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HEALTH AND SAFETY COMMISSION

Approval of amendments to new regulations on the manufacture and storage of explosives

**A paper by Andy Miller (Head of Section Mines Quarries and Explosives Policy)
Cleared by Mike Tonge and Jonathan Rees Responsible Board Member: Giles Denham**

Issue

1. The Commission agreed at its November 2003 meeting to draft regulations to update the law on the manufacture and storage of explosives. It is now asked to approve a revised set of regulations. The amendments address issues identified in consultations with the Office of the Parliamentary Counsel as well as dealing with errors, omissions and loopholes identified during further consultation. The paper also discusses proposals for increases to the fees chargeable for work done by local authorities and the police.

Timing

2. We hope to bring the regulations into force on the next common commencement date of April 6.

Recommendation

3. The Commission is asked to agree the proposals for revised regulations.

Background

4. The Explosives Act 1875 is one of the few major pre-Health and Safety at Work Act pieces of legislation that is still in force. While the Act itself has stood the test of time well there have been significant changes in the industry and in the wider economy that have been addressed in this review.

5. **The new regulations replace not only most of the Explosives Act but also 48 items of secondary legislation. The major benefit from the new legislation will be in reducing the complexity of the legislation.** This work forms part of HSC/E's contribution to the government's 'better regulation' effort as well as to meet the obligations under section 1(2) of HSWA to progressively replace pre-1974 legislation.

6. Since the draft regulations repeal or amend primary legislation, it has been necessary to consult with the Office of the Parliamentary Counsel. This has led to extended discussions to get right the repeals and the consequential amendments to other legislation. In addition to this, other changes were needed either to refine the regulations or deal with errors or omissions that came to light during discussions with stakeholders including a series of 'roadshows' for local authority staff.

Argument

7. The revised regulations are attached at Annex A. Annexes B-E include a detailed discussion of the changes to the previously-agreed proposals. The most

significant changes - on the definition of explosive and a tightening of the provisions on temporary storage - are discussed below.

Definition of explosives

8. It has become clear that the present definition of explosive would not pick up certain explosives which, because they have been diluted by water or other liquids, are not classified as UN Class 1. We have amended the definitions to address this gap. At the same time we have also amended the licensing requirements to exclude processes that use desensitised explosives to make products that are not themselves explosives.

9. This expanded definition will be included in the Control of Explosives Regulations 1991. Since COER came into force a number of new desensitised explosives have been recognized by the UN. Some of these raise serious security concerns: while the dilution may have made the substance safer for transport purposes it is nevertheless still potentially useful to terrorists. This amendment will address this potential loophole.

Exemptions from licensing requirements for temporary storage

10. The present legislation does not define storage, as distinct from possession, and the case law is old and unclear. This has meant that for a number of years HSE has adopted the operational policy of accepting storage without a licence for periods of up to 24 hours. This approach has been adopted in the new regulations. However, there is concern among local authorities that there would be widespread abuse of this provision, and that it would be impossible for them to prosecute without the prohibitive expense of overnight surveillance operations. Due to the continuing political concern over illegal supply of fireworks we took the view that we had no option but to address these concerns.

11. The view we have taken is that if a person wishes to take advantage of the dispensation permitting temporary storage without a licence, then it should be incumbent upon them to demonstrate that they were complying with the conditions of the dispensation (ie storing for less no longer than the permitted period). After discussions with the HSE Solicitor Regulation 23 has been amended to put a burden on the defendant, in the event of a prosecution, to demonstrate that they had complied with the terms of the exemption. The Solicitor's view is that these can be justified as consistent with human rights legislation. The burden would be to prove on the balance of probabilities – rather than to prove beyond a reasonable doubt.

12. We intend to provide guidance both to dutyholders and enforcers on what evidence dutyholders should reasonably be expected to provide and on how this provision should be used in accordance with HSC's Policy on Prosecution.

13. We have also made some other amendments to the requirements in this area to state that the maximum permitted amounts are the maximum that can be present at the site at any one time ie including material that is there 'temporarily' and that where explosives are kept temporarily at a site under one of the dispensations all of the explosives must be removed at the end of the period – in other words it would **not** be possible to store explosives for longer periods by rotating the stock. In our view these amendments simply close potential unintended loopholes in the regulations.

Fees for work done by the local authorities and police

14. As part of the work on the review of the regulations we have also looked at the fees payable to the police and local authorities for the work they do. There are two major problems:

- some fees are significantly out of line with the real costs. The present fee for a registration is £13 compared to the estimated cost for a new application of £95 and £45 for a renewal;
- the police do not receive any fee for issuing explosives certificates.

15. We believe that the ‘polluter pays’ principle clearly applies here and the Treasury policy is that statutory services such as these should be subject to full cost recovery. There therefore is a strong case both for a significant increase in the fees for registrations and for the introduction of fees for the issue of explosives certificates. At the same time Ministers have also taken the view that increases [of the scale needed here] should be phased in over a period of time. We are therefore proposing that there should be a one-off increase and then the fees should be increased by 20 percent each year until they have reached the true cost level.

	Current fee	True cost	Proposed annual fee
New store licence	£75	£170	£100
Store licence renewal	£75	£75	£75
New registration	£13	£95	£60
Registration renewal	£13	£45	£30

The proposed fees for explosives certificates will vary from £165 to £225 for new certificates and from £135 to £200 for renewals (all fees are for three years): Part of this increase will however be mitigated by fees for three-yearly licences which will represent a saving over the present annual licence fee.

Consultation

16. There has been extensive consultation on this work via a sub-committee of ACDS as well as bilateral consultations with interested parties. The proposals have been endorsed by the main ACDS.

Presentation

17. We do not plan any major public launch; instead we plan to build awareness of about the changes through industry and other representative groups. Our line will be that, the proposals maintain the strengths of the existing framework while bringing the law up to date and bringing together guidance on best practice in one document. Where necessary, the framework has been strengthened and enforcement responsibilities rationalised.

18. We will issue a press release with the document and target it at the relevant specialist and national press. We expect some media interest in the aspects of the proposals that affect the supply of fireworks. The proposals will assist DTI efforts to restrict the supply of fireworks through the illicit supply chain.

19. Given the sensitivities around fireworks, the proposals are likely to attract interest from MPs. There is a good story to tell in that HSE has worked closely with local authorities (and DTI) in the development of the regulations and sought to address the issues they have identified, in to order to strengthen the hand of enforcers in dealing with illegal storage (and by extension, with illicit trading).

20. The work on this will be included in the presentation of HSE's more general better regulation effort.

Costs and benefits

21. The objective has been to introduce a set of proposals that are cost neutral overall. There will be cost benefits from reducing the volume of legislation and paperwork requirements. HSE has sought to limit and mitigate the adverse cost implications of the proposals but there will be cost implications for a small number of people storing high explosives. Overall cost savings for dutyholders are estimated at £2.6 million over ten years in present value terms. Total health and safety benefits discounted over 10 years would be estimated at around £800,000. There are in addition cost savings to HSE and local authorities.

Financial/Resource Implications for HSE

22. There have been significant costs to HSE in the development of these regulations. These are estimated at around £500,000 over the last 6 years. There will also be costs in publishing the ACoP and guidance to the new regulations and in. However in the longer term resources will be freed up for other work.

Environmental and Other Implications

23. None.

Action

24. The Commission is invited to endorse the amended proposed draft regulations and endorse the proposed approach on fees (paragraph 14).

List of Annexes

- Annex A: draft regulations;
- Annex B: a regulation-by-regulation commentary on the changes we have made;
- Annex C: a table comparing the proposed repeals and amendments to the Explosives Act between the original and new versions;
- Annex D: a table showing the changes to the consequential amendments;
- Annex E: a draft covering letter to the Minister for Work..

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Regulation-by-regulation commentary

1. This annex provides a detailed commentary on the changes made since draft regulations were submitted to the Health and Safety Commission in November 2003. The proposed changes are as follows.

Preamble (paragraph 2)

2. This has been revised to include additional changes to references to the Explosives Act in other legislation.

Regulation 2(definitions)

3. The most important changes are the addition of a new definition of 'desensitised explosive' and changes to the definitions of 'explosive substance' and 'explosive'.
4. As discussed in the main paper, desensitised explosives have been added to the definition to include substances which would be classified as explosives but for the fact that they have been diluted with water etc.
5. The definition of 'explosive substance' has been amended to make clear that 'preparation' does not include a preparation involving a gas.
6. We have also included a definition of 'percussion caps' as well as making some small changes to paragraph 8.

Regulation 3

7. This regulation has been amended to specify that the MoD licensing scheme should provide for a system of separation distances and/or other safety measures. This amendment was needed to deal with submarines in dry dock but it is also a better form of words in that it was always the intention that separation distances should be considered in conjunction with other safety measures.
8. Paragraph 8 has been included because of the proposed amendments to the Isle of Man Act – we have agreed that it would make most sense to make one amendment which would cover imports from the Isle of Man into Northern Ireland and into mainland Britain.

Regulation 5

9. We have included percussion caps in the provision for shooters powders.

Regulation 9

10. The most important changes to the Regulation are the addition of two new sub-paragraphs (9(2)i and 9(2)j). The former removes the requirement for a manufacturing licence where desensitised explosives are used to manufacture products that are not explosives. The latter enables a wholly-owned subsidiary to operate under a licence granted to the parent company.
11. Sub-paragraph (2)b has been amended for the avoidance of doubt.

Regulation 10

12. Again we have made amendments on desensitised explosives and on wholly-owned subsidiaries. Paragraph 10(2)g removes the requirement for a storage licence for certain types of desensitised explosive, 10(2)h enables a wholly-owned subsidiary to operate under the parent company's licence.
13. Paragraph 2(b) has been amended to correct an error in the previous draft. The intention was always to maintain the status quo of allowances. As Schedule 1 of COER includes some explosives that are **not** in UN HD 1.4, the proposals as previously drafted (ie to limit the 5 kg allowance to Hazard Type 4 explosives) would have represented a significant tightening.
14. Paragraph 10(3)b has been added to make clear that the maximum permitted quantities apply to all explosives on site.

Regulation 11

15. The most important change to the regulation is the addition of paragraph 6. Schedule 3 limits the amount of fireworks that can be stored in the sales area of a shop (the amount will depend on the size of the shop – see Schedule 3)
16. This regulation has also been amended to include percussion caps. Paragraph 8 has also been added to address the issue of temporary storage.
17. This Regulation has also been amended to maintain annual registrations where the local authority is the licensing authority while permitting the police to issue registrations to run concurrently with explosives certificates. This change is indirectly a product of the introduction by DTI of a system for licensing sales of fireworks. A similar change has been made in Regulation 13.

Regulation 13

18. A new sub-paragraph has been added to paragraph 4. The new sub-paragraph has been added to provide for those firms that are currently sub-letting part of an existing site and who need to apply for a new licence.

Regulation 16

19. Regulation 16(1) has been reordered and clarified. There is no change in the substance of the regulation.

Regulation 23

20. Regulation 23 has been substantially revised. Paragraph 23(3) has been added. The issues are discussed in the main paper. Paragraphs (1) and (2) have been revised so that the form of words is consistent with Regulation 23(3)

Regulation 27

21. This regulation has substantially reworked since the version that went to the November 2003 meeting of the Commission. The main changes are that new transitional provisions have been added to mitigate potential adverse effects on existing licensees – or people currently exempt from the need for a licence. In general terms these give three years in which to apply for a new licence, and also facilitate this process by exempting applicants from the need for local authority

assent – providing that they are not proposing to make significant changes to their operations. This includes cases where:

- a person is required to apply for a licence when they had previously been operating on a site where the licence was held by the site operator;
- an existing local authority licensee is required to apply to HSE for a licence.

22. There are also transitional provisions to ensure that someone currently applying for a licence under the Explosives Act does not have to restart the application process when the new regulations come into force.

Schedule 1: licensing authorities

23. Paragraph 3 has been added as a clarification and to avoid a situation where the regulations might be interpreted as requiring someone to apply to the HSE for a manufacturing licence and to the local authority for a storage licence.

Schedule 2: separation distances

24. 'Place of public resort' has been amended to specify a minimum qualifying number.

Schedule 4: registers

25. The solicitor has clarified the wording on costs for copying of register entries for members of the public. The substance is unchanged.

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Explosives Act: amendments, repeals and revocations

Revised Proposal	Previous proposal	Comment
Repeal sections 4 to 22, 24 to 29,	Repeal sections 4 to 22, 24 to 29	Unchanged
Amend Section 23 so that it reads as follows: (1) The occupier of every premises at which gunpowder is manufactured or stored shall take all due precaution for preventing unauthorised persons having access to the premises or to the gunpowder therein. (2) In the event of any breach (by any act or default) of subsection (1), the occupier shall be guilty of an offence.	Delete references to safety so that section only covers security	Section 23 to add a new paragraph to create an offence if the main duty is breached.
Repeal sections 24-29	Repeal sections, 24 to 29	Unchanged
Repeal sections 35, 36, 38,.		New repeals
Repeal sections 40 and 41	Repeal section 40 (except subsections (9) to (11) insofar as they relate to the supply of acetylene), 41	Whole of section 41 to be repealed
Section 43, amended to create an offence in the event of a breach of the main duty.	Retain unamended.	
Repeal sections 44 to 51	Repeal sections 44 to 51	Unchanged
Repeal section 58		
Repeal sections 60, 63 and 64	Repeal sections 60, 61, 63, and 64	Section 61 added to list of repeals
In section 67, amend reference to London Boroughs and delete reference to harbour authorities		Section 67 to be retained
Repeal sections 70 to 72, 77, 78 82, 84 and 86	Repeal sections 72, 77, 78, 82, 84,	Section 70 added to list of repeals
In section 91, repeal the words from "Provided that" to "exceed one month".		New repeal
	Repeal section 95	Section 95 to be retained
In section 97, repeal paragraphs (3) and (4) and the words from "Provided that" to the end.		New repeals
Repeal sections 98 and 101.	Repeal sections 98 and 101	unchanged
In section 102, repeal the words from "A continuing certificate" to the end.		New repeal
Repeal sections 103, 105 and 106.	105	Sections 103 and 106 added to list of repeals
In section 108 – (a) in the definition of "this Act", the words "certificate, byelaw, regulation, rule,"; (b) in the definition of "store", the		New repeals to remove redundant definitions

<p>words “an existing gunpowder store as defined by this Act, or” and “licensed by a license granted by a local authority under this Act”; and</p> <p>(c) the definitions of “existing”, “factory magazine”, “harbour authority”, “canal company”, “railway company”, “safety cartridges” and “Gunpowder Act 1860”.</p>		
<p>Section 109(11).</p> <p>In section 110, paragraph 2 and the word “and” preceding it.</p> <p>In section 111, paragraph (b) and the word “and” preceding it.</p> <p>Section 113.</p> <p>In section 114, paragraph (a).</p>		
Schedule 1.	Schedule 1	Unchanged

Consequential amendments

1. We have made minor drafting changes to the following consequential amendments:
 - London Building Act 1930
 - London Government Act 1963
 - Fire Precautions Act 1971
 - Customs and Excise Management Act 1979
 - The Factory and Workshop Act 1901, use of locomotives and wagons on lines and sidings, Regulations 1906
 - The Clean Air (Emission of Dark Smoke)(Exemption) Regulations 1969
 - The Fire Certificates (Special Premises) Regulations 1976
 - The Isle of Scilly (Functions) Order 1979
 - The Notification of Installations Handling Hazardous Substances Regulations 1982
 - The Building Standards (Scotland) Regulations 1990
 - The Building Regulations 2000
 - The Planning (Hazardous Substances) Regulations 1992
 - The Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993
 - The Coal and Other Safety Lamp Mines (Explosives) Regulations 1993
 - The Placing on the Market and Transfer of Explosives Regulations 1993
 - Control of Pollution Act 1974
 - Environmental Protection Act 1990
 - The Quarries Regulations 1999
2. The Reporting of Injuries and Dangerous Occurrences Regulations 1995 and The Health and Safety (Enforcing Authority) Regulations 1998 have been amended to reflect to the revised definition of explosive.
3. We have also made a number of drafting changes to the amendments to the Fireworks Act 1951. Sections 4 and 7 are relevant statutory provisions and have been deleted. The residual parts of the Act are to be amended to reflect the terminology used in the regulations. The legislation is redundant but we have nevertheless had to update it as it is unlikely to be repealed in the near future.

4. We have amended the Control of Explosives Regulations to reflect the terminology used in the new regulations and in particular the inclusion of desensitised explosives in the definition of explosive. As noted in the main paper this will have the effect of including substances, such as dilute TNT, which should have been included within the explosives control regime from the outset. On the other hand a number of other desensitised explosives have been added to the list of explosives.
5. The form of the explosives certificate has been amended to reflect the new terminology used in the regulations.

New consequential amendments

6. We have included new consequential amendments to amend references in other items of legislation that for various reasons had not been included in the original proposals. These are amendments to:
 - The Celluloid and Cinematograph Film Act 1922
 - The Acquisition of Land (Authorisation Procedure) Act 1946
 - The National Parks and Access to the Countryside Act 1949
 - The Emergency Laws (Miscellaneous Provisions) Act 1953
 - The Trade Descriptions Act 1968
 - The Public Expenditure and Receipts Act 1968
 - The Roads (Scotland) Act 1984
 - The Merchant Shipping Act 1995
 - The Criminal Procedure (Scotland) Act 1995
 - The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975
 - The Classification and Labelling of Explosives Regulations 1983
 - The Dangerous Goods in Harbour Areas Regulations 1987
 - The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2004
 - The Stratified Ironstone, Shale and Fireclay Mines (Explosives) Regulations 1956
 - The Miscellaneous Mines (Explosives) Regulations 1959
7. The Isle of Man Act 1979 has been amended so explosives that cannot be imported under the new regulations cannot be brought into the country via the Isle of Man. This simply updates the current status quo.

Draft Letter to Jane Kennedy

Jane Kennedy MP
Minister for Work
Department for Work and Pensions

Proposals for new regulations on the manufacture and storage of explosives

I am writing to send you the Health and Safety Commission's proposals for new regulations on the manufacture and storage of explosives. The package includes the draft regulations, explanatory memorandum, regulatory and competition assessment, and draft Approved Code of Practice.

The new regulations will replace most of the Explosives Act 1875. The Explosives Act 1875 is one of the few major pre-Health and Safety at Work Act pieces of legislation that is still in force. While the Act itself has stood the test of time well there have been significant changes in the industry and in the wider economy.

The new regulations replace not only most of the Explosives Act but also 48 items of secondary legislation. The major benefit from the new legislation will be in reducing the complexity of the legislation. This work forms part of HSC/E's contribution to the government's 'better regulation' effort as well as to meet the obligations under section 1(2) of HSWA to progressively replace pre-1974 legislation.

We expect that the proposals will produce savings in both enforcement and compliance costs.

The proposals have been developed in close consultation with the CBI, TUC, local authorities and other interested parties.

The proposals maintain the strengths of the existing framework while bringing the law up to date and making it easier to understand. They will also help to improve standards by bringing together guidance on best practice in one document. Where necessary, the framework has been strengthened and enforcement responsibilities rationalised.

The proposals will also strengthen the law on the storage of fireworks. This area is well regulated by the local authorities in partnership with HSE, and injuries resulting from the storage of fireworks are very rare. However, the Commission recognises that the legislation on storage plays an important role in support of the wider regime for the control of fireworks. HSE has worked closely with local authorities (and DTI) in the development of the regulations and sought to address the issues they have identified, in to order to strengthen the hand of enforcers in dealing with illegal storage (and by extension, with illicit trading).

I would welcome approval of the regulations. Subject to your agreement HSC would wish that the regulations can be laid before Parliament in time to allow for the coming into force on the common commencement date of 6 April 2005.

I would also welcome your consent for the Commission to approve a Code of Practice to support the regulations

As part of the review of explosives legislation the HSE has also reviewed the fees payable to the police and local authorities for the work they do in licensing and registering premises for the storage of explosive and in granting explosives certificates authorising the acquisition and keeping of explosive. There are two major problems:

- some fees are significantly out of line with the real costs. The present fee for a registration is £13 compared to the estimated cost for a new application of £95 and £45 for a renewal;
- the police do not receive any fee for issuing explosives certificates.

We believe that the 'polluter pays' principle clearly applies here and the Treasury policy is that statutory services such as these should be subject to full cost recovery. There therefore is a strong case both for a significant increase in the fees for registrations and for the introduction of fees for the issue of explosives certificates. At the same time we are mindful of the impact on businesses of such fee increases and that Ministers have also previously taken the view that such increases should be phased in over a period of time. We are therefore proposing that there should be a one-off increase and then the fees should be increased by 20 percent each year until they have reached the true cost level.

Bill Callaghan
Chair, Health and Safety Commission