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PROPOSED CONTROL OF MAJOR ACCIDENT HAZARD (COMAH) REGULATIONS 2015 - OUTCOME OF PUBLIC CONSULTATION

Purpose of the paper

1. To inform the HSE Board of the outcome of the public consultation on the proposed Control of Major Accident Hazard (COMAH) Regulations 2015 and agree publication of consultation outcome.
2. To seek agreement to submit the final Impact Assessment to the Regulatory Policy Committee (RPC).
3. To seek agreement to send the regulatory package to the Minister for Disabled People in advance of a second ministerial write-round.

Background

4. The Seveso III Directive (2012/18/EU) must be implemented by Member States by 31 May 2015. The Board was informed of the plan for implementing the new Directive in October 2013 and the proposed public consultation in March 2014.
5. Seveso III is a new Directive rather than an amendment and was required to take into account the planned replacement of the hazard based classification system of chemicals on which the scope of Seveso II was based. Without a new Directive, the COMAH Regulations 1999 would have required updating to reflect the change in the classification system, similar to the package of consequential amendments presented in board paper HSE/14/75.
6. The CLP (Classification, Labelling and Packaging of Substances and Mixtures) Regulation came into force in January 2009 and replaced the CHIP (Chemicals Hazard Information and Packaging for Supply) Regulations. The CLP Regulation adopts the UN Globally Harmonised System of classification (GHS) and there is significant industry support for implementing the globally harmonised system to benefit trade across Europe and the rest of the world. CLP allowed for a five year familiarisation period for industry.
7. The Commission also took the opportunity to modernise and update other aspects of the Directive including alignment with the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) which underpins the new public information requirements present in the Directive.

8. New COMAH Regulations are needed to implement the new requirements. There is no intention to fundamentally alter the COMAH regime but there are differences, for example new timescales, which must be implemented.
9. Subject to clearance from the Board, the Minister for Disabled People and the Reducing Regulation Committee, the new Regulations will be laid by 13 March to come into force on 1 June 2015. The chemical classification legislation which establishes whether a site enters the COMAH regime and at which tier will be repealed by this date meaning that without the new COMAH 2015 Regulations there will be no effective major hazards regulatory regime in place.

Proposed changes and costs

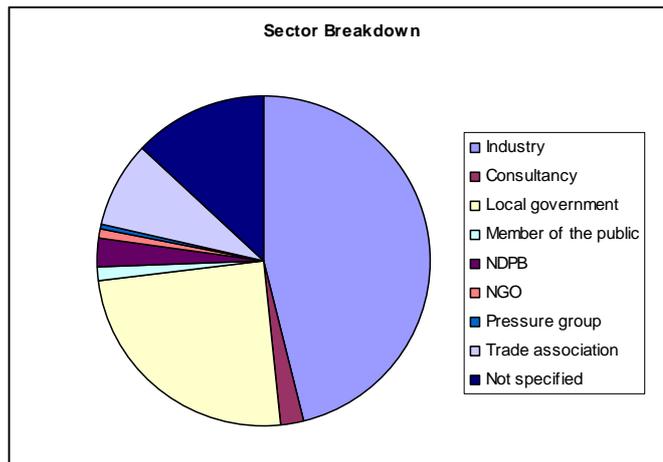
10. The primary changes between the current regulatory regime and the new COMAH Regulations 2015 that were the subject of the consultation are:
 - a. Public Information
 - b. Scope
 - c. Emergency Plans
11. The consultation stage Impact Assessment, including the ten instances of gold-plating (listed in the table at Annex 5), was given a green rating on 4 April 2014. In the first stage write round the Cabinet Office and the Department for Business, Innovation and Skills gave qualified support for the proposals, stating they would need to see clear support for any gold-plating to approve the final write round.
12. The impact assessment of these changes is contained in Annex 4. This gives a total best estimate net cost to society of around £40.23m in present values over 10 years. The best estimate net cost to business is around £39.30m in present values over ten years. This gives a best estimate equivalent annual net cost to business of around £3.69m. Of this, around £0.1m is in scope of One in Two Out (OITO) and constitutes the 'IN'.

Overall response

13. The eight week consultation concluded on 27 June 2014 but responses were accepted for another week. Several responders commented that eight weeks was too short for a consultation of this level of complexity. A link to the consultation was issued to subscribers to the Seveso III e-bulletin (approx 24,000 email addresses) and to HSE's consultations e-bulletin (approx 27,000 email addresses), it was also shared on HSE's Twitter feed. Additionally, 80 key COMAH stakeholders, including members of the COMAH Strategic Forum and Chemical and Downstream Oil Industries Forum (CDOIF) were directly informed.
14. Extensive informal consultation had been carried out with key stakeholders, including the main trade associations, in the course of developing the consultation proposals. These discussions enabled the key issues for

consultation to be highlighted. Stakeholders were made aware of these key points and the launch date for the consultation.

15. The consultation document was downloaded 4532 times leading to 145 actual responses, these included trade associations, operators, representatives of local authorities, emergency services and members of the public. Trade Unions were involved in the informal stage consultations and were generally supportive of the proposals but no responses were received from trade unions to the formal consultation. A breakdown of respondents is provided below.



| Sector Breakdown | |
|-------------------------------------|------------|
| Consultancy | 3 |
| Industry | 67 |
| Local government | 36 |
| Member of the public | 2 |
| Non-Departmental Public Body (NDPB) | 4 |
| Non-Governmental Organisation (NGO) | 1 |
| Pressure group | 1 |
| Trade association | 12 |
| Not specified | 19 |
| Total | 145 |

16. The responses to the consultation were positive and supportive of the proposals. A detailed summary of responses including breakdowns of the key points raised on each question can be found at Annex 1.

17. The responses to the consultation supported the approach taken in the draft Regulations.

Scope

18. 93% of 104 responses agreed (including 90% of responses from industry) that notifications should be completed electronically. Some operators did however express concerns about the security of the information held on the proposed IT platform that would host the notifications.

19. Proposed Action: The security arrangements have been discussed extensively with the Home Office and with the developers in the planning stages and appropriate security would be part of any system specification.

20. 59% of the 112 responses supported the proposal to retain the existing requirement for the rolling submission of Safety Reports for new sites at pre-construction and pre-operation stage. Of the 60 responses received from industry 53% supported the proposal. Of the 17% of respondents that did not agree with the proposal most expressed concern that the proposal would hinder development.

21. Proposed Action: Our experience is that in practice, new constructions are uncommon, but the rolling submission is considered useful for both the Competent Authority¹ and industry. It allows for early sight of proposals and provides the opportunity to consider both health and safety and environmental matters at the design stage potentially avoiding costly post construction remedial action. To maintain the existing robust, world class regulatory regime HSE proposes to retain this policy and to provide clear guidance to ensure that reports provide information that builds on the earlier submission.

Public Information

22. There was overwhelming support (82% of 123 responses) for the proposal to use an IT platform hosted on HSE's website to hold the information for the public that all sites must provide. 72% and 80% of responses from Industry and Trade Associations respectively supported the proposal as did 100% of response from members of the public. Some responders said they would find the information useful, particularly amongst emergency planners to support the development of emergency plans.

23. The proposal for information to be made permanently and electronically available to the public is needed to deliver the public information requirements referred to in paragraph 7.

24. The 18% of respondents who did not fully support the proposals expressed concerns regarding:

- security of the information given its potential usefulness to terrorists
- the level of detail that would require to be entered on the IT platform
- releasing any information beyond the leaflets distributed to the public in the immediate vicinity of Upper Tier sites.

25. The responses to the questions regarding the provision of the information to the public, need to be considered against a background of a general reticence to release information and a difficulty in reconciling security and confidentiality concerns with the requirement of the Directive to be more open.

26. Proposed action: Any IT portal will be designed to address security concerns as discussed with the Home Office. The public information database will use a system of fields containing lists of pre-determined information which will define the level of detail, and guidance will be available to assist operators. This system should be easy for operators to use and require limited resources to complete and entry.

27. Although not an issue on which views were sought during the consultation, a number of respondents took the opportunity to express concern regarding the requirement to release information held by the Competent Authority upon request. The concerns centred on: the national security and commercial

¹ The COMAH Competent Authority works together to ensure consistency of enforcement of the COMAH Regulations and comprises of HSE, the Environment Agency, Scottish Environment Protection Agency, Natural Resources Wales and the Office for Nuclear Regulation.

confidentiality implications; the resources required to redact Safety Reports; and concerns that such information would alarm rather than inform members of the public. Some responders opposed the release of any information beyond the information Upper Tier sites are currently required to distribute to the public close to their site. The position of a number of responders demonstrated a lack of understanding about what the current Secretary of State's Direction means for Safety Reports. Whilst it placed a blanket ban on Safety Reports being placed on the public register, the requirements of the Freedom of Information Act and the Environmental Information Regulations (EIR) continued to apply and allowed for the release of all or part of a Safety Report upon request. This has led to some responders believing that the differences between the proposed changes and the current policy are more significant than they actually are.

28. Proposed Action: Guidance will be made available to provide more clarity on this matter, including the implications of the EIR to COMAH 2015. We also propose specific guidance (produced in conjunction with the Home Office) on how to handle national security sensitive information. We will also be seeking the help of trade associations in clarifying what the changes to the law means and explain the reality of the new requirements compared to the old.

Emergency Planning

29. 78% of 122 responses either agreed or strongly agreed with the proposal that local authorities should continue to have six months to produce an external emergency plan for Upper Tier sites rather than the two years proposed by the Directive. 91% of responses from local government agreed or strongly agreed with this proposal.

30. The majority of responders agreed to retain the current requirement because two years was too long to be without external emergency plans and this posed too great a risk. Most local authorities responded that the current timescales were generally realistic and achievable with current workloads.

31. Proposed Action: Based on the responses received, this proposal will be retained.

32. 66% of the 124 responses supported the proposal that Local Authorities could compel Category 1 responders to participate in the testing of external emergency plans as needed. 82% of local government responses and 57% of industry responses agreed with the proposal. Only 10% of industry responses disagreed with the proposals and did so because there wasn't a problem in their local area and therefore they didn't feel a legal requirement was necessary. The 33% of industry that were "unsure" sought assurance that any requirement to participate in testing would be proportionate to the level of testing required and would take into account the other duties of the Category 1 responders.

33. The main concern raised by both industry and Local Authorities was about where the cost burden for this proposal would lie. Charging or cost recovering

for this work is a matter for the local authorities and Category 1 responders to address.

34. Proposed Action: This is a new duty that is not in the Directive, but was put forward by stakeholders during informal consultation and was supported in the consultation responses. The proposed Regulations continue to allow for cost recovery by the Local Authority, but do not go any further as this is a matter for local democracy.

Additional matters not specifically related to the consultation questions but raised by respondents:

Timetable for reclassification

35. The Directive and COMAH 2015 Regulations are expressed in terms of the CLP Regulation not the CHIP Regulations used in COMAH 1999, therefore all operators must reclassify their inventories. Sites with large inventories of chemicals and mixtures may find this challenging, especially those that are downstream in the process and reliant on reclassified information being provided by their suppliers.
36. Proposed Action: The new Regulations allow for a transition period which should provide time for suppliers to update their information and downstream users to establish their COMAH status. Information and advice, including from HSL, will be included in the legal guidance to the Regulations and published on HSE's website. HSL are also considering a classification service as part of the commercialisation agenda.

Coming within scope of COMAH

37. A number of responders commented that they might come into scope or change tier because of the proposed COMAH Regulations. They formed this opinion based on the anticipated presence of dangerous substances or substances being reclassified under the CLP Regulation. It is possible that at least some of these sites should already have been in scope of COMAH, or at a different tier. Operators who have approached the Competent Authority with specific concerns regarding the implications of the CLP Regulation have been advised of the requirements of the current and new Regulations.
38. Proposed action: Operators who should previously have been in scope of COMAH 1999 and notify under COMAH 2015 will be treated as new establishments, notwithstanding any enforcement action which may be taken under COMAH 1999.

Pipelines

39. Several responders highlighted a discrepancy between the consultation document and the Regulations. For the purposes of the new Regulations any quantity of a dangerous substance in a pipeline within the boundary of an establishment should be included in the site's inventory.

40. Proposed Action: This discrepancy has been resolved, the wording and intention of the draft Regulation will be retained.

Transitional Arrangements

41. There is ongoing work to develop how Safety Reports due after 1 June 2016 will be handled. The Directive sets timescales for the new information required in a Safety Report to be submitted, which has the effect of setting new five year review cycles. This will create a peak of work for the Competent Authority which needs to be considered for effective handling of Safety Reports.

Legal Issues

42. Land use planning elements of the Directive are being actively addressed by the Department for Communities and Local Government and the Scottish and Welsh governments.

43. The legal risks to the transposition of the Seveso III Directive are low, and infraction by the European Commission on any point is considered unlikely.

Summary of amended proposals

44. The responses to the consultation were positive and there is support from all stakeholder groups to proceed with the proposals, including those that constitute gold-plating to retain the world class regulatory regime that exists in the UK. All the issues raised can be addressed through minor amendments to the draft Regulations or by providing appropriate guidance. The concerns of some operators about the release of information to the public reflect the significant culture change that the new Directive intends.

45. The revised Regulations can be found in full at Annex 3. Some work to further refine them will take place before the Minister for Disabled People is approached to send a second 'write around' to the Reducing Regulation Committee in December 2014.

46. The impact assessment has been signed off by HSE's Acting Chief Economist and will be submitted to the RPC for final opinion, subject to the Board's agreement, on 6 October 2014.

47. Since the consultation version of the proposed COMAH 2015 Regulations was published in May 2014, there has been further work on Part 9, Regulations 31-33 on savings, revocations and transitional provisions. The savings provisions allow for documentation including Safety Reports, Major Accident Prevention Plans and emergency plans produced in the COMAH 1999 Regulations to remain valid until a COMAH 2015 compliant equivalent is completed. It also has the effect of ensuring that any enforcement action begun under the COMAH 1999 Regulations can be concluded under the new Regulations after 1 June 2015.

Communications

48. A summary of the consultation responses can be found at Annex 2. Subject to agreement from the Board, this summary will be published on the Seveso III pages of the HSE website.
49. The Seveso III web pages were updated on 4 August 2014 to reflect the current position of development of the new Regulations. These pages will continue to be updated as appropriate until the Regulations are laid in March 2015. Updates to industry will continue to be provided via the COMAH Strategic Forum and other bodies.
50. Work is underway to draft the legal guidance supporting the Regulations. This legal guidance must be available online, in draft form, at least twelve weeks before the Regulations come in to force.

Devolved issues

51. Representatives from SEPA, NRW, the Welsh and Scottish governments are part of the Seveso III Implementation Programme Board and have been involved in drafting the Regulations with HSE, the EA and the Treasury Solicitors Department.
52. HSE Northern Ireland and the Government of Gibraltar, via the Foreign and Commonwealth Office, are kept up to date with the work to develop the COMAH Regulations 2015 as they prepare their own implementation of the Seveso III Directive.

Action

53. The Board is invited to:
 - a. Note the issues raised in the responses to the consultation outlined in paragraphs 18 - 38, and to agree the proposals to address them;
 - b. Agree that the Summary Response (see Annex 2) should be published on HSE's website;
 - c. Note the Final Impact Assessment (see Annex 4) and agree it should be sent to the RPC for an opinion; and
 - d. Agree that the package should be sent to the Minister for Disabled People seeking permission to go to a second ministerial write-round in December 2014.

Annexes

Annex 1 – Detailed analysis of response to CD266 – COMAH 2015 Consultation

Annex 2 – Summary response for publication on HSE web site

Annex 3 – Final Control of Major Accident Hazard (COMAH) Regulations 2015

Annex 4 – Final Stage Impact Assessment signed the Acting Chief Economist

Annex 5 – Table of points of gold-plating

