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### **Extending Cost recovery**

#### **A Paper by Gordon MacDonald**

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**Cleared by Gordon MacDonald on 22 June 2011**

#### **Issue**

1. HSE is extending the scope of activities for which it recovers its costs from those it regulates. This paper updates HELA on HSE's proposals, and seeks early views on the pros and cons of LAs being included within scope and what form of future engagement it wants on the issue.

#### **Timing**

2. A HELA view on issues now would be useful as HSE plans to consult on the proposals in the middle of July..

#### **Recommendation**

3. That HELA:
  - Notes the Government's policy on extending cost recovery and HSE's plans for its implementation;
  - Gives an early view on the pros and cons of LAs being in or out of the scope of the proposal;
  - Gives a view on how LAs should be involved in the consultation process.

#### **Background**

4. The 21 March Ministerial statement "Good Health and Safety, Good for Everyone" announced that it was Government Policy for HSE to extend the scope of its cost recovery. In particular, it set out three areas where changes are proposed:
  - Where businesses are found to be in material breach of health and safety law, they rather than the taxpayer should bear the related costs incurred by the regulator in helping them put things right – what is known in this paper as fee for intervention (FFI).

- Where HSE provides services to business which are a necessary part of the land use planning process, and where it acts as a statutory consultee for land use planning applications and hazardous substances consents.
  - Where HSE provides non-statutory services to business such as providing initial advice to large development projects at the request of developers.
5. It was also agreed that HSE would look to extend cost recovery in major hazard areas, beyond that which currently exists for COMAH sites, offshore installations and gas and other pipeline networks.
  6. The annex contains further information on our approach to land use planning, non-statutory advice to businesses and major hazard activities. This paper focuses on FFI since it is both most immediate and of most significance for LAs.

## **Argument**

### *Fee for Intervention*

7. This is the major change proposed for now. The key ingredients of the scheme are:
  - a) FFI will apply where, in the inspector's opinion, there is material breach of health and safety legislation which requires a formal regulatory intervention (a letter, e mail, or enforcement notice). Inspector decision making will continue to be guided by the enforcement policy statement and enforcement management model. The cost recovery boundary will be the initial visit at which the breach is found, and any subsequent action taken by HSE until the breach has been rectified. If HSE prosecutes, FFI will stop when an information is laid or, in Scotland, when a case is referred to the Procurator Fiscal. At this point, additional costs will be recovered in England and Wales through the courts as now, though in Scotland no such costs can be recovered. HSL and specialist inspector support will be charged for. An hourly rate (currently estimated at £133) will be used across HSE. No fee will be charged for trivial breaches. Compliant businesses will pay nothing.
  - b) FFI will not apply where HSE already recovers its costs under a permissioning regime such as operates in the high hazard chemicals, offshore and nuclear sectors.
  - c) There will be a disputes process for resolving any differences between the inspector and duty holder on issues such as the levels of payment and interpretation of material breach.
  - d) Section 43 of HSWA allows HSE to recover its costs in certain circumstances and the Health and Safety Fees Regulations specify to which activities this will apply. The FFI proposal will be implemented through a change to the fees regulations. When an activity is specified in the fees regulations, HSE must recover its costs for that activity i.e. cost recovery becomes a mandatory requirement and not a discretionary power.

### *Local Authorities*

8. We recognise that LAs will have an interest in the issue as both a duty holder from whom HSE might in future recover its costs, and as a partner regulator. Most of the discussion with LAs so far has been on the latter. We have taken soundings from LGR, the Scottish Society of Chief Officers of Environmental Health, the Welsh LGA and a number of LAs through the HSE/LA partnership relationships.
9. The views that have been expressed so far are mixed. The view for inclusion is based on wanting to avoid a two-tier system and to ensure that no obstacles are put in the way of continued partnership working. The view against inclusion is that FFI could harm LA's broader role of promoting and supporting businesses, and that the overhead costs of setting up the back office functions to support cost recovery would not be worth the likely income generated. In addition, some LAs will be waiting to see the detail of the proposal before taking a view. Recognising that the discussions so far have been limited, the prevailing current view seems to be that LAs would prefer a discretionary power to recover costs. However, as set out in paragraph 7, the construction of HSWA will not allow this. If LAs were to be included, they would be open to legal challenge if they subsequently decided not to recover their costs.
10. Because of this, the draft consultation document assumes that LAs are out of scope but asks the question as to whether they should be. Meanwhile HSE intends to engage with LAs further and with DCLG and the devolved administrations to establish a clearer consensus on where LAs should be positioned on the issue.

#### *Key Project Milestones*

11. An Impact Assessment is with the Regulatory Policy Committee now for clearance. We plan to start a 12 week formal consultation from July to October.
12. We will undertake a dry run of new cost recovery processes in FOD in selected regions in October through to December and all relevant parts of HSE will shadow run the new processes from January to March. Go live date is 6 April 2012.

#### **Financial/Resource Implications for HSE**

13. Current estimates are that FFI will generate £37m in revenue once the system beds down.

#### **Contact**

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## Annex

### Land Use Planning, Non-Statutory Advice and Major Hazards

#### *Cost Recovery for Land Use Planning Work*

1. Any extension of cost recovery to functions HSE performs as a statutory consultee on land use planning will have to be achieved through amendments to planning legislation. This will therefore have to be done through DCLG. HSE will engage with DCLG on this basis but it is not feasible to achieve this change by April 2012.

#### *Cost Recovery for Non-Statutory Advice*

2. An example of non-statutory advice would be where a developer of a retail development near a major hazard site seeks our input to the proposal prior to seeking formal planning approval. In these circumstances we might advise on what changes would be necessary to ensure that the proposal did not get an “advise against” recommendation on health and safety grounds when it reached the application stage. This will not require a change to the law but HSE will develop policy guidelines on how it will be implemented.

#### *Extending Permissioning Cost Recovery*

3. HSE intends to extend cost recovery in major hazard sectors including deep mines, explosives, high hazard biological agents, some wells and some pipelines. This will be on the basis of recovering our costs for all regulatory activity irrespective of whether a material breach is identified.
4. In nearly all these sectors, we have plans for legislative streamlining and reform and we propose extending cost recovery as we make these reforms and not through the changes now proposed. Furthermore, we propose that FFI applies in these sectors until such time as permissioning cost recovery applies.