



Environment

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My ref:

Your ref:

The Rt Hon Sir Geoffrey Howe QC MP
Lord President of the Council
Privy Council Office
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| November 1989

Dear Lord President *into CAS?* *with request of* *revised*

Following my letter of 10 October, I have received the views of colleagues on my proposals for including provisions on the release of genetically modified (manipulated) organisms in the Environmental Protection Bill.

Colleagues were generally content that I should proceed to instruct Parliamentary Counsel to draft appropriate provisions. However, Norman Fowler, Nicholas Ridley and John Gummer had certain reservations on the scope of the proposed legislation and its interface with existing legislation. My Department has now reconciled these concerns at official level and revised the draft instructions to Counsel accordingly. In particular, agreement has been reached that the Bill will provide for a general duty to protect the environment against GMOs, and for appropriate systems for release consent, etc to be established by regulations. We have confirmed that while insurance may legitimately be a condition of individual consents, it is not a matter to be referred to in the Bill. And very importantly, we have dealt with the problem of the disclosure of potentially sensitive information by agreeing that the circumstances in which disclosure may take place will be set out in regulations.

I enclose a copy of the revised instructions. Unless I hear from colleagues to the contrary, I intend sending these to Parliamentary Counsel by lunchtime tomorrow. My office will contact the relevant Private Offices tomorrow morning to confirm that everything is now in order.

Copies of this letter, together with the draft instructions to Counsel, go to the Prime Minister, other members of "H" committee, Tom King, John Gummer and Sir Robin Butler.

CE J Bosh

PP CHRIS PATTEN

(Approved by the Secretary of State and signed in his absence)



Recycled Paper

ENVIRONMENT PROTECTION BILL

GENETICALLY MODIFIED ORGANISMS

Department of the Environment and the Welsh Office

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ENVIRONMENT PROTECTION BILL

GENETICALLY MODIFIED ORGANISMS

Department of the Environment and the Welsh Office

Instructions to Parliamentary Counsel

1. Introductory

(i) Outline of the Department's proposal

Genetic engineering, or modification, is a relatively new technology. It consists of a variety of different techniques for altering genetic material. These techniques may have little in common other than being different from traditional methods of breeding animals and plants. The resulting organisms (GMOs), be they animals, plants or other organisms such as viruses, may range in size from farmyard animals to the sub-microscopic. The heart of the Department's proposal is to control the import, containment, or release to the environment of GMOs by requiring persons who perform any of these operations in prescribed cases, in the course of an undertaking, to obtain a consent (which may contain limitations and conditions) from the Secretary of State. The second string to the Department's bow is to provide that any person importing, containing or releasing a GMO to the environment in the course of an undertaking is to be under a duty to employ BATNEEC (elaborated below) to ensure that significant harm to the environment is prevented. Further, there is to be

a requirement for prior notification to the Secretary of State in prescribed cases of such operations. We envisage making a single, comprehensive set of regulations setting out the details of the regime.

(ii) The environmental problem presented by GMOs

The structure of genetic material, which is fundamental to all living things, came to be understood less than forty years ago, and the techniques for artificially altering an organism's genes to modify, add to or remove from the organism's characteristics have been exploited only within the last twenty years. Experience so far indicates that the potential hazard posed to humans by GMOs is not as great as was feared at first. However, the hazard that such organisms (for example, breeding in the wild) might pose to the environment is considerable. There are precedents (admittedly, not concerning GMOs) which show the sort of damage that might occur: rabbits introduced to Australia in the nineteenth century have had a devastating effect on the landscape; the myxoma virus, which is endemic in South America, ran out of control when introduced to European and Australian rabbits; and forty pairs of starlings introduced to Central Park, New York, in 1890 are the ancestors of the starling population of America, which is now a considerable pest. The lessons of past misjudgements point to the need to get the new GMO technology off on the right footing, and in particular to the need to promote public confidence. To be effective, the regulatory framework needs to provide a secure basis on which industry can develop whilst protecting the environment from

potential hazards. Development has already reached the stage where GMOs are routinely employed in contained factory processes, and thus may reach the wider environment in waste streams or by accident. Other GMOs, designed to carry out specific functions in the wider environment, for example pollution clean up and pest control, are reaching the stage where either experimental releases are required or products are ready for marketing.

(iii) Related initiatives and consultation paper

The Royal Commission on Environmental Pollution published their report on the release of genetically engineered organisms to the environment in July. This proposed that, at the current state of knowledge, releases should only take place with the consent of the Secretary of State for the Environment and the Health and Safety Commission ("the HSC"), exercising their responsibilities for protecting the environment and human safety respectively. In formulating these proposals, the Department has had regard to this report. The European Community has reached agreement in principle on two draft Directives, one on the deliberate release of GMOs to the environment, and the other on the contained use of GMOs. The Department intends that the provisions requested herein will suffice to empower the Secretary of State to implement those aspects of these Directives which relate to environmental protection when this becomes necessary. The Secretary of State for Employment will make regulations under powers contained in the Health and Safety at Work etc Act 1974, c. 37, to implement those aspects of these Directives which relate to human safety. Those regulations will also require a

system of consents relating to GMOs. Together with the Welsh and Scottish Offices, the Department issued a paper for public consultation in June entitled "Proposals for additional legislation on the intentional release of GMOs". Copies of the RCEP Report, the two Directives, and our consultation paper are available should Counsel wish to see them.

(iv) Proposed arrangements for operating the control regime

Counsel may wish to be aware of the Department's plans for implementing the scheme. An amount of legislation, both primary and secondary, already exists which deals with GMOs, including the Genetic Manipulation Regulations 1989 (No 1810) (two copies enclosed), which is operated by the Health and Safety Executive (the "HSE"). The Department intends to operate the new control regime in co-operation with the HSC. We propose to establish a single advisory committee which will advise both the Secretary of State and the HSC in relation to the granting of consents. In order to minimise the burden on industry, it is intended that an applicant will be enabled to apply for any necessary consents on a single application form, and that the consents will also be issued in a single document. Counsel may wish to note that there is an interrelationship between human and environmental safety: actions serving to increase human safety could interact with actions serving to increase environmental safety. Thus it will be appropriate for the advisory committee to consider the applications to the Secretary of State and to the HSC together.

We hope to enter into an agency agreement with the HSC for their inspectorate to enforce our provisions.

DETAILS OF THE PROPOSAL

2. Requirement for consent, and duty to employ BATNEEC

The essence of our proposal is, firstly, that in prescribed cases, a consent, granted by the Secretary of State, is to be required for the import, containment, or release to the environment of a GMO in the course of an undertaking; and, secondly, that every person (without exception) importing, containing or releasing a GMO to the environment is to be under a statutory duty to employ BATNEEC to ensure that significant harm to the environment is prevented. Breach of this requirement or duty, both of which are to apply only to those acting in the course of an undertaking, is to be an offence. The Secretary of State is to be empowered to make regulations (by statutory instrument subject to negative resolution) covering a variety of matters mentioned below.

3. Requirement for notification and classification

Additionally, it is to be a requirement that any person who intends to import a GMO, or contain one, or release one to the environment, in prescribed cases, shall notify the Secretary of State in a form and manner to be prescribed in the regulations. Breach of this requirement is to be an offence. Further, the Secretary of State is to be empowered to require, in the regulations, that persons intending to perform specified types of operations with GMOs, shall carry out a safety assessment to

classify the nature of the GMO and the type of operation in which they are intending to use it. The Secretary of State is to have powers to require such persons to justify their classifications to him. "Operations" refers here, as elsewhere in these Instructions, to import, containment or release.

4. "Personal" imports

Further, in prescribed cases, any individual importing a GMO, other than in the course of an undertaking carried on by him (for example, for his own use or that of his family), is to require a consent from the Secretary of State. Breach of this requirement is to be an offence. We do not seek to control "personal" containment or release, nor to require notification or the use of BATNEEC in connection with "personal" import.

5. Meaning of "GMO", "containment", "release to the environment" and "significant harm to the environment"

(i) **GMO.** In this phrase, it is the Department's intention to include within the meaning of "organism" all living entities, animals, plants, bacteria, fungi and viruses, but to exclude (whole) human beings. An "organism" is to encompass an individual biological entity, a population, or a strain (in the sense of a biological line) which is capable of reproduction, replication or transfer of genetic information. We intend to include within our controls, in addition to complete organisms, cells from multi-cellular organisms (including human beings) although we appreciate that these would not usually be encompassed within the term "organism". Genetic modification

is the use of certain recently developed techniques for altering genetic material. These techniques effect changes in genetic material in a way that does not occur by mating or natural recombination. They do not include traditional methods of breeding animals, plants or other organisms. There is no generally accepted definition of GMO amongst scientists, nor is there universal agreement as to which techniques should properly be classified as genetic engineering, and which not. In order to prevent doubt as to whether a particular existing, or yet to be developed, technique is or is not genetic modification for the purposes of the Act, we require power to specify, in the regulations, which techniques shall be so construed.

(ii) **Containment and release to the environment.** We mean by "containment" to refer to the case where physical, chemical or biological barriers, or any combination of these, are used to prevent contact between the GMO and the environment. "Release to the environment" is to be taken as occurring whenever the GMO is not contained. The "environment" here is to be understood as including air, water and land, and all living things including man.

(iii) **Significant harm to the environment.** In this phrase, the "environment" is to be understood in the same sense as in the subparagraph above, except that mankind is excluded. (This is necessary as the Department's remit does not include protecting man as such, please see paragraph 20(ii) below.)

"Harm" is to include any pollution to air, water or land.

"Significant harm" means any harm which is not de minimis.

6. Scope of requirement for consent to importation of GMOs

In cases to be prescribed in the regulations, any person importing a GMO, in the course of an undertaking carried on by him, is to be required to have a consent covering its import. This is to apply whatever the purpose of import may be, whether containment, release to the environment, or re-export.

7. Scope of requirement for consent to containment of GMOs

In cases to be prescribed in the regulations, any person possessing a GMO, in the course of an undertaking carried on by him, is to be required to have a consent covering its containment. Essentially, containment will be of two types, firstly, containment prior to something else being done with the GMO, for example a planned release or re-export of the GMO, and secondly, containment of a GMO used in a manufacturing or other process.

8. Scope of requirement for consent to release of GMOs

In cases to be prescribed in the regulations, any person releasing a GMO to the environment, in the course of an undertaking carried on by him, is to be required to have a consent covering its release. It is envisaged that GMOs will be deliberately released to the environment in three different ways:-

1. For experimental purposes
2. As waste, principally from processes involving the contained use of GMOs, and
3. In the form of finished products for use by consumers.
(It is appreciated that this is not really "release to the environment", but this is the stage at which it is considered practical to apply control.)

In the case of releases for trial purposes and as waste, the consent will be granted to the applicant who will be authorised to make the release or releases, subject to any limitations or conditions. In the case of finished products, the release consent is to be obtained by the manufacturer or importer of the product, and will authorise him to arrange for the sale of the GMO, again subject to any limitations or conditions. No consent will need to be obtained by the consumer of the product for its containment or release.

9. Applications for consents

(i) The Secretary of State is to have power to prescribe in the regulations the nature of the information to be supplied by an applicant for a consent, and the form and manner of applications including any time limits applicable. In some cases the Secretary of State will require the applicant to advertise his proposed operation in such manner as may be prescribed in the regulations (compare draft Schedule 1 paragraph 1). (All references to draft clauses and the draft Schedule in

these Instructions are to the set of draft clauses numbered 1 to 27 and draft Schedule 1 dated 20 September 1989.)

(ii) On consideration of an application for a consent, the Secretary of State, with a view to protecting the environment, is to be empowered to grant the application, either with or without limitations or conditions, or refuse to grant the application. (For Counsel's information, the sorts of limitations and conditions envisaged include the identity of the GMO; the methods and scale of containment; the types of use during containment; the number and location of releases to be allowed; requirements for continued monitoring; reporting the results, say of trial releases, to the Secretary of State; the type of information to be obtained and kept in respect of the release; the retention of a viable sample of the GMO to be available to the Secretary of State in the event of an accident; requirements for the labelling and packaging of products and the provision of instructions and conditions for their use). In particular, the Secretary of State is to be empowered to make it a condition of a consent that the person concerned carries insurance which is, in the view of the Secretary of State, adequate to cover the risk of any significant harm to the environment which might reasonably arise from release of the GMO.

10. Power to require information

The Secretary of State is to have power to require further information, in addition to that prescribed in the regulations, from an applicant, or from anyone else, should he consider it

necessary to enable him to deal with an application for a consent or a variation, or where he is considering whether to revoke or vary a consent. Failure to provide such information when required, or knowingly or recklessly providing false or misleading information, is to be an offence.

11. Variation and revocation of consents

The Secretary of State is to be empowered to vary a consent, either on application by the holder, or on his own initiative. The Secretary of State is also to be empowered to revoke a consent at any time.

12. BATNEEC

(i) **Meaning of.** The duty to employ BATNEEC means a duty to employ the best available techniques not entailing excessive cost. What is "excessive" cost is to depend on the risk of harm to the environment, and the extent and degree of that potential harm, not on the operator's financial resources. It may well be that in many cases a person proposing to import, contain or release to the environment a GMO will not be able to afford to employ the best available techniques not entailing excessive cost to prevent harm to the environment. In such cases, the effect of the BATNEEC requirement will be to prevent him from lawfully engaging in the proposed operation. The effect of draft clause 5(10) is also to be applied here.

(ii) **Scope of.** The duty to employ BATNEEC is to apply to any person (without exception) importing, containing or

releasing a GMO to the environment, in the course of an undertaking carried on by him. The duty is to ensure that significant harm to the environment is prevented. The consequences of the duty are to include the following. A person containing a GMO is to be under a duty to prevent any significantly harmful release to the environment, and should there be such a release (whether accidental or not), he is to be under a duty to minimise the impact of the release on the environment. A person releasing a GMO is to be under a duty to ensure that the nature and state of the GMO, and the circumstances of its release, are such as to prevent significant harm to the environment.

(iii) Proof of. In any prosecution for the offence of failing to employ BATNEEC to ensure that significant harm to the environment is prevented when importing, containing or releasing a GMO, the onus of proving that BATNEEC was employed is to be on the defendant. (Similar to draft clause 21.)

13. (Withdrawn)

14. Emergency plans

(i) The Secretary of State is to be empowered to direct an applicant for a consent to prepare an emergency plan for his (the Secretary of State's) approval as a condition precedent to the granting of the consent. Such a plan is to specify what action is to be taken by the prospective consent holder, and by a "relevant body", to prevent any significant harm

to the environment from the release of the GMO in the event of a significant accident or other comparable untoward event occurring. The Secretary of State is to be empowered to specify, in the regulations, those bodies or classes of bodies which may be "relevant bodies" for this purpose. (We envisage specifying as "relevant bodies" certain classes of local authorities, water and sewerage undertakers (Part II of the Water Act 1989, c 15), and certain authorities such as the London Fire and Civil Defence Authority and the National Rivers Authority). The Secretary of State is to be empowered to direct which of these relevant bodies, if any, is to be involved in any particular emergency plan. A body which is so directed is to be under a duty to co-operate with the applicant for the consent in the preparation of the plan, and (should the consent be granted) to respond in any relevant emergency in the manner described in the plan (or in an equally or more efficacious manner). The applicant is to be under a duty to disclose all information concerning his prospective undertaking which is necessary for the purpose of adequately constructing the plan to any body involved in the plan (or to the Secretary of State if so directed). It is to be an offence for a body or an applicant to breach the duty to respond in an emergency. It is considered that the other duties do not require such backing. Not obtaining the consent should be sufficient sanction as regards the applicant, and the body's duty to co-operate in preparing the plan can be enforced by the usual civil remedies at the suit of the applicant.

(ii) Further, it is to be an offence for any person to disclose confidential information which has been given to or obtained by him in accordance with these provisions except:

- (a) with the consent of the (prospective) consent holder; or
- (b) in accordance with a direction given by the Secretary of State; or
- (c) in connection with the execution of this part of this Act; or
- (d) for the purposes of any legal proceedings arising out of this Part of this Act or of any report of any such proceedings.

(This last offence is modelled on section 13(3) of the Radioactive Substances Act 1960, c 34.)

15. Prohibition notices

If an inspector (see next paragraph) is of the opinion that the continued import (including personal import), containment or release of a GMO under the terms of a consent poses an unacceptable risk of significant harm to the environment, he is to be empowered to serve a prohibition notice on the person carrying on the operation. The effect of serving the prohibition notice is to be to suspend the consent or any part thereof specified in the notice with immediate effect, until such time as the prohibition notice is varied or revoked by the Secretary of State.

16. **Inspectors: appointment, powers and protection**

(i) **Appointment.** The Secretary of State is to be empowered to appoint as inspectors, to assist him in the execution of these provisions, such persons having suitable qualifications as he considers necessary, and he may make to or in respect of any person so appointed such payments, by way of remuneration, allowances or otherwise, as he may with the approval of the Treasury determine.

(ii) **Powers and protection.** Counsel is requested to provide provisions similar to those found in draft clauses 13, 14 and 15, with the following differences:-

* throughout clause 13, the powers to enter (with a constable and with equipment and materials), examine and investigate, direct to be left undisturbed, measure, photograph and record, and take samples, should be extended so as to apply to any land or water which the inspector or person authorised has reason to believe may have been affected by the "relevant operation", and not just to the operator's premises (but always excluding domestic premises). "Relevant operation" means the import, containment or release of a GMO. We are concerned that the effects of the operation in question, for example a release of a GMO to the environment, may be felt at some considerable distance from the operator's premises, and not just in their "vicinity" (see subsection (3) (f)).

* in subsection (1) (line 8), "functions of the enforcing authority" should be functions of the Secretary of State;

* in subsection (3)(b)(i), (line 22), the "duly authorised person" provision is inapplicable, as in our case such persons are to be authorised by the Secretary of State (and consequently are to have a right of entry etc themselves in accordance with subsection (9));

* in subsection (3)(f), we require a power to take samples of GMOs, although these may not be articles or substances, and we further require power to take samples of or from all living things (animals, plants, bacteria, fungi and viruses, including samples from, but of course not of, human beings) as well as samples of air, water or land. GMOs should also be encompassed within the provisions of paragraphs (g) and (h), so that they may be subjected to any process or test, and seized and detained for the purposes specified therein. (We do not seek to have variation and enforcement notices as such in these provisions.)

* subsection (3) (j) is not required for our purposes.

* we require the inspectors to be empowered to seize any documents found on the operator's premises which appear to them to be relevant to the functions of the Secretary of State under this part of this Act.

17. Charging for consents

We wish the Secretary of State to be empowered to introduce a scheme of charging for consents, similar in most respects to the scheme already provided for in draft clause 6. We wish the Secretary of State to have the power, subject to Treasury approval, to provide for: (i) a once only charge for the consideration of an application for a consent (or variation of a consent) (this charge is to be payable on making the application and is to apply whether or not the application is successful); (ii) an annual charge payable by every holder of a consent which runs from year to year (some consents will relate to particular events, for example a particular import or release, and not run from year to year). An application for a consent is only to be valid if accompanied by the appropriate fee. If the annual charge is not paid when due, the consent is to cease to be valid forthwith, or following a period of grace at the discretion of the Secretary of State. The Secretary of State shall, in setting charges, aim to ensure that the total amount recovered in charges does not exceed his estimated costs of operating the consent regime. (This is not to be limited to a financial year or other specific period.) There are to be powers to provide in the scheme for different charges in different cases, and for times and manners of payment, and for incidental and supplementary provisions. We wish to have a provision similar to draft clause 6(5)(a), but instead of the charge reflecting the nature and size of the process and its potential for causing environmental

harm, we wish to have power to adjust the charges to reflect the costs to the Department of administering the system of consents (which is to include monitoring consent holders' premises to ensure compliance with the limitations and conditions in the consents). It is our intention to levy charges in co-operation with HSE, and to present a single account to the applicant or consent holder.

18. Disclosure of information by Secretary of State

The Secretary of State is to be empowered to provide in the regulations as to the circumstances in which he may, at his discretion and having due regard to proper considerations of confidentiality (including commercial confidentiality), disclose information as to an operation in respect of which he has received an application for a consent, or as to the effect on the environment of the release of a GMO.

19. Reserve power of Secretary of State

We wish the Secretary of State to be given power to contain, make harmless, or destroy GMOs which, in his opinion, are causing or are likely to cause significant environmental harm, where it appears to him that there is no person responsible for the GMOs, or that the person responsible for them is unable, unwilling, or for any other reason unlikely to take appropriate measures to protect the environment. The Secretary of State is to be empowered to recover his reasonable expenses from any person responsible for the GMOs. (This power, modelled on section 10(4) of the Radioactive Substances Act 1960, c. 34, is in addition to.

the power requested for inspectors to deal with the cause of imminent serious environmental harm in paragraph 16(ii) above.)

20. The Regulations

(i) As has been indicated above, the Department requires an enabling power to make regulations covering a variety of matters. Counsel might find it of assistance to have these matters collected together at this point:-

- (a) the prescribed cases in which a person intending to import, contain, or release a GMO in the course of an undertaking will be required to notify the Secretary of State (paragraph 3);
- (b) the form and manner (including time limits) of notification to be given by any such person (paragraph 3);
- (c) the classes of operations which are to carry the obligation to classify and to justify with a safety assessment (paragraph 3);
- (d) the prescribed cases in which a person importing, containing, or releasing a GMO in the course of an undertaking will be required to have a consent granted by the Secretary of State (paragraph 2);
- (e) the prescribed cases in which a person personally importing a GMO will be required to have a consent granted by the Secretary of State (paragraph 4);

- (f) which techniques are to be included in the meaning of "genetic modification" for the purposes of the Act (paragraph 5(i));
- (g) the nature of the information to be supplied by an applicant for a consent, and the form and manner of applications including any time limits applicable (paragraph 9(i));
- (h) the manner in which an applicant is to advertise his proposed operation (paragraph 9(i));
- (i) the bodies or classes of bodies which may be relevant bodies for the purposes of emergency planning (paragraph 14).
- (j) the circumstances in which the Secretary of State may disclose information (paragraph 18).

(ii) It will be appropriate to apply draft clause 25 to these regulations (and to the powers of direction requested in these Instructions). In addition, the power is to include making different provision for different circumstances, and making incidental and supplemental provisions. The Department has it in mind as a possibility that it may be attractive to make, together with the Department of Employment, a single set of regulations covering both environmental protection (under these statutory provisions) and protection of human beings, under the provisions of the 1974 Act. Counsel will note, from the preamble to the Genetic Manipulation Regulations 1989, which

powers in the 1974 Act the Department of Employment considers it is exercising in making those regulations. Subject to Counsel's advice, we should like our enabling powers drafted so as to facilitate the making of such regulations with the Department of Employment.

21. Offences

There follows a list of the offences which are required:-

1) **importing, containing, or releasing to the environment a GMO, knowing or having reasonable grounds for believing it to be such, in a case for which a consent is required, in the course of an undertaking carried on by him, except in accordance with a consent granted by the Secretary of State (passim);**

*** special defence to offence 1**

We wish Counsel to provide a special defence to the charge of breaching a limitation or condition in a consent. This is to be that the breach was necessary in order to comply with the duty to employ BATNEEC to ensure that significant harm to the environment was prevented. When this defence is pleaded, the onus of satisfying the court that the action taken was indeed necessitated by the BATNEEC duty is to be on the defendant.

2) **failing to employ BATNEEC to ensure that significant harm to the environment is prevented when importing, containing, or releasing to the environment a GMO, knowing or having reasonable grounds for believing it to be such, in the course of an undertaking carried on by him (paragraph 12);**

3) failing to notify the Secretary of State, in the prescribed form and manner, in a case in which such notification is required, prior to importing, containing, or releasing to the environment a GMO, knowing or having reasonable grounds for believing it to be such, in the course of an undertaking carried on by him, (paragraph 3);

4) importing a GMO (for "personal" use), knowing or having reasonable grounds for believing it to be such, in a case in which a consent is required except in accordance with a consent granted by the Secretary of State (paragraph 4);

5) without reasonable excuse, failing to supply information when required to do so by the Secretary of State, or knowingly or recklessly supplying information to the Secretary of State which is false or misleading in a material particular, in connection with:-

any application for a consent, or any variation of a consent.

(This is to apply to information supplied by the applicant or by any other person, see paragraph 10 above);

6) breach of certain duties involved in emergency planning (paragraph 14), namely:-

(a) failing to respond as planned or in an equally efficacious manner in a relevant emergency without

reasonable excuse (this applies both to the consent holder and to any "involved body") (paragraph 14(i));

- (c) disclosing confidential information as detailed in paragraph 14(ii);

7) offences relating to the powers of inspectors (paragraph 16), namely:-

- (a) without reasonable excuse, contravening any lawful requirement made by an inspector or authorised person in the exercise or performance of his powers or duties;
- (b) preventing any other person from appearing before or from answering any question to which an inspector or authorised person may require an answer in the exercise or performance of his powers or duties;
- (c) intentionally obstructing an inspector or authorised person in the exercise or performance of his powers or duties;
- (d) falsely pretending to be an inspector or authorised person.

8) wrongfully failing to comply with any requirement in the regulations (paragraph 20);

9) with intent to deceive, forging or using a consent or making or having in one's possession a document so closely resembling a consent as to be likely to deceive;

10) failing to comply with an order made by the court ordering the cause of an offence to be remedied (paragraph 23 (iv)).

22. Penalties

(i) Offences 1 and 2 in the paragraph above are central to the Department's proposed control regime. These offences are to be triable either way. On summary conviction, the maximum penalty is to be the statutory maximum (currently £2000) or imprisonment for up to 6 months or both. On indictment, an unlimited fine or imprisonment for up to 5 years or both.

(ii) The other offences are also to be triable either way, and the penalties are to be the same as in subparagraph (i) above, except that the maximum period of imprisonment on indictment is to be 2 years.

(iii) We wish Counsel to provide for a continuing offence in all appropriate cases, namely the following offences: 1 and 2 in respect of containment only, 6(a), and 7(a) to (d). In all these cases the daily penalty is to be 10% of the summary maximum fine (ie, currently £200).

(iv) My administrators have liaised closely with the Home Office over these offence and penalty provisions and we have had the benefit of considerable advice from them. Their formal approval is anticipated. Counsel will be informed as soon as this is obtained.

23. Further provisions relating to offences

(i) We require the usual directors' liability clause, and the usual provision for prosecuting another whose act or default caused the commission of the offence (see for example section 87(2) of the Control of Pollution Act 1974, c 40.)

(ii) Proceedings in respect of any offence under these provisions are to be instituted only by the Secretary of State or by or with the consent of the DPP.

(iii) We wish inspectors, who are neither barristers nor solicitors, to be empowered to prosecute in respect of any offence under these provisions in a magistrates court, if so authorised by the Secretary of State.

(iv) Following draft clause 23, we wish the court to be empowered to order the cause of the offence to be remedied.

24. Miscellaneous

(i) These provisions are to bind the Crown. However, the effect of draft clause 27(4) is to be applied here (Crown exemption for Her Majesty in her private capacity).

(ii) These provisions are to apply to England and Wales only.

(iii) The Department intends to bring these provisions into force by commencement Order.

(iv) Service of notices. Please apply the burden of draft clause 26 (except subsection (1): we do not require any provision for notices to be served on our inspectors).

