

HSE proposal for extending cost recovery

This consultative document is issued by the Health and Safety Executive in compliance with its duty to consult under section 50(3) of the Health and Safety at Work etc Act 1974 and in line with the Government's Code of Practice on consultation with stakeholders for proposed policy and legislation changes.

Comments should be sent to:

Cost Recovery Consultation
Health and Safety Executive
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to reach there no later than 14 October 2011

The Executive tries to make its consultation procedure as thorough and open as possible. Responses to this consultation document will be lodged in the Health and Safety Executive's Knowledge Centre after the close of the consultation period where they can be inspected by members of the public.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004 (EIR)). Statutory Codes of Practice under the FOIA and EIR also deal with confidentiality obligations, among other things.

If you would like us to treat any of the information you provide, including personal information, as confidential, please explain your reasons for this in your response. If we receive a request under FOIA or EIR for the information you have provided, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will be disregarded for these purposes. Requests for confidentiality should be made explicit within the body of the response.

HSE will process all personal data in accordance with the DPA. This means that personal data will not normally be disclosed to third parties and any such disclosures will only be made in accordance with the Act.

Consultative Document

Proposed Health and Safety (Fees) Regulations 2012

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1 Consultation by the Health and Safety Executive

1.1 How consultations are handled

- 1.1.1 When consulting stakeholders to seek their views on its policy and legislative proposals, the Health and Safety Executive (HSE) follows the Government Code of Practice on Consultation. Further details of the code of practice are set out in Appendix 1. HSE is committed to best practice in consultation and believes effective public consultation provides an open and transparent approach to decision-making. This is essential if policies and decisions are to have widespread support and to reflect the needs and aspirations of the people they will affect. Following this consultation HSE will decide on the best way forward based on careful consideration of all the views expressed.
- 1.1.2 Responses to consultation documents are normally made publicly available unless respondents request confidentiality. If you reply to this consultation in a personal capacity, rather than as a post holder in an organisation, you should be aware that the information you provide may constitute “personal data” in terms of the Data Protection Act 1998. For the purposes of this Act, HSE is the data controller and will process the data for health, safety and environmental purposes. HSE may disclose the data to any person or organisation for the purposes for which it was collected, or where the Act allows disclosure. You have the right to ask for a copy of the data and to ask for inaccurate data to be corrected.

1.2 How responses are handled

- 1.2.1 HSE will consider all the views and comments received in response to this consultation. We may also contact you if, for example, we have a query in respect of your response. When the consultation has closed we will produce a summary of the views expressed to each question and we will also collate a list of all the organisations that have responded to this consultation. This information will be placed on HSE’s website. HSE will then decide on how best to take the proposals forward based on an interpretation and analysis of the consultation responses.
- 1.2.2 To take account of the responses received to this consultation document we may revise the impact assessment and further refine the cost recovery process before the regulations are laid before Parliament. Once Parliament has agreed the regulations, we will publish them together with further details of the cost recovery process. Subject to the necessary legislation, regulations could then come into force as early as 6 April 2012.
- 1.2.3 A summary of the proposal and the consultation questionnaire can be found in Appendix 2 and also at www.hse.gov.uk/consult/condocs. You do not have to use the online questionnaire, and you are welcome to comment on any issue raised by this document.

You can:

Complete the online questionnaire; or

Respond by email – costrecoveryconsultation@hse.gsi.gov.uk; or

Respond on paper – by printing and completing the online questionnaire and sending responses to:

Cost Recovery Consultation

Health and Safety Executive

6.4 Redgrave Court

Merton Road

Bootle

Merseyside L20 7HS

Responses must be received by 14 October 2011.

If you require a more accessible format of this document please send details to: creative@hse.gsi.gov.uk and your request will be considered.

1.3 Queries and complaints

1.3.1 If you are not satisfied with the way this consultation exercise has been conducted, please either write to: Teresa Farnan, Health and Safety Executive, Sanctuary Buildings, 20 Great Smith Street, London SW1P 3BT or send an email outlining your concern to: teresa.farnan@hse.gsi.gov.uk.

1.3.2 We aim to reply to all complaints within 10 working days. If you are not satisfied with the response, you can then raise the matter with HSE's Chief Executive, Geoffrey Podger, at Health and Safety Executive, Redgrave Court, Merton Road, Bootle, Merseyside L20 7HS. You can also write and ask your MP to take up your case with us or with Ministers. Your MP may also ask the independent Parliamentary Commissioner for Administration to review your complaint.

2 Proposed replacement and points for consultation

2.1 Summary

- 2.1.1 The policy of the Government and the HSE Board is to place a duty on HSE to recover costs where duty holders¹ are found to be in material² breach of health and safety law. If the duty holder has breached health and safety law and a requirement to rectify the breach is formally made in writing (e.g. by way of improvement and prohibition notices, electronic mail or letter), HSE would recover all of the costs of that intervention. This is known as fee for intervention. Compliant duty holders would pay nothing nor would duty holders in technical³ (non-material) breach of the law.
- 2.1.2 Health and safety inspections and incident investigations are undertaken by both HSE and Local Authorities. The proposal outlined in this consultation document is that fee for intervention would only apply to the activity undertaken by HSE and would not apply to the activity undertaken by Local Authority officers. This proposal is not finalised and using this consultation HSE is continuing to seek the views of Local Authorities (see 3.3 for further details).
- 2.1.3 In March 2011 the Department for Business Innovation and Skills announced a “moratorium from all new domestic regulations for three years for businesses of less than 10 employees and for genuine new start ups”. Ministers have confirmed that the moratorium will not apply to these proposals for cost recovery, other than in the following circumstances: a self-employed duty holder will not be subject to cost recovery unless, in conducting their undertaking, they expose any other people to risks to their health or safety. This moratorium will only apply to costs that HSE does not currently recover. (See paragraph 4.3.1 for further details.)
- 2.1.4 To implement fee for intervention, HSE is proposing to replace the Health and Safety (Fees) Regulations 2010 with new regulations. In addition to carrying over the existing fees⁴, it is anticipated that these new regulations would place a duty on HSE to recover the costs of its interventions under the Health and Safety at Work etc Act 1974 and relevant statutory provisions (hereafter referred to as health and safety law). Health and safety is a reserved matter and as such all the options for change proposed in this consultation document and the accompanying impact assessment, would be applicable throughout Great Britain (Scotland, England and Wales).

¹ Duty holder - Refers to employers and self-employed people who have duties under Health and Safety at Work etc Act 1974 and relevant statutory provisions.

² Material breach – When, in the opinion of the inspector, there has been a breach of health and safety law which requires them to make a formal intervention.

³ Technical breach – When, in the opinion of the inspector, there has been a breach of health and safety law but it does not require them to make a formal intervention.

⁴ The rates which HSE charges for these fees may be revised. Details of existing fees can be found on the HSE website <http://www.hse.gov.uk/charging/index.htm>

- 2.1.5 The underlying policy of recovering costs for HSE's intervention through the introduction of fees where there is a material breach of the law has been agreed by Government and is therefore not in question in this consultation. Instead this consultation document seeks views on the systems being proposed by HSE for how it would implement this policy.
- 2.1.6 It should be noted that with the duty being proposed, HSE would not have discretion on whether to apply fee for intervention. HSE would have a legal duty to recover the cost of its intervention activity where there is a material breach of health and safety law. Costs would be recovered from the start of the intervention during which the material breach was identified up to and including the point where intervention in relation to that breach had been concluded. In addition to the initial intervention, the costs are anticipated to include any related follow-up interventions (e.g. site visits, phone calls), the provision of any specialist assistance needed, the costs of writing letters and reports and drafting and issuing improvement or prohibition notices.
- 2.1.7 An averaged hourly fee for intervention rate, currently estimated at £133, would be used for all HSE staff (excluding those working at the Health and Safety Laboratory) involved in the interventions (further details of how this figure is calculated are available in the accompanying impact assessment). If Health and Safety Laboratory or non-HSE specialist support is required to assist with the interventions, the duty holder who is in material breach of the law would pay the actual costs of the specialist support.
- 2.1.8 In England and Wales, if HSE prosecutes, cost recovery would stop when an Information is laid; at this point, recovery of further costs would be sought through the court. In Scotland, cost recovery would stop when a case is referred to the Procurator Fiscal. Under Scottish Law, prosecution costs may not be recovered.
- 2.1.9 Fee for intervention would not apply where HSE already recovers its costs for intervention activity under an existing permissioning regime. Therefore, top tier sites under the Control of Major Accident Hazards Regulations 1999 (as amended) (COMAH), offshore gas and oil installations, licensed nuclear installations and some pipelines activities are excluded. At lower tier COMAH sites, HSE will continue to recover costs for COMAH related activity and recover costs under fee for intervention for activity related to non-COMAH health and safety law.
- 2.1.10 Fee for intervention would not apply to work with high hazard biological agents (i.e. those requiring Containment Level 3 and Containment Level 4 under either the Control of Substances Hazardous to Health Regulations 2002 or the Genetically Modified Organisms (Contained Use) Regulations 2000). This is due to the fact that these facilities will soon be subject to a new legislative regime which will include a cost recovery scheme. Fee for intervention would however still apply to work with biological agents undertaken at Containment Level 1 and Containment Level 2.
- 2.1.11 Given the potential for major hazard incidents due to gas or oil fires and explosions at onshore boreholes, operators are required to notify HSE in

certain circumstances under the Borehole Sites and Operations Regulations 1995. Similar to the permissioning regimes described above, HSE assesses these notifications to ensure adequate design, and then verifies that they are operated safely through inspection. HSE currently regulates this major hazard activity without recovering the costs. Given the major hazards associated with this activity, HSE also proposes to recover all its costs for the assessment of borehole notifications and any verification inspections. The current offshore cost recovery rate of £256 per hour would be used as the expertise required to undertake notification assessment work resides with specialists with detailed knowledge of the industry.

3 Introduction

- 3.1.1 On 21 March 2011 the Minister for Employment, the Rt Hon Chris Grayling MP, announced the Government's policy to reform the health and safety system in Britain in the Department for Work and Pensions statement 'Good Health and Safety, Good for Everyone' (<http://www.dwp.gov.uk/policy/health-and-safety/>). This proposed a package of measures to change the culture of health and safety in Britain. It included a commitment for HSE to reduce the level of proactive health and safety inspections by approximately one third (11 000 fewer inspections a year).
- 3.1.2 HSE will achieve this reduction in proactive inspections through the better use of intelligence to target inspections towards higher risk industries and duty holders where there is information indicating that they may be operating in material breach of health and safety law or that there are higher risks arising from the work being carried out.
- 3.1.3 The overall package of measures also included the Government's policy to allow HSE to recover the costs of its regulation on the basis that "it is reasonable that duty holders that are found to be in serious material breach in standards – rather than the taxpayer – should bear the related costs incurred by the regulator in helping them put things right. A cost recovery principle will provide a deterrent to those who would otherwise fail to meet their obligations and provide a level playing field for those who do".
- 3.1.4 To implement this element of the new policy, HSE proposes that in addition to carrying over the existing fees, the proposed Health and Safety (Fees) Regulations will place a duty on HSE to recover costs as described in paragraph 2.1.1.
- 3.1.5 Certain major hazard industries such as the chemicals industry and the offshore oil and gas industry are subject to regulatory arrangements proportionate to the risks these activities pose to society from a single catastrophic event. HSE will continue to regulate the major hazard sector with the current level of oversight while continuing to modernise its regulatory approach. For non-major hazard industries, HSE has worked in consultation with the Government to identify three categories of industry to help ensure that only higher risk premises are proactively inspected:
- Comparatively high risk areas – Construction activities, waste and recycling and high risk manufacturing (e.g. molten metal working, wood working). For this category proactive health and safety inspection will continue.
 - Areas of concern but where proactive inspection is unlikely to be effective and is not proposed – For example agriculture, quarries, health and social care. HSE will continue to intervene proactively with these sectors but through means other than inspection (e.g. joint initiatives with industry).

- Lower risk areas – Low risk manufacturing (textiles, light engineering), transport sector (road haulage, docks), Local Authority educational provision and postal/courier services. Proactive health and safety inspection by HSE will no longer take place in these sectors.

3.1.6 These categorisations will inevitably change in their composition over time e.g. as an industrial sector improves its health and safety record, or as new industries with new health and safety challenges emerge.

3.1.7 No areas of industry will be exempted from maintaining good standards of health and safety. Employers who do not take seriously the protection of their employees, or those affected by their work activities, will still face intervention by HSE. HSE will continue with reactive work across all categories of industry investigating incidents and following up complaints.

3.2 Maintaining the integrity of intervention approaches and regulatory decisions

3.2.1 HSE inspectors (and Local Authority Officers) influence the health and safety performance of duty holders in a range of ways. They inspect workplaces, investigate incidents and cases of ill health and follow up complaints. They also exert influence by working in partnership with bodies such as trade associations and professional organisations, and by providing advice in written publications and electronically over the Internet. HSE works with the European Union undertaking research on incident and ill health causation and prevention and influencing the supply chain to ensure that equipment reaching users is safe and supplied with appropriate instructions. This mix of influencing techniques is kept under review and is driven by data and information on what causes incidents and ill health and what is seen to be effective in securing improvements in health and safety standards. The introduction of a cost recovery scheme will not change this approach. The industries, duty holders and sites that HSE targets, and the mixture of interventions it undertakes is, and will continue to be, driven by what has the most impact on health and safety outcomes and not the need to achieve any specific level of cost recovery.

3.2.2 HSE (and Local Authorities) have long-standing publicly available policies and practices⁵ which set out the principles that inspectors apply when deciding on the appropriate action to take in response to breaches of health and safety legislation. In addition to guiding inspectors and helping them to make consistent decisions, the policies and practices enable managers to monitor the fairness and consistency of inspectors' decisions. Underlying these policies and practices is the principle that any action should be proportionate to the health and safety risks and the seriousness of any breach of the law. This action can range from verbal advice, to a written requirement (e.g. an email or letter), serving an improvement notice⁶ or a prohibition notice⁷, through to prosecution in the courts.

⁵ HSE's Enforcement Policy Statements (<http://www.hse.gov.uk/pubns/hse41.pdf>) and HSE's Enforcement Management Model (<http://www.hse.gov.uk/enforce/emm.pdf>).

⁶ Improvement Notice - a legal instrument requiring breaches to be remedied within a specified time.

⁷ Prohibition Notice - a legal instrument prohibiting certain activities which involve, or will involve, a risk of serious personal injury.

Under the proposals being made in this consultation document fee for intervention would occur where, in the opinion of an inspector, a material breach of law has occurred such that a requirement to rectify it is formally made to the duty holder in writing (e.g. by electronic mail or letter). This includes any of the actions described above from written requirements to prosecution (up to the point described in paragraph 2.1.8.)

- 3.2.3 The long-standing principles set out in the publicly available policies and practices will remain unchanged by the introduction of a cost recovery scheme. HSE inspectors will continue to take targeted, proportionate decisions based on these principles. Regulatory decisions will be independent of whether HSE will subsequently recover costs as a result of any decision taken. The fee for intervention scheme proposed will not generate a profit. The scheme will only be used to recover the costs incurred by the regulator for the work as described in paragraph 2.1.6.

3.3 Work activities regulated by Local Authorities

- 3.3.1 Health and safety interventions are undertaken by both HSE and Local Authorities. The Health and Safety (Enforcing Authority) Regulations 1998 allocate the enforcement of health and safety legislation at different premises between HSE and Local Authorities. Further guidance on how work activities are allocated between HSE and Local Authorities can be found on the HSE website: <http://www.hse.gov.uk/lau/lacs/23-15.htm>.
- 3.3.2 It is anticipated that the new regulations would place a 'duty' on health and safety regulators to recover costs. If the new regulations applied to both HSE and Local Authorities, cost recovery would become mandatory for HSE and Local Authorities.
- 3.3.3 Whether Local Authorities should be mandated to recover their costs under this fee for intervention policy is a complex question and one on which there are differing views within the Local Authority community. In light of this, the proposals outlined in this consultation are only intended to apply to HSE and not to apply to equivalent work undertaken by Local Authorities. This, however, is an issue on which the views of consultees are sought. HSE will continue to engage and consult with Local Authorities to seek their views during the public consultation. In light of the consultation responses, and subject to the necessary legislation, the proposals could be amended to enable Local Authorities to recover the costs of their interventions from as early as April 2012.
- 3.3.4 The impact assessment that accompanies this consultation document makes provision for the impact of cost recovery both including and excluding a duty on Local Authorities to cost recover. As part of the formal consultation, HSE is seeking further information from Local Authorities to strengthen the data in the final impact assessment.

3.4 The current legal position

3.4.1 Section 43(2) of the Health and Safety at Work etc Act 1974 gives Ministers the power to create fees by regulations. The Fees Regulations associate a tariff with certain categories of work undertaken by health and safety inspectors. Currently, cost recovery for such work is generally limited to specific major hazard industries and some licensed or approved activities.

3.5 Why do the Regulations need to be changed?

3.5.1 To implement the Government policy outlined in paragraph 2.1.1 and to enable HSE to recover fee for intervention costs, and extend cost recovery to onshore boreholes, it is anticipated that it is necessary to change the Fees Regulations, or other relevant legislation. In addition to carrying over the existing fees, the legislation would place a duty on HSE to recover the costs of their regulatory activity under health and safety law.

3.5.2 Subject to the necessary legislation, the cost recovery arrangements proposed in this consultation document could come into operation from as early as 6 April 2012.

4 How would cost recovery arrangements affect duty holders?

4.1 What would duty holders need to do differently under the proposed Regulations?

4.1.1 The proposed introduction of fee for intervention and the borehole notification fees into the Fees Regulations or other relevant legislation does not impose any new health and safety requirements on duty holders. Those that comply with health and safety law would not pay fee for intervention. Non-compliant duty holders would pay the costs of an intervention only if a material breach is identified and formal intervention is required. Those who notify HSE of their intention to operate an onshore borehole would pay the costs incurred by HSE in assessing the notification and the cost of any verification activities (e.g. inspections, writing reports).

4.2 Which duty holders would be affected by fee for intervention?

4.2.1 With the exception of the specific examples cited in paragraphs 4.3 to 4.11, fee for intervention will apply to all work activities in Great Britain where there has been a breach of health and safety law which requires HSE to make a formal regulatory intervention. Fee for intervention would not apply to duty holders who are compliant with health and safety law. Nor will fee for intervention apply to duty holders who are in technical (non-material) breach of health and safety law.

4.3 Micro businesses

4.3.1 In March 2011 the Department for Business Innovation and Skills announced a “moratorium from all new domestic regulations for three years for businesses of less than 10 employees and for genuine new start ups” (full text of the Ministerial announcement is available online <http://www.bis.gov.uk/news/speeches/mark-prisk-fsb-2011>). Ministers have confirmed that the moratorium will not apply to these cost recovery proposals, other than in the following circumstances: a self-employed duty holder will not be subject to cost recovery unless, in conducting their undertaking, they expose any other person, to risks to their health or safety. Consequently, cost recovery will not apply to the self-employed so long as their activities do not expose people they employ or others (including members of the public) to risks to their health or safety. The moratorium will not apply to fees which HSE currently charges.

4.4 Fee for the notification of onshore boreholes

4.4.1 Under the proposed legislative change those who notify HSE of their intention to operate an onshore borehole would pay the costs incurred by HSE in assessing the notification and the cost of any verification activities (e.g. inspections, writing reports). The estimated hourly rate for this activity is £256.

4.5 Major hazard industries

4.5.1 Major hazard industries are already subject to HSE cost recovery schemes, including licensed nuclear sites, offshore oil and gas production, and certain onshore chemical manufacturing and storage. In these industries, HSE operates extensive intervention programmes driven by the high hazards associated with the activities. The intervention programmes are often backed by specific legislative requirements which require that the duty holders in question demonstrate to HSE that they have identified the risks, are controlling them adequately and have plans to mitigate their effects. This may involve the submission of safety reports, safety cases and/or the granting of licences, permissions or approvals. Under various legislative regimes, HSE already recovers all or most of the costs it incurs regulating these sectors. The sections below make it clear which areas of the major hazards sectors are in and out of scope of fee for intervention.

4.6 Operators of offshore installations

4.6.1 The current arrangements for offshore installations would not be affected by the proposed introduction of fee for intervention. HSE will continue to recover costs for its work relating to all offshore activities including those in relation to the relevant statutory provisions.

4.7 Operators of nuclear installations

4.7.1 The current arrangements for licensed nuclear installations would not be affected by the proposed introduction of fee for intervention. HSE will continue to recover costs for all work at licensed nuclear installations including those in relation to the relevant statutory provisions.

4.8 Operators of Top Tier COMAH sites

4.8.1 The current arrangements for cost recovery at Top Tier COMAH sites⁸ would not be affected by the proposed introduction of fee for intervention. At such sites HSE will continue to recover costs for all work relating to COMAH activities i.e. the activities that give rise to major hazards such as large scale explosions or releases of toxic substances and also in relation to the relevant statutory provisions. The existing arrangements for determining the hourly rate for COMAH cost recovery will continue. Further details can be found on the HSE website: (<http://www.hse.gov.uk/charging/comahcharg/comahch1.htm>).

4.9 Operators of Lower Tier COMAH sites

4.9.1 For Lower Tier COMAH sites, HSE will continue to recover its costs for all work relating to COMAH activities on the site. The proposals would mean that fee for intervention would apply to interventions by HSE in relation to any material breaches of non-COMAH health and safety law.

⁸ Currently set out in Regulation 22 of the Control of Major Accident Hazards Regulations 1999.

- 4.9.2 HSE does not recover the costs associated with off-site emergency planning in relation to COMAH sites. There are no proposals at present to amend the law to enable HSE to do this.
- 4.9.3 Some COMAH sites are identified as 'enclaves' within a larger industrial site or complex which itself does not present the same hazard as the enclave e.g. a small, on site chemical plant providing a chemical in bulk quantities for a manufacturing process. Current arrangements for cost recovery at COMAH enclaves will continue as described above. HSE intervention activities on the site or complex outside the COMAH enclave would be subject to cost recovery under fee for intervention.

4.10 Operators of facilities at biological Containment Level 3 or Containment Level 4

- 4.10.1 Following the investigation into the Foot and Mouth outbreak in Surrey in 2007 Sir Bill Callaghan's review of the regulatory framework governing work with microorganisms made a number of recommendations. A key recommendation was the creation of a single regulatory framework (SRF) for handling human and animal pathogens and genetically modified organisms (GMOs). (<http://archive.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/fmd/document/s/callaghan-reviewreport071213.pdf>). The aim is to simplify the regulatory regime thereby reducing the regulatory burden on those undertaking work with human and animal pathogens and GMOs. Since the publication of the review, HSE has been working with other regulators and devolved administrations to develop and implement the SRF.
- 4.10.2 Plans for the SRF are well developed and (subject to Ministerial/Government approval and public consultation) it is proposed to implement it within a relatively short period of time. Given this timeframe, and that the SRF will include provision for HSE to recover the costs of all of its activities at high hazard biological containment facilities (i.e. Containment Level 3 and Containment Level 4 facilities), fee for intervention would not be applied to these facilities for this short, interim period.
- 4.10.3 The fee for intervention proposals would apply to all activities undertaken at Containment Level 1 and Containment Level 2. As HSE is continuing to target intervention activity towards higher risk activities, it is unlikely that a well managed Containment Level 1 or Containment Level 2 facility that is adequately controlling health and safety risks would be proactively inspected.
- 4.10.4 The existing scheme of applying fees to notifiable work with biological agents remains in place until the SRF is introduced.

4.11 Duty holders operating under an existing HSE licensing, approval or notification scheme

- 4.11.1 HSE will ensure that duty holders do not incur two sets of costs for the same regulatory activity. HSE arranges and administers a number of licensing, approval and notification schemes for high hazard activities. These include licensing of asbestos removal contractors and licensing to manufacture or

store explosives. Most HSE licensing/approval/notification schemes charge applicants a fee. This fee relates to both the administrative costs of the scheme and technical assessment of the application. The cost also relates, where applicable, to the granting of a licence or consent to undertake the activity.

4.11.2 The existing licensing/approval/notification arrangements will continue, however, where inspectors identify a material breach not covered by the technical assessment fee then fee for intervention will apply as described in paragraph 2.1.1.

4.12 What would duty holders pay for?

4.12.1 Under the fee for intervention proposal, duty holders would pay for each intervention that relates to the identification of a material breach and all subsequent regulatory work up to the point where regulatory intervention in relation to the breach has been concluded. Cost recovery would start and stop as described in paragraph 2.1.6 and 2.1.8. Costs would also be recovered for associated relevant office based work in gathering relevant information/evidence, and writing relevant documents such as emails, letters, reports, and visit records.

4.12.2 It should be noted that costs may vary depending on the time and the level of activity that HSE must devote to the intervention. The time expended and level of activity required will depend upon the circumstances of the incident being investigated or the standards observed at the time of inspection.

4.12.3 Fee for intervention would only cover material breaches of health and safety legislation and would not apply to technical (non-material) breaches. Appendix 3 outlines several examples of HSE interventions and details where fee for intervention may be applicable to breaches of health and safety law.

4.12.4 In the case of onshore boreholes, costs would be recovered for the time spent assessing notifications, including any verification inspections, plus relevant office based work in gathering relevant information/evidence, and writing relevant documents such as emails, letters and reports.

4.13 What is the likely level of costs and how will this figure be calculated?

4.13.1 The amount to be recovered from the duty holder is calculated on the basis of the total time expended on that particular cost recoverable activity multiplied by the cost recovery rate.

4.13.2 The current estimated hourly rate for fee for intervention is £133 - an estimated averaged rate to cover all staff involved in the intervention based on the HSE rate setting model explained in the impact assessment associated with this consultation document.

4.13.3 The potential averaged costs for intervention activity are estimated in Table 1. The actual intervention costs will depend upon the particular circumstances explained in paragraph 4.12.2. These costs will be dependent on the complexity of the investigation that is required to follow all reasonable lines of enquiry.

Intervention	Estimated Averaged Costs Recovered
Inspection with no action taken	No costs will be recovered
Inspection which results in a letter	Approximately £750
Inspection which results in an Enforcement Notice	Approximately £1500
Investigations	Ranging from approximately £750 through to several thousands of pounds to, in extreme cases, tens of thousands of pounds

Table 1 Estimated averaged costs for a range of HSE interventions under fee for intervention.

4.13.4 For regulatory work in relation to onshore boreholes notifications the current offshore hourly rate of £256 would be used. This rate differs from the fee for intervention rate as the inspectors who assess borehole notifications require specialist knowledge and experience which incurs an increased cost to HSE in undertaking this regulatory activity.

4.13.5 Both the fee for intervention and the boreholes notification rate are calculated in accordance with HM Treasury guidance on fees and charges and include the full cost of all the resources used in carrying out the cost recoverable work (http://www.hm-treasury.gov.uk/d/mpm_ch6.pdf).

4.13.6 For both fee for intervention and cost recovery in relation to onshore boreholes the cost of travelling from an HSE Office to the location of the duty holder would not be recovered separately. Instead this cost is included in the calculation of the hourly rate.

4.14 How would HSE recover costs from duty holders?

4.14.1 To recover costs incurred by fee for intervention or boreholes notification fees, HSE will invoice duty holders and expect them to pay within thirty days. To assist duty holders with cash flow and accounting arrangements, it is expected that invoices will be issued on a monthly basis as costs are incurred rather than collating all costs into one invoice issued when all work has been completed. If duty holders do not pay, normal credit control action will then be taken, i.e. a series of reminders will be sent followed by a final reminder and HSE would then apply to the courts to recover the funds.

4.15 How would fee for intervention apply to principals and agents?

4.15.1 In any client/contractor relationship (for example, where a contractor engages a subcontractor), both parties are likely to owe duties under health and safety law but not necessarily to the same extent. When undertaking inspections, investigations, enforcement or following up complaints, HSE will identify the duty holders to whom fee for intervention applies and would seek to recover costs from them where they are in material breach of health and safety law.

4.16 Would fee for intervention apply to employees?

4.16.1 Section 43(4) of the Health and Safety at Work etc Act 1974 states that any fees that are payable under health and safety Regulations will not be payable by employees. As such if employees are found to be in breach of health and safety law, HSE will not recover the costs of the regulatory activity relating to their breach. In these circumstances however HSE will continue to take enforcement action including where appropriate, prosecution action. If the employer has met their legal duties and it is only the employee who has breached the law then the employer will not be subject to cost recovery.

4.17 How would HSE deal with queries and disputes regarding costs to be recovered?

4.17.1 HSE would implement a robust queries and disputes resolution procedure. The aim would be to resolve all queries or disputes promptly, fairly and in a transparent way.

4.17.2 Queries may arise from duty holders regarding information in the invoice including: composition of costs; amount of the invoice; method of payment; terms of payment or invoicing arrangements. The costs of resolving queries about the HSE invoice would be met by HSE. If the query remained unresolved it would become a dispute.

4.17.3 Disputes may arise concerning the propriety of the costs to be recovered or the regulatory enforcement decisions made. To focus on assisting duty holders with genuine disputes, HSE proposes to recover the costs of handling disputes where the dispute is not upheld. It is proposed that this is based on the hourly rate relevant to the intervention multiplied by the time taken to resolve the dispute. For example, a dispute regarding an inspection letter could take two hours of HSE staff time to resolve: 2x fee for intervention

hourly rate £133 = £266. If the duty holder dispute is not upheld, the costs would not be refunded and the duty holder would still be liable for the full amount of the outstanding HSE invoice(s) plus the additional cost of handling the dispute. Where a duty holder dispute is upheld, the costs would either be offset against any outstanding HSE invoice (if applicable) or refunded in full.

4.17.4 HSE is considering several options for handling queries and disputes. HSE's favoured option is adopting a two level process for disputes. At Level 1, the dispute is anticipated to be dealt with by a Principal Inspector with operational experience. If the matter is not resolved to the satisfaction of the duty holder, it will become a Level 2 dispute. Disputes at Level 2 could be handled by an HSE senior manager. Alternative practical suggestions for resolving disputes would be welcomed as part of this consultation (see Appendix 2 Question 7),

4.17.5 The existing HSE procedure for dealing with complaints about the professional conduct of HSE staff will remain unchanged: duty holders should contact the line manager of the HSE employee. The line manager will investigate the complaint and inform the duty holder of the action taken. Further information can be found on the HSE website (<http://www.hse.gov.uk/pubns/hsc14.htm#complaints>).

4.18 What is the likely impact of the proposed legislative changes?

4.18.1 The equality impact assessment indicates that there is no evidence to suggest that the proposals outlined in the consultation document would have an adverse effect on individual groups (race, disability, gender, age, religion/beliefs, sexual orientation, gender reassignment, maternity, pregnancy, or other vulnerable groups).

4.18.2 Full details of the likely impact of the legislative changes are detailed in the impact assessment that accompanies this consultation document. There are sections of the impact assessment where HSE does not have access to all the information it requires. This public consultation will be used to gather the outstanding information for inclusion in the final impact assessment.

Appendix 1

Government's Code of Practice on Consultation

HSE is committed to effective consultation and to the Government's Code of Practice on Consultation. The Code of Practice sets out seven criteria for consultation. These are:

When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Duration - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Accessibility - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

The burden of consultation - Keeping the burden of the consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Appendix 2

Summary of all questions available via the online Consultation Questionnaire.

Q1. If you do not agree with the proposals outlined in this consultation document for implementing the Government and HSE Board policy of cost recovery please offer reasons for your disagreement and suggest an alternative proposal for delivering cost recovery.

Q2. Were you clear about how the cost recovery proposals would operate?

Y/N/ If No please explain the reason for your answer.

Q3. Do you agree with the extent of the regulatory activity for which HSE would recover its costs?

Y/N/ If No what regulatory activities should HSE recover costs?

Q4. Do you agree with the proposals for when these costs would be incurred?

Y/N/ If No please explain the reason for your answer.

Q5. Do you agree with the model used for setting the hourly rates for cost recoverable work?

Y/N/ If No please explain the reason for your answer.

Q6. HSE will not use cost recovery to drive intervention approaches. Other than clearly stating this policy and the continued application of HSE's Enforcement Management Model and Enforcement Policy Statement, how else do you think that HSE can reassure duty holders it will not use cost recovery to drive its intervention approaches?

Q7. Do you agree with the two level dispute process outlined in this consultation document?

Y/N If No – What alternative system would you propose to ensure a practical, fair and transparent dispute process?

Q8. Do you agree that Containment Level 3 and Containment level 4 containment laboratories should be exempt from fee for intervention for a short interim period until the SRF is implemented?

Y/N/ If No can you explain why you believe they should not be exempt?

Q9. Do you agree with the proposal that HSE recovers full costs in relation to Boreholes, irrespective of material breach?

Y/N/ If No please explain the reason for your answer.

Q10. Do the assumptions made in the impact assessment look reasonable in relation to the estimates made for:

Familiarisation costs: Y/N/ What are your estimated costs?

Costs of processing invoices Y/N/ What are your estimated costs?

Q11. Are there any costs or benefits not detailed in the impact assessment which HSE needs to consider? Y/N/ please provide any additional details

Q12. The impact assessment details risks and uncertainties. Which of these are most likely to be realised?

Please provide your views/comments.

Q13. Do you think there are any other risks or uncertainties HSE need to consider in the impact assessment?

Y/N/ Please provide your views/comments.

Q14. Are you satisfied with the conclusions of the Equality Impact Assessment related to this consultation document?

Y/N/ If no what conclusions are you concerned about?

Q15. Are there any additional factors which you believe should be taken into account in the impact assessment?

Y/N/ If yes what additional need to be taken into account?

Q16. Do you have any specific comments on cost recovery not covered by the questions above?

LOCAL AUTHORITY SECTION

Please only answer the questions in this section if you represent a Local Authority.

Q17. Would your Local Authority wish to have a legal duty (non-discretionary) to operate a fee for intervention cost recovery scheme?

Y/N/ and please explain the reason for your answer.

Q18. Assuming your Local Authority is required to implement cost recovery, are the HSE estimates in the impact assessment an accurate representation of what would happen in your Local Authority with reference to:

a) the proportion of visits that would result in finding a material breach?

b) the estimated cost recovery rate?

c) If the estimates are not correct not, what estimates do you feel HSE should use in these areas when estimating LA costs?

Q19. What do you expect to be the costs of establishing a cost recovery scheme? Please give separate estimates for:

a) training of inspectors,

b) internal communication efforts,

c) process and system testing,

d) changes in computer systems,

e) setting up an invoicing system etc,

f) annual running costs for a cost recovery system.

Q20. Do you have systems in place that will allow your Local Authority to accurately record the time spent on regulatory interventions to allow invoice generation?

Appendix 3

Examples of hypothetical HSE interventions and how fee for intervention would be applied.

Example 1:

During an inspection, the HSE inspector observes that the duty holder is not displaying Health and Safety at Work Law “What You Should Know” poster or distributed the leaflet giving the same information. Failure to do so is a breach of the Health and Safety Information for Employees Regulations 1989. However, this failure does not increase the risks posed to employees or members of the public. Depending on the health and safety standards across the rest of the workplace, inspectors would resolve this matter with verbal advice. They would however advise the duty holder that the breach should be resolved and may seek confirmation or evidence. If this technical (non-material) breach required no further regulatory intervention, and was the only breach identified by the inspector, this inspection would be exempt from cost recovery by fee for intervention and the cost of the regulatory work would not be recovered from the duty holder.

Example 2:

While undertaking an inspection, the HSE inspector asks to see the record of thorough examination for a piece of lifting equipment. The duty holder assures the inspector that the equipment has undergone a statutory thorough examination but is unable to provide a record as evidence, because they are stored off site at the business headquarters. The inspector looks at the equipment concerned and identifies no obvious defects that may indicate the equipment is not being maintained appropriately. The inspector may deal with this matter verbally, but agree a date by which the duty holder should send the inspector copies of the thorough examination record as evidence that the equipment has undergone a thorough examination. If the duty holder sends the evidence within the timescale stipulated by the inspector there has been no breach of the law. As such, the inspection would be exempt from fee for intervention cost recovery and the duty holder would pay nothing.

If the duty holder failed to provide the inspector with evidence that the equipment had undergone a through examination the inspector may formally write to the duty holder requesting evidence or they may, on consideration of other factors (such as previous similar advice) serve an Improvement Notice. In either case, the requirement to rectify is formally made in writing (by way of the letter or Improvement Notice) to address the material breach of the Lifting Operations and Lifting Equipment Regulations 1998, and would be cost recoverable. Fee for intervention would apply to both these circumstances and HSE would recover the costs from the duty holder for this intervention. The costs of intervention would include the total time of the inspection when the material breach was identified, the time spent preparing

the letter and visit records and the time spent subsequently verifying that the duty holder had taken the action required.

Example 3:

As part of an inspection, an HSE inspector raises concerns regarding the level of guarding on a bespoke piece of process machinery. The inspector has concerns that employees may be able to gain access to dangerous moving parts of machinery which could result in a significant injury. As the machine is bespoke and has been adapted specifically for the processes undertaken by the duty holder, the HSE inspector requires specialist assistance to determine what the most appropriate level of guarding should be for this machinery. On the basis of discussions with the specialist inspector the inspector forms the opinion that the machine is not adequately guarded and employees could be significantly injured. The inspector serves an Improvement Notice to ensure that the material breach of the Provision and Use of Work Equipment Regulations 1998 is remedied. The inspector subsequently revisits the site to ensure the duty holder has complied with the terms of the Improvement Notice.

This was a material breach of health and safety law: Fee for intervention would apply and HSE would recover the costs from the duty holder. This cost would include all the time spent; i.e. the whole of the initial intervention when the material breach was identified, discussing the issue with the HSE specialist, preparing the letter, Improvement Notice and visit records, plus the time spent revisiting to ensure the duty holder has complied with the terms of the Improvement Notice

HSE proposal for extending cost recovery

The full text of this and other
Consultative Documents can be viewed
and downloaded from the
Health and Safety Executive web site on the
internet: www.hse.gov.uk/consult/index.htm

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