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 Council⁹ 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.

⁹ Council in this instance means the European Council of the European Union.

- Chemical and thermal processing operations and storage relating to those operations.
- Operational tailings disposal facilities, including tailing ponds or dams, containing a hazardous substance.

Nuclear Sites

4.10 **Regulation 4(8)** of the Hazardous Substances Regulations states HSC is not required for the presence of a hazardous substance which creates a hazard from ionising radiation if present on, over or under land in respect of which a nuclear site license has been granted or is required for the purposes of **section 1 of the Nuclear Installations Act 1965**. Hazardous substances present at sites licensed under the Nuclear Installations Act 1965, which do not create a hazard through ionising radiation, will be subject to consent if they exceed the controlled quantities.

Minerals

4.11 As per **regulation 4(9)** of the Hazardous Substances Regulations, HSC 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.

4.12 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.

4.13 **Regulation 4(10)** of the Hazardous Substances Regulations removes the requirement for HSC for off shore exploration and exploitation of minerals, including hydrocarbons or the storage of gas at underground offshore sites

including both dedicated storage sites and sites where exploration and exploitation of minerals, including hydrocarbons are also carried out.

Explosives

- 4.14 **Regulation 4(11)** of the Hazardous Substances Regulations exempt HSC being required for explosives in certain case, within the meaning of **Regulation 2(1) of the Manufacturing and Storage of Explosives Regulations (Northern Ireland) 2006**, where a licence is required and has been granted by the Department of Justice.
- 4.15 **Regulation 4(12)** of the Hazardous Substances Regulations provides that HSC is not required where an explosive licence within the meaning of **Regulation 2(1) of the Dangerous Substances in Harbour Areas Regulations (Northern Ireland) 1995** has been issued.

Presence of Established Substances

- 4.16 **Regulation 4(13)** of the Hazardous Substances Regulations covers exemptions in relation to substances which were present at a site legally without HSC prior to 16th October 2015. 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 regulations had been in force at the time the substance was present;
 - The quantity of substance present on or after 16th October 2015 does not exceed the maximum quantity which was present at the site at any time during the 12 month period prior to 16th October 2015.

4.17 Under **regulation 26** of the Hazardous Substances Regulations, persons who control the land relying on the exemption in **regulation 4(13)** are to give written notice to the council 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 16th October 2015.

4.18 The purpose of the notification requirement is to ensure that decisions on the applications for planning permission for development in the vicinity of establishments with hazardous substances take into account the presence of such establishments. The council needs to know where hazardous substances, which would require HSC in the absence of the exemption, are present. Regulation 26(2) also requires the council to pass a copy of the notice to the HSENI. A copy of the notice must also be placed upon the register¹⁰.

Small Quantities '2% Rule'

4.19 Under **regulation 4(16)** of the Hazardous Substances Regulations a small amount of most substances can be disregarded for assessing whether an HSC is required because of an exemption referred to as the 2% rule. 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, lies with the site operator. Inspections of sites are undertaken by HSENI and should ensure the rule is not being abused.

¹⁰ The council must hold a register for HSC as per Section 242(a) of the 2011 Act.

Minor Changes

- 4.20 This involves no amendment to the extant HSC. **Regulation 4(17) & (18)** of the Hazardous Substances Regulations allows exemptions for minor changes if details of the proposed change are sent to the council by HSENI¹¹. The applicant must confirm, in line with regulation 4(18)(a)(i) – (iii):
- how the hazardous substance is to be kept and used;
 - the minor change will not result in a safety hazard change¹²;
 - the minor change will not result in a lower tier establishment becoming a higher tier establishment¹³.

The onus is on the site operator to have provided HSENI with details of the proposed change.

5.0 Directions by the Department in Emergencies

- 5.1 **Section 118(1)** of the 2011 Act permits the Department to issue a direction to allow storage of a hazardous substance if it is to help a community, or part of a community, avoid becoming deprived of an essential service. The Department can direct that, subject to conditions or exceptions as the Department considers necessary, the presence of a hazardous substance may not constitute a breach of control.
- 5.2 Where a national security certificate is issued by either the Secretary of State under **section 235(1)** of the 2011 Act, or the Department of Justice under **section 235(4)**, the Department is required under **section 114(3)** to issue a direction requiring the application to be referred to it.
- 5.3 A copy of any direction must be sent to the relevant council and to the HSENI. Councils must also place a copy on their planning register.

¹¹ Copies of the correspondence should be placed on the planning register as per Section 242(1)(e).

¹² Minor amendments can be made to the area notified to the council (consultation distance) by HSENI unless and until the cumulative effect represents a Safety Hazard Change i.e. the potential danger has increased.

¹³ Sites that are classed as upper tier by the Directive require additional requirements placed on them by COMAH Regulations.

6.0 Applications for Hazardous Substances Consent

6.1 The purpose of this consent regime is to allow an assessment of the major hazards for a particular dangerous substance(s) and come to a decision after considering comments received. There are three types of HSC:

- Applications for consent.
- Applications for a replacement consent without compliance to conditions previously attached.
- Applications for continuation of consent where there has been a change in the person in control of part of the land.

HSC application

6.2 **Section 109(1)** of the 2011 Act allows the Department to make regulations regarding the form and manner in which applications for HSC are made. Of note, **section 109(3)** makes it an offence to provide false or misleading information in the accompanying land ownership certificate as set out in Schedule 1 to the Hazardous Substances Regulations. A person is liable on summary conviction to a fine not exceeding level 3 (currently £1,000) on the standard scale.

6.3 **Regulation 5(1)(a)** of the Hazardous Substances Regulations permits applications for HSC to be made to councils. The regulations no longer include a prescribed application form unlike the previous regulations. However, regulation 5(1)(b) to (e) sets out the information and number of copies to be provided to the council. An example template for appropriate modification is attached at Annex B. Regulation 5(1)(c) requires the submission of a substance location plan. Regulation 5(4) requires that such a plan be drawn to a scale of not less than 1:1250 and identifies:

- Any area of land intended to be used for the storage of substance.

- Where the substance is to be used in a manufacturing, treatment or other industrial process, the location of the major items of plant involved in that process in which the substance will be present.
- Access points to and from the land.

Grant of HSC without compliance with conditions previously attached

- 6.4 **Section 111** of the 2011 Act permits applications for consent for non compliance with conditions. It allows a site operator to apply to either alter or remove a condition attached to a HSC. If it is concluded that no conditions should be imposed, then a new unconditional consent or consent with revised conditions must be issued. The decision is limited to whether there should be conditions or whether they are applied, the original consent cannot be overturned. **Section 111(3)** requires that the application for non compliance must be determined by the authority which granted the original consent¹⁴.
- 6.5 Such applications may be made either before or after the original consent is enacted. For example, a condition may require the removal of a substance by a certain date and the applicant may subsequently need to continue that use after that date. If it is concluded that the conditions attached to the consent should not be changed, then the application must be refused with the original consent remaining.
- 6.6 **Regulation 5(2)(b) – (i)** of the Hazardous Substances Regulations sets out the required information needed to be submitted in support of the application for consent. The change of location plan requested in **Regulation 5(2)(c)** is a plan drawn to a scale of not less than 1:1250 that identifies the location of the hazardous substance at the date of the application and the proposed location requiring the application.

¹⁴ A HSC to alter or remove a condition made to the Department will be determined via either the convening of a PLI or by way of a Notice of Opinion as per Regulation 14 of the Hazardous Substances Regulations. In these circumstances the Minister's decision is final.

Change of Control of Land

- 6.7 A HSC goes with the identified land. However, provision is also made to take account of changes in the ownership of the land. **Section 116(2)** of the 2011 Act denotes that a consent will cease to have effect if there is a change of control of part of the land to which it relates, unless an application for the continuation of the consent has previously been made to the council. Under **section 116(5)** the council may modify the consent in a way it considers appropriate or revoke it. In considering such an application the council must in accordance with **section 116(6)** consider the provisions of **section 110(2)** and any advice given by HSENI. The provisions do not apply to a transfer of land from one part of the Crown to another (section 116(4)).
- 6.8 **Regulation 5(3)** of the Hazardous Substances Regulations requires that all applications for the continuation of consent, following a change in control of part of the land, must be made to the council. **Regulation 5(3)(b)–(i)** sets out the required information needed to be submitted in support of a change of control application. **Regulation 5(3)(c)** specifically requires a change of control plan which is defined in **regulation 5(4)** as a plan of the land to which the application relates drawn to a scale not less than 1:1250, which identifies each area of the site under separate control after the proposed change of control.

Public Participation

- 6.9 There is no statutory requirement to neighbour notify. However, **regulation 6(1)** of the Hazardous Substances Regulations requires an advertisement to be placed in at least one newspaper in the locality and if the council provides a website for advertising it must publish a notice on the website. **Regulation 6(2)(a)–(h)** sets out what shall be included in any advertisement.
- 6.10 To facilitate public consultation, the council is required by **regulation 8** of the Hazardous Substances Regulations to make the application for consent available for public inspection. It is good practice to consider any

representations made in the consideration of an HSC. As per **regulation 9**, which deals with applications made by someone other than the owner of the land, the council must, in determining the application, take into account any representations made by persons who fall under (a) to (c) of Certificate C of the prescribed form in Schedule 1 of the Hazardous Substances Regulations.

Consultations and determination

- 6.11 Prior to making a determination the council is required by **regulation 11(1)** of the Hazardous Substances Regulations to consult with the Department of Agriculture, Environment and Rural Affairs (DAERA)¹⁵, Health and Safety Executive for Northern Ireland (HSENI) and the Northern Ireland Fire and Rescue Service (NIFRS). There is also a requirement to consult any other persons, including any non-governmental organisation promoting environmental protection, who are affected or are likely to become affected by, or have an interest in, the application and who in the council's opinion are unlikely to be aware of the HSC through the HSC advertising procedures. Consultations must be undertaken in writing within 7 days of receipt of a valid application for consent.
- 6.12 A determination must not be made prior to the expiry time (at least 21 days) for receipt of representations as per **Regulation 6(2)(g)** of the Hazardous Substances Regulations and the council must take into account consultation responses.

Appeals

- 6.13 Where the council has determined an HSC, section 115 of the 2011 Act provides a right of appeal to the Planning Appeals Commission (PAC). The applicant may appeal to the PAC regarding a HSC decision, which refuses consent or imposes conditions, which the applicant feels are unnecessary or

¹⁵ Regulation 11 of the Hazardous Substances Regulations was amended by Regulation 2(2) of the Planning (Hazardous Substances) (No. 2) (Amendment) Regulations (Northern Ireland) 2016. The requirement to consult DAERA refers to the functions of that Department carried out by the NIEA.

unwarranted. A request to the PAC must be made in writing and within 4 months from the date of notification of the decision.

7.0 Call-in of applications

7.1 **Section 114(1)** of the 2011 Act allows the Department to issue a direction requiring the council to refer applications for a single consent or multiple consents to the Department for processing and determination. The consent will be processed by either the route of requesting the PAC to convene a Public Local Inquiry (PLI) or by the issuing of a Notice of Opinion. In both cases, the Department's decision is final.

7.2 A call-in of an application for HSC will be by exception and will generally be where issues have arisen which are more than locally important. When a direction under section 114 is served, **regulation 15** of the Hazardous Substances Regulations requires the council to serve notice on the applicant informing them that the application is now with the Department and the reasons given by the Department for that referral.

8.0 HSC applications made by the council

8.1 Councils cannot process or determine its own HSC applications. Regulation 16 requires that any application by the council must be made to the Department who will determine these by either convening a PLI or by issuing a Notice of Opinion. Again, the Department's decision is final.

9.0 Contravention of HSC Control

9.1 Enforcement of a HSC is the responsibility of the relevant council. Contravention of a HSC can potentially be a serious and immediate risk to people and the environment in that area. It may involve someone operating

without a consent or in contravention of a condition. It is considered good practice for each council to liaise with HSENI and NIEA as contraventions may give rise to health and safety or environmental concerns.

9.2 Actions by the council as the hazardous substances authority can vary from informal to formal actions. In less serious cases there may be informal negotiations with the operator to regularise the operation by requiring them to apply for a HSC retrospectively. However, this is not appropriate where there are likely to be significant impacts on human health or the environment. The council in these instances should consider more formal action including asking a court for an injunction to restrain a breach of control or to prosecute.

9.3 **Section 117** of the 2011 Act covers breaches in HSC. Section 117 (a) and (b) set out that a contravention will have taken place when:

- A quantity of a hazardous substance equal to or exceeding the controlled quantity is or has been present on, over or under land when there is no HSC or the quantity on site exceeds that permitted. There is a failure to comply with a condition.

9.4 **Section 156(1)** of the 2011 Act allows the council to seek an injunction where considered necessary or expedient regarding an actual or apprehended contravention of hazardous substance control. **Section 162(1)** allows the council to issue a Hazardous Substances Contravention Notice¹⁶.

9.5 **Section 117** details that the person guilty of an offence is someone who knowingly causes the substance to be present on, over or under land, any person allowing it to be so present and any person in control of the land. A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £100,000 or on conviction on indictment to

¹⁶ The Department has no reserve power to issue a HSC contravention notice.

a fine. In arriving at the fine the court must have regard to any financial benefit which has accrued or appears likely to accrue.

- 9.6 The issuing, appealing and effect of a hazardous substances contravention notice are covered in **regulations 20, 21 and 22 of the Hazardous Substances Regulations**. An appeal to a HSC contravention notice can be appealed to the PAC¹⁷.

10.0 Revocation or Modification of HSC

- 10.1 **Section 112** of the 2011 Act gives the council power to make an order to revoke or modify a HSC. This may be considered appropriate when it is concluded that it is undesirable for a HSC to continue to have effect if it has fallen into disuse and possibly restricts the uses to which neighbouring land can be used. It may also not be desirable to allow a HSC to have effect when there has been a material change of use in the land.
- 10.2 A HSC can be revoked entirely or for a specific substance which it has permitted to be present at that location. Section 112(1) gives the council the authority to revoke a HSC when there has been a material change of use of the land to which the HSC relates or where planning permission has been granted for development the carrying out of which would involve a material change in use of such land and the development to which the permission relates has been commenced. Section 112(2) allows the council to revoke a HSC which relates to a single substance if it has not been present on, over or under land in the controlled quantity or above for a period of at least 5 years. Under the provisions of section 112(1) and (2) the consent may be revoked without compensation being payable. Section 112(3) allows the council to revoke or modify a HSC having had regard to any material consideration. Orders made under section 112 should specify the grounds on which they are made.

¹⁷ Further guidance on enforcement matters can be found in Enforcement Practice Notes 1 - 4.

10.3 An order under section 112 may not take effect until it has been confirmed by the Department. Section 113 sets out the procedures for the confirmation of revocation and modification orders. An order may be confirmed without changes or with changes as considered expedient by the Department. Section 113(3) requires the council on submitting an order under section 112 to serve notice of the 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 the opinion of the council will be affected by the order. Section 113(4) requires those served with the notice to be given at least 28 days to request to be heard by the PAC.

11.0 Development proposals around hazardous substances installations

11.1 **HSC does not override the need for planning permission if development is also involved.** Where both are required two separate applications will be necessary and the respective statutory requirements will need to be followed. It may not be possible to act upon one authorisation without having the other. It is advised that both should be dealt with together. This does not necessarily mean that similar decisions need to be given on both applications as there are likely to be considerations which are material to one and not to the other. For example, after due consideration it may be concluded that planning permission should be refused for the associated development as it has inadequate access arrangements. The consent, however, could issue if it has been concluded that the potential risks to the local community arising from the proposed presence of a hazardous substance do not merit refusal. There also needs to be consideration of any development in the vicinity of those establishments containing hazardous substances.

Consultation

11.2 **Schedule 3 of The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016** sets out the statutory

consultees for the planning application process. Schedule 3 Part 1¹⁸ covers the statutory consultees for the council including the circumstances when to consult the HSENI or NIEA or applications that relate directly to a development proposal that involves hazardous substances or those in their vicinity.

11.3 Schedule 3 Part 1 paragraph 3(a) requires consultation to be undertaken with HSENI when an application is within a notified area. A notified area is an area within which HSENI considers there is a significant off-site risk to people and the environment because of the presence in the vicinity of toxic, highly reactive, explosive or inflammable substances¹⁹. The council must consult on an application within a notified area when it is for:

- residential provision
- more than 250sqm of retail floorspace
- more than 500sqm of office space
- more than 500sqm to be used for an industrial process

11.4 Statutory consultation also needs to take place with HSENI in accordance with Schedule 3 Part 1 paragraph 3(b) when development:

- Involves the siting of new establishments.
- Consists of the modification of an existing establishment.
- Involves new development including transport routes, locations of public use and residential areas in the vicinity of establishments, where the siting or development may be the source of or an increase the risk or consequences of major accident.

¹⁸ Schedule 3 Part 2 to The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016 sets out the consultees for the Department. Part 2 paragraph 4(a) and (b) apply HSENI requirements and Part 2 paragraph 3(d) and (m) apply DAERA requirements.

11.5 NIEA is the main source of advice on risks to the environment of a proposal involving hazardous substances. Part 1, paragraph 2(d) and (m) require consultation when a development proposal involves:

- the refining of or storing of mineral oils and their derivatives
- the use of land for industrial processes including the processing, storing or distribution of hazardous substances or intensive livestock activities.

11.6 Given the potential significant consequences on human health and the environment, granting planning permission against the advice of the statutory consultee should not be done without the most careful consideration.

Public Participation Requirements

11.7 **Regulation 19** of the Hazardous Substances Regulations covers the public participation measures a competent authority must undertake when it receives a proposal for a development proposal in the vicinity of an establishment, the creation of a new establishment, modification of an existing establishment or where development may be a source of increased risk or consequences²⁰.

Notification Requirements

11.8 To facilitate the potential call in of a major application that may have implications for the storage of hazardous substances the Planning (Notification of Applications) Direction 2015 requires a council to notify the Department on major applications when there is a significant objection from a government department or a statutory consultee. Paragraph 3(ii) of the Schedule attached to the direction requires notification to the Department when a major application has been the subject of consultation with HSENI

²⁰ Regulation 19(5) of the Hazardous Substances Regulations defines a relevant project as development under Part 1 paragraph 3(a) and (b) of Schedule 3 of The Planning (General Development Procedure) (Amendment) Order (Northern Ireland) 2016.

and they have raised a significant objection or conditions they have asked to be imposed are not to be attached to the proposed decision being considered by the council²¹.

12.0 Development Plan

12.1 **Regulation 18** of the Hazardous Substances Regulations requires, when formulating development plans, account is taken of establishments where hazardous substances are used and stored, and the development of land within the vicinity of establishments where hazardous substances are used or stored, or may be present.

13.0 Registers

13.1 **Section 242(1)(a)** of the 2011 Act requires the council to keep a register or registers of any permission, consent or approval. This will include HSC and section 242(3) requires that such a register is available to the public at all reasonable hours. A HSC register will, however, contain details of potentially hazardous substances with a substantive threat to human health.

²¹ Further guidance on notification and call in can be found in Development Management Practice Note 13.

Annex A – Example of the Addition Rule

The following substances are present together at the example establishment:

Substance/Category	Amount Present	Controlled Quantity ²²	Fraction
Bromine	15 Tonnes	20 Tonnes	15/20
Chlorine	3 Tonnes	10 Tonnes	3/10
Ethylene oxide	2 Tonnes	5 Tonnes	2/5
Propylene oxide	1 Tonnes	5 Tonnes	2/5
H1 acute oxide	1 Tonnes	5 Tonnes	1/5
H2 acute toxic	5 Tonnes	50 Tonnes	5/50
P8 oxidising liquids and solids	3 Tonnes	50 Tonnes	3/50

None of these substances are present in amounts equal to or greater than its individual controlled quantity. However, 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 (Part 1, Section H – Health Hazards) 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 HSC would be required. Any consent granted by the council will be in respect of the amount of the hazardous substance present.

²² As denoted in Schedule 2 to the Planning (Hazardous Substances) (No. 2) Regulations (Northern Ireland) 2015 – Hazardous Substances and Controlled Quantities, Part 2 named substances, Column 2 Controlled Quantity.

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

$$3/50 + 1/5 + 1/5 = 0.06 + 0.2 + 0.20 = 0.46$$

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

Annex B – Sample Application Forms for Hazardous Substances Consent²³

Form 1- Application for Hazardous Substances Consent

**The Planning (Hazardous Substances) (No 2) Regulations 2015
Regulation 5**

Please complete in Block Capitals

- 1. Name and Address of Applicant(s)** (full and first name and surname required)

Full Name(s) _____

Tel No: _____

Fax No: _____

Mobile No: _____

E-mail: _____

Address of Applicant(s) _____

Including postcode: _____

Name and Address of Agent

Name of Agent: _____

Contact Name: _____

Tel No: _____

Mobile No: _____

Fax No: _____

E-mail: _____

- 2. Address or Location of Application Site**

Address/Location/Description (Include OSNI Six Figure Grid Reference)

²³ Whilst it is non-statutory, this form may assist applicants when applying for a HSC.

3. Substance(s) covered by application

(3a) Please list named substances falling within Part 1 of Schedule 1 to the 2015 (No 2) Regulations first, then list any substances falling within the categories in Part 2 of threat Schedule 1, finally list substances falling within the description in Part 3.

(3b) Substances falling within Parts 1 and 2 of Schedule 1 to the 2015 (No 2) Regulations may be listed under the relevant category or description or named specifically.

- Where a substance falls within Part 1 and 2, please list under Part 1 only
- Where a substance falls within more than one category in Part 2 please list under the category which has the lowest controlled quantity.
- Where a substance falling within Part 1 or 2 also falls within Part 3 please list under the part that has the lowest controlled quantity.

Table A				
Name or relevant Category or Description of Substance	Part and Entry Number in Schedule 1 to the 2015 (No 2) Regulations	Do you have a current consent* in respect of this substance?	If Yes, state quantity for which consent in respect of this granted.	Maximum quantity proposed to be present in tonnes.

*Hazardous Substance Consent.

4. Manner in which substances(s) are to be kept and used

For each substance, category or description of substance, covered by the application, please provide the following information, referring to the substance location plan where appropriate.

(4a) Insert substance entry number in column (1) below and tick whichever columns (2) and (3) is appropriate:

Table B		
Part and entry number in Schedule 1 of the 2015 (No 2) Regulations.	Storage Only	Stored and involved in an industrial process

(4b) For each vessel to be used for storing the substance(s) please give the following Information:

Vessel No. (1)	Entry Substance(s) to be stored	No. Installed above ground (2) (Yes/No)	Buried (Yes/No)	Mounded (Yes/No)	Maximum Capacity (Cubic Metres)	Highest vessel design temperature

5. Additional Information

(5a) If you have existing hazardous substances consents as referred to in Table A please enclose a copy of each consent with this application.

(5b) Has any application for hazardous substances consent or planning permission relating to the application site been made which has not yet been determined? YES/NO

(5c) Will any such application be submitted at the same time as this application? YES?NO

(5d) The main activities to be carried out on or proposed to be carried on, over or under the land to which the application relates:

(5e) How and where each relevant substance is to be kept and used:

(5f) How each relevant substance is proposed to be transported to and from the land to which the application relates

(5g) The vicinity of the land to which the application relates, where such details are relevant to the risks or consequences of a major accident

(5h) The measures taken or proposed to be taken to limit the consequences of a major accident

I/We* hereby apply for hazardous substances consent in accordance with the proposals described in the application.

Signed: _____ Date: _____

On behalf of: _____
(Insert name of applicant if signed by an agent)

NOTES

(a) The “**2015 No 2 Regulations**” are The Planning (Hazardous Substances) (No. 2) Regulations (Northern Ireland) 2015.

(b) The “**controlled quantity**” means the quantity specified for that substance in Column 2 of Parts 1, 2 or 3 of Schedule 1 to the 2015 Regulations, calculated in accordance with the notes to that Schedule.

(c) For Part 3, state the part only.

Notes to accompany sample HSC Application

1. In order to avoid delays in processing, applicants are asked to study these notes and the enclosed application carefully to ensure that all necessary particulars and plans are provided.

Application Forms

2. Applications for Hazardous Substances Consent can be made on **FORM 1**.
3. **THREE** copies of the form shall be submitted, together with three copies of a site map, a substance location plan, and the CERTIFICATE OF OWNERSHIP (as required by Regulation 7)²⁴.

4. **Notifications of owners**

The Planning Authority shall not entertain an Application for Hazardous Substances Consent unless it is accompanied by a CERTIFICATE OF OWNERSHIP (as required by Regulation 7).

5. The applicant /agent should complete and sign whichever of Certificate A to D is appropriate. The required Notice referred to in Certificate B and C shall, in the case of an Application for Hazardous Substances Consent, invite any owner on whom the Notice is served to make representations on the Application to the Planning Authority within 21 days of service of the Notice.

6. **Plans required**

Three copies of plans shall be submitted and shall be clear, intelligible and numbered:

- (a) **Site Map** – the site map shall be a map reproduced from, or based upon, an OS map with a scale of not less than 1:2500 which identifies the land to which the application relates and shows National Grid lines and reference numbers.
- (b) **Substance Location Plan** – the substance location plan shall be a plan of the land to which the application relates, drawn to a scale of not less than 1:1250 that identifies,
 - (a) any area of the site intended to be used for the storage of the substance(s):
 - (b) where the substance(s) is / are to be used in a manufacturing, treatment or other industrial process, the location of the major items of plan involved in that process in which the substance(s) will be present; and

²⁴ Certificate of Ownership is a prescribed form in Schedule 1 to The Planning (Hazardous Substances) (No 2) Regulations (Northern Ireland) 2015.

- (c) access points to and from the land.
- (c) **Change of Location Plan** - the change of location plan shall be a plan to which the substance relates reproduced from, or based upon, an OS map with a scale of not less than 1:1250 which identifies each area of the site under separate control after the proposed change of control.

7. Relevant Consent

Please include three copies of past consents where relevant. Relevant consent means the existing hazardous substances consent to which the application relates.

8. Fees for Hazardous Substances Consent as per Regulation 10 of The Planning (Fees) Regulations (Northern Ireland) 2015.

- (a) The fee for an application for a new consent is £340.
- (b) If the quantity specified in the application as the maximum quantity proposed exceeds twice the controlled quantity the fee shall be £427.
- (c) The fee for applications to remove conditions attached to hazardous substances consent is £340.
- (d) The fee for applications seeking the continuation of Hazardous Substances Consent where there has been a change in the person in control of any part of the land is £680.

9. Other Permissions

It should be clearly understood that the Application for Hazardous Substances Consent does not relieve the applicant of necessity of obtaining necessary planning permission if required.



Department for

Infrastructure

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