

## **Explanatory Memorandum to The Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2014.**

This Explanatory Memorandum has been prepared by Department for Housing and Regeneration and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

### **Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2014. I am satisfied that the benefits outweigh any costs.

Carl Sargeant  
Minister for Housing and Regeneration

20 February 2014

## **1. Description**

- 1.1 The Planning (Hazardous Substances) Act 1990 (the “1990 Act”) provides that the presence of or above a “controlled quantity” of a hazardous substance on, over or under land, requires hazardous substances consent.
- 1.2 The Planning (Hazardous Substances) Regulations 1992 (the “1992 Regulations”) (among other things) lists the substances which are hazardous for the purposes of the 1990 Act and prescribes the controlled quantities of those substances. This ensures that hazardous substances can be kept or used in significant amounts only after the hazardous substances authority has had the opportunity to assess the degree of risk arising to persons in the surrounding area, and to the environment.
- 1.3 These regulations contribute towards the implementation of a European Directive (known as the Seveso Directive). The Directive relates to the control of major accident hazards involving dangerous substances. It has health and safety aspects and planning aspects. The Directive provides a standardized system of classification, based on the risk posed by the substance. Due to uncertainty in relation to the correct classification of heavy fuel oils (“HFO”), a new Seveso Directive (2012/18/EU) has reclassified HFO as a petroleum product (see Article 30). This change will ensure that a standardized approach is taken to the risk posed by the substance and the level at which it is required to obtain consent.
- 1.4 The Directive requires this reclassification to be transposed into UK legislation by the 14 February 2014. This has been done in relation to health and safety legislation in relation to Wales by the Heavy Fuel Oil (Amendment) Regulations 2014 (S.I. 2014/162). The Planning (Hazardous Substances) Regulations 1992 also need to be amended in relation to Wales in order to effect a corresponding amendment in relation to land use planning.
- 1.5 The Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2014 add HFO to category 36 Petroleum products in Schedule 1 of the 1992 Regulations. This will classify HFO as a petroleum product and set the threshold for consent at 2,500 tonnes.

## **2. Matters of special interest to the Constitutional and Legislative Affairs Committee**

None.

## **3. Legislative background**

- 3.1 The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 5 and 40 of the Planning (Hazardous Substances) Act 1990.
- 3.2 The powers under sections 5 and 40 are now vested in the Welsh Ministers so far as they are exercisable in relation to Wales. They were transferred to the National Assembly for Wales by Article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) and subsequently transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32) by virtue of being “relevant Assembly functions” as defined in paragraph 30(2).

#### **4. Purpose & intended effect of the legislation**

##### **The issue**

- 4.1 HFO is a generic term used to describe a range of blended products based primarily on the residues from distillation or cracking units in oil refinery processes. HFO is a viscous liquid petroleum residue used predominantly in power stations, manufacturing and marine transport; it is also used as a primary fuel for industry in remote off-grid locations, as well as a back up fuel elsewhere, for example for boilers in hospitals.
- 4.2 Following changes in 2009/10 to its hazard classification (to ‘very toxic to aquatic organisms’), HFO became classified as ‘Dangerous for the environment’ for the purposes of hazardous substances consent. This meant that the presence of more than 100 tonnes of a HFO at a site required consent. This threshold is inappropriate given the risk posed by the substance and has brought unintended sites under the remit of the regulations.
- 4.3 In recognition of this, Directive (2012/18/EU) has (among other things) reclassified HFO as a petroleum product. This requires transposition into UK legislation in accordance with the timetable set by the directive.

##### **Purpose & intended effect**

- 4.4 The Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2014 transpose the land use planning aspect of Article 30 of European Directive 2012/18/EU into the relevant planning legislation in relation to Wales. They insert HFO within category 36 Petroleum products in Schedule 1 of the 1992 Regulations.
- 4.5 This will mean that the threshold at which consent is required for HFO is 2500 tonnes. This will decrease the number of sites which require hazardous substances consent for HFO.
- 4.6 Transitional provisions have been inserted to ensure that existing hazardous substances consents and other matters such as appeals and enforcement related to existing consents are not affected by the

amendment.

**Risks if legislation changes are not made**

4.7 If the proposed revisions to the regulations are not introduced, the following issues may arise.

*- Infraction costs*

4.8 Failure to transpose this aspect of Article 30 would mean that the UK would fail to fully transpose that requirement of the Seveso Directive with the attendant risk of infraction proceedings.

*- Increased burden on industry and Hazardous Substances Authorities*

4.9 Not introducing the new threshold will mean that hazardous substances consent will be required at a lower threshold than is considered necessary for the risk posed by the substance. This will mean that applicants and authorities will have to deal with applications that they really should not be troubled with, taking resources from elsewhere.

**5. Consultation**

5.1 Details of the consultation undertaken are included in the RIA below.

## PART 2 – REGULATORY IMPACT ASSESSMENT

### 6. Options

6.1 The following options are considered:

**Option One: Do nothing** - Continue to operate the current threshold for HFO making it a requirement for sites to apply for hazardous substances consent and regulatory authorities to enforce compliance.

**Option Two: Introduce heavy fuel oils as a named petroleum product in the Planning (Hazardous Substances) Regulations 1992** - To apply the provisions of the Seveso III Directive in order to introduce a lower threshold for HFO in line with levels being set in The Control of Major Accident Hazards Regulations 1999 (COMAH) and adjacent administrations.

**Option Three: Transpose Article 30 of the Directive within the ‘whole’ transposition process** - Continue to operate the current threshold for HFO and undertake the transposition for 1 June 2015 in-line with the Directive as a whole.

The options for implementation are constrained by the EU Directives as non-legislative methods are not considered to be appropriate. The do nothing option has been considered for the purposes of comparison.

### 7. Cost Benefit Analysis

7.1 The sectors most likely to be affected by the proposals for amending the threshold for HFO include:

- **businesses/industry** who require consent;
- **local authorities** who determine applications for hazardous substances consent; and,
- **the public** who may be affected by the change.

7.2 The following cost and benefit analysis has been undertaken for each of the above sectors.

#### Cost Analysis for Option One: Do nothing

7.3 Indirect and direct costs to:

##### Businesses/industry

- Should Wales retain the existing arrangements, significant disparity will occur between industry located in Wales and other administrations. This will compromise fair competition to the detriment of business located in Wales.

- The Control of Major-Accident Hazards Regulations 1999 (“COMAH Regulations”), and the 1992 Regulations as they apply to England, have been amended by the Heavy Fuel Oils (Amendment) Regulations 2014 to reflect the new threshold. Retention of the existing arrangements in Wales would create regulatory confusion as stakeholders may be uncertain which regulation or standard applies in their context. This confusion could lead to the additional time and expense to industry in understanding the requirements.
- Should Wales retain the existing arrangements for new applications, although the threshold is perceived as inappropriate, industry may be subject to enforcement costs.

#### Local authorities

- The COMAH Regulations, and the 1992 Regulations as they apply to England, have been amended to reflect the new threshold. Retention of the current standard in Wales will create regulatory confusion as stakeholders may be uncertain which regulation or standard applies in their context. This confusion could lead to additional time and expense to understand or explain the requirements.
- Should Wales retain the existing arrangements for new applications, although the thresholds is perceived as inappropriate, the regulator may, in certain circumstances, face demands to ‘enforce the law’ in accordance with the higher threshold. This could add additional enforcement costs to the regulator.

#### Public

- There are no identifiable public costs.

### **Benefit Analysis for Option One: Do nothing**

#### 7.4 Indirect and direct benefits to:

##### Businesses/industry

- There are no identifiable business/industry benefits.

##### Local Authorities

- Local authorities will retain the same level of revenue generated through hazardous substances consents.

##### Public

- This option would bring a potential benefit to Wales. The 1992 Regulations would require industry to go significantly beyond the minimum standard specified by Europe. The higher standard could lead to enhanced protection of people and the environment.

## **Cost Analysis for Option Two – Introduce heavy fuel oils as a named petroleum product in the Planning (Hazardous Substances) Regulations 1992**

### 7.5 Indirect and direct costs to:

#### Businesses/industry

- The transitional provision means that sites that have consent, or applied for consent, before these Regulations come into force will be subject to the Regulations as they currently exist. This may mean that a minor number of sites will need to comply with consents, where had they been subject to the new standards, they would not. The dangerous for the environment category covers a wide variety of substances, which includes HFO. It is not known how many of the 24 dangerous for the environment consents relate specifically to HFO. If this is assumed to be 50%, equalling 12 consents across Wales, it is assumed that 10% would be subject to stricter controls than are required.

#### Local authorities

- The amendment will reduce the revenue generated through the number of consents that are required. The amendment is limited to HFO only and there are no specific consents that name HFO in Wales. Only 24 consents have been granted under the category dangerous for the environment since the regulations came into force in 1992. The dangerous for the environment category covers a wide variety of substances, which includes HFO. It is not known how many of sites with these consents hold HFO. If this is assumed to be 50%, this provides 12 consents granted across Wales since 1992. Given the small number of consents, only seven HSC were granted for all chemicals across Wales in the past year the impact upon local authorities' income is likely to be limited.

#### Public

- The reduction in threshold increases the risk to the public and the environment. However it should be noted that the current threshold is inappropriate for the hazard risk posed by the substance.

## **Benefit Analysis for Option Two: Introduce heavy fuel oils as a named petroleum product in the Planning (Hazardous Substances) Regulations 1992**

### 7.6 Indirect and direct benefits to:

#### Businesses/industry

- Setting the standards in the hazardous substances regulations at the level set within COMAH provides legislative clarity. Setting equal standards will establish a clear threshold in which HFO is considered to form a potential hazard and what approval is required. Whereas dual standards could lead to confusion over what regulations are appropriate to a scheme or site.

- The transitional provisions, although retaining the old treatment of HFO, has an impact on a small number of sites is also considered to provide certainty to industry. In practice the Regulations provide certainty over the validity of an existing consent that is granted for HFO in combination with other substances.
- The new threshold for HFO will reduce the burden on industry, and are expected to effectively exclude certain sectors that are not considered a major hazard.
- The Directive applies on an EU basis and it is understood that all nation states will transpose the requirements around the 14 February 2014 deadline. Amendment of the regulations will ensure competition between industries located in Wales and other areas occurs on a level playing field.

#### Local authorities

- The setting the standards in the hazardous substances regulations at the level set within COMAH provides legislative clarity. Setting equal standards will establish a clear threshold in which HFO is considered to form a potential hazard and what approval is required. Whereas dual standards could lead to confusion over what regulations are appropriate to a scheme or site.
- The transitional provisions, although having an impact on a minor number of sites are also considered to provide certainty over the validity of a consent that is granted for HFO in combination with other substances.
- The local authority may see a reduction in applications for new sites seeking consent to store HFO, this could lead to a reduction in processing costs.

#### Public

- There are no identifiable public benefits.

### **Cost analysis for Option Three: Transpose Article 30 of the Directive within the 'whole' transposition process**

#### 7.7 Indirect and direct costs to

##### Businesses/Industry

- The identifiable costs will replicate those under Option one, until transposition in which case they will change to those identified under Option two.

##### Local authority



- The identifiable costs will replicate those under Option one, until transposition in which case they will change to those identified under Option two.

#### Public

- The identifiable costs will replicate those under Option one, until transposition in which case they will change to those identified under Option two.

### **Benefit analysis for Option Three: Transpose Article 30 of the Directive within the ‘whole’ transposition process**

#### 7.8 Indirect and direct benefits to:

##### Businesses/industry

- The identifiable benefits will replicate those under Option one, until transposition in which case they will change to those identified under Option two.
- Further positive action is found in combining the work as this may reduce confusion amongst stakeholders over the process of consultation and deadlines for complying with the new Directive.

##### Local Authority

- The identifiable benefits will replicate those under Option one, until transposition in which case they will change to those identified under Option two.
- Further positive action is found in combining the work as this may reduce confusion amongst stakeholders over the process of consultation and deadlines for complying with the new directive.

##### Public

- The identifiable benefits will replicate those under Option one, until transposition in which case they will change to those identified under Option two.

### **Analysis of Other Effects and Impacts**

#### *Voluntary Sector*

- 7.9 The proposals are likely to have no impact on the voluntary sector. The sites affected by the amendments are operated by businesses primarily in the chemical, petroleum and marine transport sectors.

#### *Equality*

- 7.10 The Seveso 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 and marine transport sectors.

- 7.11 We do not consider that these regulations will affect any racial group disproportionately, or have any adverse effects on health. We do not consider they will impact unfairly on people in rural or remote areas.

*Sustainable Development*

- 7.12 The proposals will not have any significant adverse impact on sustainable development.
- 7.13 The introduction of a new threshold will remove some businesses from the requirement to obtain hazardous substances consent. This will provide greater regulatory freedom for businesses and may also assist in bringing forward development proposals.
- 7.14 The reduced threshold will potentially have some impact on the public and environment as the 'risk' of some sites will not be considered through the process.

*The Welsh Language*

- 7.15 The proposals do not have any adverse implications for the Welsh language.

*Biodiversity*

- 7.16 The Welsh Ministers must have regard to duties under section 11A of the National Park and Access to the Countryside Act 1949 and section 85 of the Countryside and Rights of Way Act 2000. To the extent (if any) that the Regulations may affect land in any national park or area of outstanding national beauty, the new threshold in the Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2014 is considered to be reasonable in the light of the danger posed by HFO and is implemented in pursuance of an obligation under EU law.

## **8. Consultation**

- 8.1 A consultation paper was issued on 23 September 2013 setting out the Welsh Government's proposals for amendments to schedule 1 to the 1992 Regulations in relation to HFO.
- 8.2 A 12 week period was provided for the submission of responses to the consultation, this ended on 18 November 2013. The consultation paper and its annexes (included the draft Regulatory Impact Assessment) were made available on the Welsh Government's web-site. In addition, stakeholders from the private, public and third sectors were notified in writing.
- 8.3 The consultation exercise generated three responses in full support of our proposals. The low turn out indicates the non-contentious nature and general support of the proposals. A full analysis of these responses is provided in the Summary of Responses document.

## **9. Competition Assessment**

- 9.1 A competition filter test has been applied to the proposed amendments. The results of the test suggest that the proposals are unlikely to have any significant detrimental effect on competition.

## **10. Post implementation review**

- 10.1 Due to the limited scope of the change and the wider implementation of Seveso III required by the 1 June 2015 the Welsh Government will undertake no formal monitoring of this change.