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Climate Change, Environment and Infrastructure Committee

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Annex to the letter of 31 August 2021 from the Minister for Climate Change regarding the Hazardous Substances (Planning) Common Framework

Hazardous Substances (Planning) Common Framework

CP 508

Hazardous Substances (Planning) Common Framework

Presented to Parliament by the Secretary of State for Housing, Communities and Local Government by Command of Her Majesty

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Contents

Hazardous Substances (Planning) Common Framework

Part 1: What we are talking about

1. Policy area

Hazardous Substances Planning encompasses the elements of the Seveso III Directive (2012/18/EU) which relate to land-use planning (LUP), including: planning controls on the presence of hazardous substances and handling development proposals both for hazardous establishments and in the vicinity of such establishments.

The Seveso III Directive ('the Directive') has the objective of preventing on-shore major accidents involving hazardous substances, as well as limiting the consequences to people and/or the environment of any accidents that do take place. 'Hazardous substances' in the legislation include individual substances (such as ammonium nitrate), or whole categories of substances (such as flammable gases). The Ministry of Housing, Communities and Local Government (MHCLG) and devolved administrations (DAs) are responsible for the LUP requirements of the Directive. In accordance with the retained Seveso III Directive, the UK is obliged to ensure the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in land-use policies. This requires controls on the siting of new establishments and modifications to establishments which fall within scope of the Directive, and on new developments and public areas in the vicinity of

such establishments. It also requires these considerations to form the development of relevant policy and includes requirements on public involvement in decision making, including relevant plans and programmes.

When implementing the original EU Directive in this regard, a distinction was made between those elements relating to on-site controls for establishments to minimise the risk of a major accident (those now covered by the Control of Major Accident Hazards (COMAH) Regulations 2015 (GB) and their Northern Ireland equivalent) and the residual off-site risk. The latter is primarily the risk of a major accident arising due to the proximity of hazardous substances to other development or sensitive environments (i.e. if there were an accident due to on-site failures, what the risks would be where certain developments or habitats are or would be close by). This latter issue was considered to be a spatial planning matter to be addressed through planning controls.

Subsequently, LUP matters generally in the UK were devolved. To summarise; the significant majority of the Directive relates to COMAH which focuses on ensuring businesses take all necessary measures to prevent and mitigate accidents within their establishments. What is referred to here as the hazardous substances planning regime focuses solely on where these establishments are sited, and what is sited around them (a much smaller aspect of the Directive).

Very broadly the hazardous substances regime;

a) sets limits on the amount of dangerous substances that can be stored/used in an establishment before that establishment must apply for consent to do so from their local planning authority (usually the local authority);
b) requires the preparation of planning policies to take into account the aims and objectives of the Directive; and
c) requires local planning authorities to comply with various consultation requirements and consider any major accident hazard issues before they can grant planning permission in relation to establishments, to certain types of development near such establishments, and hazardous substances consent.

To note, the hazardous substances planning regime does not ban any substance, or any development around establishments containing hazardous substances. All decisions rest with local planning authorities, or in some cases, called-in applications or appeals, the Minister(s) in England, Wales, Northern Ireland or Scotland.

It should also be noted that LUP controls on hazardous substances existed in Great Britain and Northern Ireland for around a decade before becoming an EU requirement. This is an issue on which the UK has led the way.

2. Scope

The scope of this Common Framework is any legislation which applies the LUP elements of the retained Seveso III Directive in the UK. At the time of writing, the following

legislation constitutes the main body of legislation that applies these elements of the Directive, future regulations applying regulations in this area are also expected to be in scope once established:

In England

- The Planning (Hazardous Substances) Act 1990
- The Planning (Hazardous Substances) Regulations 2015
- The Town and Country Planning (Development Management Procedure) (England) Order 2015

In Scotland

- Planning (Hazardous Substances) (Scotland) Act 1997
- The Town and Country Planning (Hazardous Substances) (Scotland) Regulations 2015
- The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013

In Wales

- The Planning (Hazardous Substances) Act 1990
- The Planning (Hazardous Substances) (Wales) Regulations 2015
- The Town and Country Planning (Development Management Procedure) (Wales) Order 2012

In Northern Ireland

- The Planning Act (Northern Ireland) 2011
- The Planning (Hazardous Substances) (No.2) Regulations (Northern Ireland) 2015
- The Planning (General Development Procedure) Order (Northern Ireland) 2015

The Directive's minimum requirements are common across England, Scotland, Wales and Northern Ireland. Whilst the different administrations are currently free to use their devolved planning powers to increase controls beyond the minimum requirements of the Directive, this has not happened in any substantive way.

Now the UK has left the EU this set of common minimum requirements may cease to be in effect and the different administrations will have wider scope to use their planning powers to make changes.

There is an existing Memorandum of Understanding (MOU) between the DAs and the various bodies that make up the COMAH Competent Authority (see section 10), which applies to the COMAH aspects of the Directive. In place of a full framework the MOU is being updated to reflect the situation post-Exit. The COMAH MOU will operate alongside the Hazardous Substances (Planning) Common Framework. Despite the policy links between COMAH and LUP hazardous substances, it is not felt that there is any significant overlap between this framework agreement and the updated COMAH MOU, which explicitly states that LUP requirements are separately implemented. This is also the case with the hazardous substances

planning regime and the rest of the planning system. The hazardous substances consent process sits outside of the development consent process (i.e. the consideration of applications for planning permission), and the current requirement for planning authorities to consult HSE or HSE NI if their development is in a consultation zone does not overlap with other requirements (i.e. if this were altered in any way there would be no significant knock-on effects further along the planning system).

- The primary focus of this agreement is to maintain the principles and objectives of retained EU legislation across the hazardous substances planning regime, that is, primarily, to prevent on-shore major accidents involving hazardous substances and limit the consequences to people and/or the environment of any accidents that do take place. It also seeks to, wherever possible, facilitate the sharing of information on a multilateral basis.

- Having left the EU, the UK will still be party to the following relevant international agreements:

  - The Convention on the Transboundary Effects of Industrial Accidents is a UNECE convention designed to protect people and the environment from the consequences of industrial accidents. Parties are required to, amongst other things, "*take appropriate measures and cooperate…to protect human beings and the environment against industrial accidents…shall ensure that the operator is obliged to take all measures necessary for the*

safe performance of the hazardous activity and for the prevention of industrial accidents…take measures, as appropriate, to identify hazardous activities within its jurisdiction and to ensure that affected Parties are notified of any such proposed or existing activity"[1]. The Convention also sets out detailed requirements when it comes to siting of/ around hazardous establishments as well as setting out the types and quantities of substances that should be considered hazardous.

- The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the provisions necessary so that public authorities (at national, regional or local level) will contribute to these rights to become effective.

3. Definitions

All technical definitions used in this framework agreement will reflect those set out in legislation implementing the retained Seveso III Directive.

In this framework agreement the following definitions are also used:

1 Taken from Article 3 and Article 4 of The Convention on the Transboundary Effects of Industrial Accidents.

- JMC(EN). The JMC (EN) Joint Ministerial Committee (Europe Negotiations) is a subcommittee of the JMC that was established in 2016 to facilitate discussion between Westminster and the devolved governments over the UK's EU Exit strategy.
- HSE & HSE NI. The Health and Safety Executive and Health and Safety Executive Northern Ireland are government agencies responsible for the encouragement, regulation and enforcement of health and safety

Part 2: Proposed Breakdown of Policy Area and Framework

4. Summary of proposed approach

It is important to first note the context in which the proposed approach has been developed. Divergence is already entirely possible across the UK. However, there are currently a number of restrictions on what the United Kingdom Government (UKG) and DAs can amend based on what has been set at EU level. The key restrictions are that the UKG and DAs:

i) are unable to change the definition of what an establishment is (in short, a location where dangerous substances are present in significant quantities);
ii) must not lower standards on what constitutes a dangerous substance (i.e. by removing categories of substances or individual substances from the list, or raising the threshold at which the quantity becomes significant and the establishment falls into scope of the regime);
iii) must ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment are taken into account in their land-use policies, through controls on the siting of new establishments and new developments close to establishments;
iv) must set up appropriate consultation procedures to ensure that operators provide sufficient information on the risks arising from the

establishment and that technical advice on those risks is available when decisions are taken; and

v) facilitate public involvement at various stages of decision-making on relevant applications for consent or plans and programmes.

In simplified terms, what may become possible following the UK's exit from the EU that was not possible before is that the UKG and DAs will have the powers within a domestic context to relax requirements on the level of substances that can be held before triggering the regime and relax the process around what is required once the regime is triggered.

It is considered that whilst a framework agreement is appropriate for the hazardous substances planning regime, it should be non-legislative. This framework agreement will set out the principles of engagement between the UKG, DAs, HSE and HSE NI where changes to legislation are concerned (see section 6 for more details). This view is guided by the overarching principle established by JMC(EN); that any framework agreement should secure the proper functioning of the regime whilst at the same time respecting the devolution settlements. It is also guided with reference to the priorities that JMC(EN) list as key, that any framework should be established where it is necessary to:

- enable the functioning of the UK internal market, while acknowledging policy divergence

The hazardous substances planning regime is not

significantly different from devolved planning controls generally – it is about consenting the locations of substances with major accident hazard potential and development around those locations. As stated in section 1, establishments which store certain amounts of certain substances or developers looking to build near such establishments will be required to seek consent from a local authority. The regime is not focused on banning activities or making a substance illegal in a general sense. As a result, (and in a scenario in which the non- regression principle did not apply) the biggest potential discrepancy would be where, for example, one administration removed controls for a certain substance completely, where across the border, operators would need to go through the hazardous substances consenting process with their local authority to hold the substances at a site in the same quantities. However, due to the nature of the regime this would bring very limited economic benefits – relaxed hazardous substances standards would not bring a significant enough benefit to operators to influence which administration they set up business in to the point where this would distort the internal market. Obtaining hazardous substances consent is a relatively quick and inexpensive process for operators/developers; the fee in England for making an application is £200-250, in Wales it is £200-400, in Scotland it is £500-1000, and in Northern Ireland it is £300-750. In addition, a hazardous substances authority must inform an applicant of a decision within 8 weeks in England, Wales and Northern Ireland. In Scotland it is 2 months. This period can be extended by an agreement in writing between the applicant and the planning authority. Industry stakeholders have been clear that the current

processes play an important role in enshrining vital safeguards against major accidents.

As such, reducing standards in this way is not something that industry has been pushing for or is likely to pursue and the proposed approach is considered appropriate. However, as with all workstreams, further arrangements will need to be considered at a higher level to manage any such impacts on the internal market within this – or related – policy areas.

- ensure compliance with international obligations

The UK is a signatory to two international agreements relevant to the hazardous substances planning regime (as mentioned in section 2), the Aarhus Convention and the Convention on the Transboundary Effects of Industrial Accidents. The latter in particular cements many of the requirements of the current regime in international law, therefore any significant stripping back of the hazardous substances planning regime could result in a breach of international obligations. This presents limits on what the UKG can do as the party to the treaties, but also constrains the DAs. In very extreme cases the Secretary of State has step-in powers already built into devolution settlements where there is a potential breach of international law, although we do not envisage these forming any part of the framework agreement. A non-legislative framework agreement would provide the appropriate forum for any policy changes to be addressed, where anything of concern can be flagged and any necessary dispute resolution measures (see section 13) can be put in place.

In the event that either of the two relevant international agreements are amended UKG will decide whether the amendments should be ratified. Before ratifying any international agreement, the DAs must be consulted. If the legislation of one or more administrations needs to be brought into line with the requirements of any new amendments, then this must be finalised before any amendment can be ratified. Where necessary, any disagreements should be resolved through the dispute resolution mechanism as set out in this framework.

This framework agreement does not impact on the Belfast Agreement.

- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties

Not applicable. Through discussions we have not identified any differences between administrations on hazardous substances that would have an impact on the UK's ability to negotiate (etc.) trade agreements and treaties. Negotiation of any new trade agreements or treaties would in any event need to take account of where devolved competence means there are or could be divergence across the UK in matters pertinent to that particular treaty or agreement.

- enable the management of common resources

HSE/HSE NI operate across the different planning jurisdictions (HSE NI covering Northern Ireland), and so

any divergence could affect them, and so any framework agreement encouraging and providing a forum for discussion would be beneficial. However, potential changes to the regime with significant impacts on HSE/ HSE NI are already a potential feature of the existing regime within the EU framework and are not triggered by EU exit. There is not a new significant issue being created on this point that would need to be addressed by legislative means.

- administer and provide access to justice in cases with a cross-border element

Not applicable. Any differences between UKG and DAs on hazardous substances planning regime will not have an impact on the UK's ability to administer or provide access to justice.

- safeguard the security of the UK

Differing hazardous substances planning controls in parts of the UK are already a possibility, i.e. not affected by EU Exit, and these differences do not pose a threat to UK security.

Reducing protections below current levels could become possible, which could increase the risk to safety within an area (acknowledging the limited risk of cross-border impacts) e.g. by allowing hazardous substances near a sensitive development (to note, safety measures within establishments would still be regulated through non-planning requirements under the Control of Major

Accidents Hazards Regulations 2015 or their equivalent). As stated previously, hazardous substances powers are broadly analogous to other devolved planning powers in this regard and as such should be seen as a matter for individual administrations – divergence in and of itself does not pose a risk to the security of the UK as a whole.

According to the JMC(EN) principles, a legislative framework agreement should be considered only where absolutely necessary. As set out above, a potential legislative framework for hazardous substances would not meet these criteria. According to the principles set out by JMC(EN) and the objective of securing the proper functioning of the hazardous substances planning regime whilst at the same time respecting the devolution settlements, this Common Framework will not be a legislative vehicle but rather a reflection of the discussions that have taken place and agreements reached on ways of working going forward, post the UK's departure from the European Union.

Other considerations

- the devolved regimes predate the current version of the Directive, and in certain cases go further than its minimum requirements; this demonstrates the lack of appetite to legislate below its minimum standards.
- the HSE/HSE NI have a cross-cutting role which provides a common evidence base which all parties look to; with policy development across all four administrations informed by HSE/HSE NI advice, differing approaches would be unlikely.

Current potential for divergence – Planning authorities and Ministers in the various home nations are free to make decisions on applications as they see fit, provided major accident hazard potential forms part of the consideration. Although decision-making is devolved, which provides the scope for divergence, very little has occurred. In light of past practice, this framework agreement is sufficient to manage divergence.

5. Detailed overview of proposed framework: legislation (primary or secondary)

Whilst no legislation is considered to be necessary to put this framework agreement in place, the following 'operability' regulations have been made to ensure that the regime continues to function appropriately following Exit:

- The Planning (Hazardous Substances and Miscellaneous Amendments) (EU Exit) Regulations 2018. For England
- The Planning (Environmental Assessments and Miscellaneous Amendments) (EU Exit) (Northern Ireland) Regulations 2018
- The Town and Country Planning (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019
- The Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019
- The Planning (Environmental Assessments and Technical Miscellaneous Amendments) (EU Exit) Regulations (Northern Ireland) 2020

These regulations are fully independent of this framework.

6. Detailed overview of proposed framework: non-legislative arrangements

The UKG and the DAs have agreed a set of nine principles for future ways of working that would make up the agreement:

i. In the absence of EU requirements applying to the UK, the nations of the UK will consider appropriate evidence and expert advice (for example that of the Control of Major Accidents Hazards (COMAH) competent authority and industry bodies), as appropriate, as regards the substances and quantities to which hazardous substances consent should apply[2].
ii. Administrations will respect the ability of other administrations to make decisions (i.e. allowing for policy divergence).
iii. Administrations will consider the impact of decisions on other administrations, including any impacts on cross-cutting issues such as the UK Internal Market.
iv. Wherever it is considered reasonably possible, administrations agree to seek to inform other administrations of prospective changes in policy one month, or as close to one month as is practical, before making them public.
v. Administrations will ensure an appropriate level of public transparency in decision making that leads to policy changes.

2 Competent Authorities are detailed in Section 10

vi. Parties will create the right conditions for collaboration, by for example ensuring policy leads attend future meetings.
vii. Future collaborative meetings will be conducted at official level and on a without prejudice basis.
viii. In order to broaden the debate at future collaborative meetings, parties will ensure that different perspectives are present.
ix. Those attending future collaborative meetings recognise the importance of how collaboration is approached.

7. Detailed overview of areas where no further action is thought to be needed

N/A

Operational Detail

Part 3: Proposed Operational Elements of Framework

8. Decision making

Following the UK's Exit from the EU, all decision making under the relevant devolved competences (within the scope of the framework agreement) will fall to the UKG and the DAs within their respective territories, following usual procedures but taking into account the principles set out in section 6. An exception will be where there is a desire for any proposed policy changes to be applied across more than one territory. In such a scenario, administrations will work together to determine the best way to coordinate these changes. The procedure will be similar to that taken forward in previous coordinated work on transposing regulations following updated Directives, or the preparing of operability regulations in advance of EU Exit. Any scenario will require a slightly different approach and timeframe, so this framework agreement does not seek to be prescriptive in how work should be carried out; current arrangements for coordinating work on the implementation of the Seveso III Directive are also ad hoc.

Usually, HSE acts as the coordinator for implementing new requirements from revision of, or amendments to the Directive and engages with planning representatives from the various administrations to coordinate implementation. They may play a similar role in future but will have no explicit responsibility to do so. As other issues arise, contact is made, again on an ad hoc basis, to seek

to resolve these. Ministers responsible for planning individually sign off implementing legislation or changes to procedures. The framework agreement will also take account of any future arrangements for the functioning of the UK Internal Market, but the Hazardous Substances (Planning) Common Framework is considered non-market as it focuses on Health and Safety. It does not have a strong interaction with any relevant market considerations.

To facilitate the sharing of information where appropriate, and as a forum to discuss wider policy issues, it is envisaged that a working group of the policy leads in each administration will hold a six-monthly telephone conference to discuss any issues and share learning. This would not rule out issues being raised for consideration by the working group between meetings if necessary. The initial meeting will be arranged and chaired by UKG, with arrangements for further meetings discussed as an agenda item. Meetings will discuss any post-Exit policies that have been implemented at either the UK or devolved level, how successful they have been for example, and whether there had been any unexpected impacts. In England, it is expected that the results of these reviews will be fed into the more formal post-implementation review that is required by the Planning (Hazardous Substances) Regulations 2015 at five-year intervals.

9. Roles and responsibilities of each party to the framework

See key principles (box 6).

10. Roles and responsibilities of existing or new bodies

In Great Britain the COMAH competent authority (CA) is made up of the relevant safety body (HSE – or the Office for Nuclear Regulation (ONR) at nuclear establishments), acting jointly with the appropriate environment agency for the locality, i.e. the Environment Agency in England, the Scottish Environment Protection Agency in Scotland and Natural Resources Wales in Wales. In Northern Ireland the CA is HSE NI and the Northern Ireland Environment Agency of the Department of Agriculture, Environment and Rural Affairs. The CA determines the nature and severity of the risks to the environment and people in the surrounding area from the hazardous substances in the application and advises the Hazardous Substances Authority on whether they should grant consent. They also have responsibility for advising on any changes to the lists of controlled substances and other policy updates that may impact the hazardous substances planning regime. In relation to planning applications, HSE NI is a statutory consultee and provides advice to planning authorities in Northern Ireland.

HSE have the lead on the Seveso III Directive in Great Britain, and post-Exit will be taking up several of the functions that currently sit with the European Commission in relation to COMAH, this will include the responsibility for advising on any changes to the lists of controlled substances or other policy updates that may impact the hazardous substances planning regime. Changes in their policy, e.g. on risk or the way they engage in the planning system ultimately rest with the UK Secretary of State for

Work and Pensions. Beyond this proximity to the regime, and as a potential source of advice, neither HSE/HSE NI or the CA have any official role within the structure of this framework agreement.

They will continue in their current role and with their current responsibilities following the UK's Exit from the EU and have been kept informed throughout the process of developing this framework agreement.

11. Monitoring and enforcement

As no legislative arrangements are considered necessary then enforcement measures are not appropriate. In place of formal monitoring measures there will be regular meetings to review the framework agreement (see sections 8 and 12.) Policy officials acknowledge that there are likely to be ongoing reporting requirements associated with being part of the frameworks work programme and will cooperate with all relevant requests and commissions.

12. Review and amendment

A review meeting between UKG and DAs, arranged by UKG, will be held one year after the day the framework agreement comes into effect. This will be to consider the ongoing application of transposing domestic legislation across the different administrations. The meeting would focus in particular on any issues encountered and allow parties to provide a forward look of any changes that they are considering. The review will also involve engagement with relevant legislature committees and

other stakeholders, as considered proportionate, including appropriate competent authorities, local authorities, industry and environmental groups.

If any party to this framework agreement feels an early review is necessary, then a request can be made at official level. It is expected that such requests also be resolved at official level, and that such requests be accommodated unless there is a valid reason for refusal. Timeframes can be discussed on a case-by-case basis, but unnecessary delay should be avoided. If an agreement cannot be reached, then the dispute resolution procedure set out in section 13 will apply.

After an initial review a more permanent arrangement for recurring meetings involving UKG and DAs on this framework agreement will be decided based around a timeframe that is considered appropriate.

13. Dispute resolution

The intention under this framework agreement is that there will be a regular group at working level to discuss and work through any issues at an early stage.

The intention is for this process to remain flexible and adaptable to individual situations, and this precludes us from affixing timescales to each stage. However, resolving issues as quickly as possible will be a key priority and escalation will always be seen as a last resort.

This process would be as follows:

Policy leads. Where officials become aware of potential issues or areas of disagreement via any means the first step will be to seek to resolve this amongst policy leads without escalation. This will usually be resolved via discussion with equivalents in other administrations to determine the source of the disagreement, to establish whether it is a material concern and to work through possible solutions to the satisfaction of all parties. It is expected that most disagreements would be resolved at this point.

Director level/Chiefs of planning. Where disagreements cannot be resolved amongst policy leads the next stage will usually be to escalate the issue to director level.
At this stage directors can decide whether it would be appropriate to arrange a meeting with counterparts across administrations. Alternatively, or after such a meeting, directors may determine that the issue cannot be resolved at this stage at which point the involvement of Ministers will be required.

Portfolio Ministers. This is expected to be a last resort for only the most serious issues and where all alternatives have been exhausted. In very extreme cases the Secretary of State has step-in powers, already built into Devolution settlements, although we do not envisage these forming any part of the framework agreement.

HSE/HSE NI. They may be included at multiple stages of the process, potentially flagging issues, or providing advice on possible solutions.

Agree to disagree. It does not always follow that where disagreements emerge these will need to be escalated or a ‘solution’ need to be established. This framework agreement will not prejudice the right of administrations to ‘agree to disagree’ in certain circumstances.

Agreed outcomes of the ongoing intergovernmental relations review will be reflected in this framework.

Part 4: Practical Next Steps and Related Issues

14. Implementation

This framework agreement will take effect once agreed by all parties and approved by Ministers. The provisional framework agreement is currently in effect.

On 3 July 2019 Cabinet Office published a draft of this framework agreement to serve as a pilot alongside a wider update on the progress of the frameworks workstream in general.

On 3 September 2020 the provisional framework agreement was approved by the JMC(EN).

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