Consultation on the proposals for the review of the Dangerous Substances in Harbour Areas Regulations (DSHAR), the Approved Code of Practice (COP 18) and guidance HSE(R)27

Consultation analysis

Introduction

The consultative document (CD 277) was published on 28 October 2015 and outlined proposals to replace the Dangerous Substances in Harbour Areas Regulations 1987 (DSHAR) with new shorter, more up-to-date regulations, the Dangerous Goods in Harbour Areas Regulations. CD 277 also invited views on a new shorter Approved Code of Practice (ACOP) to support the regulations. The consultation closed on 23 December 2015.

The consultation was published on HSE’s website and DSHAR community page and through a number of HSE’s e-bulletins. In addition emails were sent directly to targeted stakeholders, other government departments and the Devolved Administrations. Due to the cross cutting nature of DSHAR we asked other government departments with an interest to promote it to their own stakeholder networks.

HSE received 21 responses, though two of these did not make substantive comments. Most respondents replied online or submitted an equivalent word template, and 7 emails were received with comments only. As some respondents offered opinions in relation to some but not all questions, or made comments without relating them to a question, total percentages under each question are expressed as a measure of those explicitly answering the question, not of total respondents.

The breakdown of respondents is as follows:

<table>
<thead>
<tr>
<th>Type of organisation</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charity</td>
<td>1</td>
<td>7%</td>
</tr>
<tr>
<td>Consultancy</td>
<td>2</td>
<td>14%</td>
</tr>
<tr>
<td>Industry</td>
<td>8</td>
<td>57%</td>
</tr>
<tr>
<td>Local government</td>
<td>1</td>
<td>7%</td>
</tr>
<tr>
<td>Trade association</td>
<td>1</td>
<td>7%</td>
</tr>
<tr>
<td>Trade union</td>
<td>1</td>
<td>7%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>

Responses received by capacity:

<table>
<thead>
<tr>
<th>Capacity</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>An employer</td>
<td>2</td>
<td>17%</td>
</tr>
<tr>
<td>An employee</td>
<td>1</td>
<td>8%</td>
</tr>
<tr>
<td>Health and safety professional</td>
<td>8</td>
<td>67%</td>
</tr>
<tr>
<td>Trades union official</td>
<td>1</td>
<td>8%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>14</td>
<td>100%</td>
</tr>
</tbody>
</table>
Overview

The consultation was generally well received and there was a high level of agreement to most of the proposals. This reflects the development of the proposals through close working with industry representatives, trades unions and other government departments.

There was only one issue on which there was substantial disagreement, relating to the proposed revocation of Part III of DSHAR, on Marking and Navigation of vessels. There were equal numbers for and against revocation; those against raised some significant concerns about our proposal to remove the requirement for vessels carrying dangerous goods to display a red flag in daylight, or an all-round red light when moored at night. Having sought further stakeholder input and discussed the matter with the Maritime and Coastguard Agency, we believe that sufficient evidence has been provided that revocation of this requirement could increase risks in certain circumstances. Therefore we propose to retain the requirement for flags and lights as a precautionary approach.

A number of other helpful comments were received which have helped us refine and clarify the proposals.

Summary of responses

Q1. Do you agree or disagree with our proposals in paragraphs 18-26 of the consultation document to amend the definitions and scope of DSHAR?

Total responses: 14. Agree 79% (11), Disagree 21% (3)

The majority of respondents agreed with the proposal. Those who raised comments or objections did so in three areas: Port Marine Safety Code and enforcement, Explosives and the definition of dangerous goods.

Port Marine Safety Code

One respondent from a trade union was in general agreement so long as there is a robust and properly funded enforcement regime and referred to compliance under the Port Marine Safety Code (PMSC). Whilst supporting the Code they wanted to record their belief and request that this should be a mandatory code.

HSE response: Policy on PMSC, including its status, lies with the Department for Transport (DfT). The respondent’s view has therefore been communicated to DfT.
Explosives

One respondent queried whether the proposal to exempt dangerous goods entering a harbour from inland, unless they are intended to be loaded on board a ship as cargo, will have implications for ease of licence compliance for a harbour that is licensed under DGHAR to load, unload or handle explosives. They felt a harbour having such a licence should continue to be aware in advance of all explosives entering the harbour by any means of transport, whether or not they are intended to be loaded on board ship as a cargo.

Another respondent accepted the changes but commented that providers of barge based fireworks displays need to be able to unload and transport fireworks using a barge to move around the harbour to an agreed location. The fireworks arrive in the harbour in UN packaging but are not when prepared for the show.

**HSE response:** On the first issue, we believe this is a valid point and we will remove explosives from the exemption for dangerous goods entering a harbour from inland that are not to be loaded onto a ship. On the second point, it should be noted that the new regulations do not substantively change the current requirements in respect of fireworks displays. However we have re-worded the regulations and ACOP to make clear that fireworks displays and their preparation will normally be exempted from explosives licensing requirements, depending on the specific circumstances.

**Definition of ‘dangerous goods’**

Two responses queried the proposed new definition of dangerous goods, which defines the scope of the new regulations. One argued that environmentally hazardous substances should be included, and commented that although the Health and Safety at Work etc. Act 1974 (HSWA) does not allow regulations to be made for protection of the environment, it has been extended to allow this in other areas, eg to make regulations on the transport of dangerous goods. Another respondent argued that oils covered by Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), noxious liquid substances covered by Annex II of MARPOL 73/78 and harmful substances in packaged form covered by Annex III of MARPOL 73/78, should be included in the definition of dangerous goods.

**HSE response:** the powers in HSWA have only been extended to cover environmentally hazardous substances for the purposes of implementing specific European Directives – as DGHAR is not transposing a European Directive we do not have such powers here. Some of the cargoes covered under MARPOL 73/78 are also covered solely by virtue of being marine pollutants, which means they cannot be included in the regulations for the same reason. However we have amended the definitions and supporting guidance to clarify the application of the regulations. Under our amended definition, cargoes are in scope of DGHAR when they meet the hazard criteria set out in the International Maritime Dangerous Goods Code (other than by virtue of being a classified as a marine pollutant). This may apply to cargoes in the annexes to the MARPOL convention, though not to all. Further explanation has been included in the ACOP.
Q2. Would the changes proposed to the exemptions to DSHAR mean you had to do anything different to comply with the regulations? If yes, please state why:

Total responses: 14. Yes 7% (1), No 93% (13)

The majority of respondents agreed to changes to the exemptions. One respondent wanted further clarification in relation to firework displays and was concerned that a jetty outside the harbour would now be required for loading fireworks onto the barge to bring into the harbour.

**HSE response**: As outlined above (HSE response to Q1) some amendments have been made to the regulations and ACOP to clarify that firework displays are normally exempt from the licensing requirements in the regulations.

Q3. Do you agree or disagree with our proposal to retain Part II of DSHAR?

Total responses: 15. Agree 100% (15), Disagree 0% (0)

All respondents agreed to this proposal. However one respondent asked for an explicit provision (as was present in the 1987 regulations) clarifying that it is not the case that in order to prohibit entry of dangerous goods into a harbour area, the harbour master must first have inspected them.

**HSE response**: we will clarify this in the regulations or the supporting guidance.

Q4. Do you agree or disagree with the amendments we are proposing in paragraphs 30 and 31 of the consultation document to the notification duty in regulation 6 of DSHAR?

Total responses: 14. Agree 93% (13), Disagree 7% (1)

Most respondents agreed. However one respondent queried why foreign warships should be exempt. As this is a matter of safety they believe the notification requirement should apply to all vessels including UK warships, civilian vessels under Ministry of Defence (MOD) control, foreign warships and civilian vessels under foreign military control. They also commented that relying on diplomatic channels for such notification would be untimely.

**HSE response**: Foreign warships are exempt from the current regulations and we propose to retain this under DGHAR. In practice explosives in foreign warships would be controlled under visiting forces’ safety procedures and we do not believe there would be significant value in bringing them in scope of the pre-notification requirement. However we have amended the regulations to clarify that other vessels under the control of visiting forces or headquarters would be subject to the same notification requirements as those under MOD control.
Q5. Should we revoke Part III of DSHAR - Marking and Navigation of Vessels?

Total responses: 14. Yes 50% (7), No 50% (7)

Views on this proposal were split and comments raised concerns over the proposed revocation of the requirement for warning flags and lights for vessels carrying dangerous goods.

Concerns were raised that:

a) not all ports are able to enact the necessary powers under other legislation;
b) technological solutions such as Automatic Identification Systems and Vessel Traffic Services are not always available, or effective, in relevant circumstances;
c) the flags and lights remain an essential safety measure to warn other vessels of the presence of substantial quantities of dangerous goods.

One respondent argued that the entire section should be kept on the grounds that revocation might require some ports to amend local byelaws and directions to retain current requirements, and that not all ports may have the power to do this. They also argued that it could lead to differential requirements being applied in different ports.

HSE response: given the lack of consensus we have sought additional stakeholder input from the UK Harbour Masters’ Association and Port Skills and Safety, and advice from the Maritime and Coastguard Agency. We believe that sufficient evidence has been provided that revocation of the requirement for flags and lights could increase risks in certain circumstances so we propose to retain the requirement for flags and lights as a precautionary approach. As less evidence has been provided that the other requirements in this Part of DSHAR are essential we propose to proceed with the revocation of the rest of the section.

Q6. Should we revoke Part IV of DSHAR, on handling dangerous substances?

Total responses: 14. Yes 93% (13), No 7% (1)

One respondent stated that they agree so long as there is adequate legal protection afforded by other regulations and there is a publicity campaign to promote the changes (the same comment was made on Q7 and Q8). The respondent who disagreed stated that precautions are still required.

HSE response: As set out in the consultation document we believe this section of DSHAR is duplicated under other regulations. These other regulations require similar precautions so we believe they provide adequate legal protection.
Q7. Should we revoke Part V of DSHAR on liquid dangerous substances in bulk?

Total responses: 12. Yes 92% (11), No 8% (1)

One respondent asked us to review requirements where the bulk liquid is in a road tanker and stated that precautions were still required. Two respondents mentioned the applicability here of the International Safety Guide for Oil and Tanker Terminals (ISGOTT), a widely used industry guidance publication. One requested it be adopted in the same manner as the Port Marine Safety Code, another wanted it to be referred to in the regulations, though noted that it was non-statutory, whereas they felt the ship-shore interface should be covered by statutory requirements.

HSE response: We believe (as set out in the consultation) that ship-shore loading and unloading of bulk liquids is adequately covered by other statutory requirements. We will explore the potential for endorsing relevant industry guidance publications where we believe they set out a reasonably practicable standard for complying with the law.

Q8. Should we revoke Part VI of DSHAR on packaging and labelling of dangerous substances?

Total responses: 14. Yes 93% (13), No 7% (1)

The one respondent who disagreed stated there is a need to know by both carrier and emergency services.

HSE response: Packaging and labelling of dangerous substances is covered in other legislation which would ensure suitable information is available.

Q9. Should we retain the duties in regulations 26 and 28 of DSHAR (emergency planning and untoward incidents) in the new regulations?

Total responses: 15. Yes 100% (15), No 0% (0)

One port authority commented that they were pleased with the retention of this requirement as this was the only statutory duty on them to undertake emergency planning. A minor drafting comment was made in relation to the definition of ‘untoward incident’, which we will take into account in preparing the final regulations.

Q10. Should we replace the duty in regulation 27 of DSHAR with a duty on berth operators to inform the master of a vessel of the emergency arrangements at the berth?

Total responses: 15. Yes 100% (15), No 0% (0)

There was unanimous agreement with no specific comments made.
Q11. Should we revoke regulations 29-31 of DSHAR?

Total responses: 13. Yes 100% (13), No 0% (0)

One comment said we should review the proposal, though no grounds were given for this.

Q12. Should we retain the requirement currently in regulation 32 of DSHAR for a designated parking area for dangerous goods?

Total responses: 15. Yes 100% (15), No 0% (0)

There was unanimous agreement. One respondent stated in their general comments they felt that this specific requirement should be retained.

Q13. (i) Should we replace the licensing requirement for harbours where ships carrying explosives are merely passing through, with a notification requirement on the ship?

Total responses: 14. Yes 100% (14), No 0% (0)

There was unanimous agreement with no specific comments made.

Q13. (ii) We have assumed that this would make no difference to what ships carrying explosives through harbours would need to do in practice. Do you agree or disagree with this assumption?

Total responses: 14. Agree 100% (14), Disagree 0% (0)

There was unanimous agreement with no specific comments made.

Q14. Should we replace the current military exemptions with an exemption for explosives under the control of Secretary of State and visiting forces, as set out in regulation 12(2)(e) of the proposed new regulations?

Total responses: 14. Yes 100% (14), No 0% (0)

There was unanimous agreement with no specific comments made.

Q15. Do you agree or disagree with our proposals in paragraphs 94-98 of the consultation document to amend the explosives safety and security requirements in DSHAR?

Total responses: 14. Agree 93% (13), Disagree 7% (1)

The respondent who disagreed felt the requirement to appoint a person to be responsible for the security of dangerous goods (Explosives Security Officer or ESO) should be maintained. This respondent and one other also commented that staff holding other roles in the port could be trained to carry out the ESO role, for
example, a safety manager, Port Facility Security Officer (PFSO), assistant harbour master or port manager.

**HSE response:** we have proposed that the requirement to appoint an Explosives Security Officer should have ACOP status so there remains a strong expectation that this should happen. We will clarify in guidance that the role could be played by staff with other roles.

One trade association suggested we clarify the ACOP so that where we state that road vehicles containing explosives could in certain circumstances remain in a harbour area for a limited period (e.g. when there is a road blockage outside), this only applies when the existence of the blockage is known in advance.

**HSE response:** We have clarified this in the ACOP.

**Q16. If we reduce the record-keeping requirement from 5 to 3 years as proposed in paragraph 99 of the consultation document, would this lead to any cost savings for you, compared with what you do now?**

Total responses: 11. Yes 36% (4), No 64% (7)

All respondents felt the change would create no or minimal cost savings.

**Q17. Should we keep the current provisions enabling statutory harbour authorities to make byelaws relating to dangerous substances in their harbour area?**

Total responses: 14. Yes 100% (14), No 0% (0)

All respondents agreed, and one respondent representing a port authority said they were pleased this power was being retained.

**Q18. Do you have any comments on the proposal to retain the current enforcement arrangements in DSHAR?**

Total responses: 14. Yes 21% (3), No 79% (11)

The respondent representing a trade union commented that they expect a properly funded and robust enforcement regime. One respondent from a port authority said they were pleased the current arrangements were being retained. Another industry health and safety professional believed the current arrangements were critical to their operation. No objections were received.

**Q19. Should we withdraw COP18 and HSR27 and replace these documents with a single consolidated ACOP?**

Total responses: 15. Yes 100% (15), No 0% (0)
Several respondents commented that the consolidated ACOP was simpler and more user-friendly than separate documents. Comments included that the ACOP is “much clearer than the current documents” and “a very useful guidance document”.

**Q20. Is the draft ACOP and associated guidance sufficiently clear for you to be confident about how you can comply with DGHAR?**

Total responses: 15. Yes 100% (15), No 0% (0)

There was unanimous agreement but the respondent representing a trade union felt concerned that there was very little ACOP text given the subject matter of the regulations. They listed several specific paragraphs that they believed should have ACOP status (paras 13, 14, 98-103, 111, 121, 174 and 211 of the draft ACOP)

**HSE response:** we have reviewed the stated paragraphs against our criteria for producing ACOPs. We believe paragraphs 99-100, 121 and 174 (112-113, 134 and 189 of the revised draft) are appropriate for ACOP status and we have made this amendment to the draft ACOP.

**Q21. Are there any impacts from the revision of the guidance and ACOP that we should be aware of?**

Total responses: 11. Yes 18% (2), No 82% (9)

One respondent felt the ability to unload road vehicles, entering from land and carrying Class 1, at a designated berth and set up a firework display on board a barge or pontoon in the harbour, and to reverse this process if the show is cancelled and remove any misfires, should be retained. Another respondent asked us to review the effect on ferries carrying limited amounts of domestic or other petroleum products.

**HSE response:** we have clarified in the ACOP that firework displays will normally be exempt from the regulations, though only if the Net Explosives Quantity is less than 1 tonne (this retains a similar proviso in the current regulations so there is no change). We do not believe that the changes will have any effect on ferries carrying limited amounts of domestic or other petroleum products, other than that there is now an exemption for goods carried in Limited and Excepted Quantities under the IMDG Code.

**Q22. Do you agree or disagree with HSE’s estimate of the industry sectors and the number of enterprises affected in Table 1 on page 23 of the consultation document?**

Total responses: 9. Agree 89% (8), Disagree 11% (1)

Several respondents felt they were not qualified to comment but most who did comment agreed with the estimates. The respondent who disagreed said that firework displays may be covered under various Standard Industry Classification (SIC) codes relating to the performing arts.
HSE response: codes relating to the performing arts mainly cover other activities, so we do not believe it is appropriate to include them in our calculations.

Q23. HSE has assumed that all of these enterprises referred to in Table 1 (other than those involved in the transportation of freight by rail and road) may, at some point, come into contact with Dangerous Goods.

a) Is this reasonable?

Total responses: 11. Yes 100% (11), No 0% (0)

There was unanimous agreement with no additional comments made.

b) If not, what would be a reasonable estimate of the proportion of these enterprises that would come into contact with dangerous goods?

No comments were made.

Q24. HSE estimates that 10% of enterprises undertaking freight transport by road are involved in the transport of dangerous goods to harbours and harbour areas. Is this assumption reasonable?

Total responses: 9. Yes 100% (9), No 0% (0)

Some respondents were unable to comment but those that did unanimously agreed with our estimate. One trade association said that shipping lines may be able to give very accurate information on their own traffic to enable a more precise estimate, but commented that it is generally accepted that 8-10% of traffic might be carrying dangerous goods.

Q25. Do you agree or disagree with our assumption that the proposed changes will be largely cost-neutral?

Total responses: 12. Agree 92% (11), Disagree 8% (1)

A large majority agreed with the assumption that the changes are cost-neutral. One respondent felt that the changes might require a carrier to re-route, though no explanation was given. Another commented that not all cargo handling facilities might agree the changes were cost-neutral, though this was not borne out in any other responses.

Q26. HSE estimates that familiarisation costs for businesses in the road and rail freight industries would be minimal. Do you agree or disagree with this assumption?

Total responses: 13. Agree 92% (12), Disagree 8% (1)

The majority of respondents agreed, though one respondent representing a consultancy estimated that they would need to spend around two hours to read and understand the new regulations and associated material.
HSE response: We have taken this into account in relation to total familiarisation costs.

Q27. Is HSE’s assessment of the process of understanding and communicating duties under DSHAR, as outlined in paragraphs 124 and 125 of the consultation document, reasonable?

Total responses: 14. Yes 93% (13), No 7% (1)

Most respondents agreed, though one respondent stated that their model involves health and safety, harbour master and dangerous goods professionals. They commented most large ports will probably have similar roles involved, so generalising to one safety manager is perhaps unrealistic.

Q28. How do businesses in your sector receive information about their obligations under DSHAR?

Total responses: 13

Respondents provided a range of useful information. Sources of information depended on the capacity of the respondent, but included HSE emails or press releases, information from Port Skills and Safety, the legislation.gov.uk website, port authorities, trade associations, consultancy advice, and information received internally from line managers or a company’s safety department, insurers and trade publications and media.

Q29. How often do businesses in your sector refer directly to the regulations and/or the guidance or ACOP documents?

Total responses: 13

Respondents gave a range of estimates. Some referred to the regulations and guidance ‘hardly ever’, infrequently’, ‘annually’ or ‘only when changes are made, thereafter very infrequently’. Others suggested more frequent consultation: ‘periodically to review policy and procedures’, ‘on a periodic basis throughout the year’, ‘regularly’, ‘twice monthly’, and ‘weekly’.

HSE response: This range has been reflected in the Impact Assessment.

Q30. Do you agree with the assumption that it will take approximately one hour of a Health and Safety Manager’s time, at a cost of £36.22 per hour, to understand and make provisions to communicate changes under the proposal?

Total responses: 13. Yes 38% (5), No 62% (8)

A majority of respondents felt that we had underestimated the time needed to familiarise – alternative estimates ranged from 2 hours to between 0.5 and 1 day. Some respondents also questioned our estimate of the hourly cost.
HSE response: We believe the hourly cost is reasonable but based on the responses we have revised our estimate of time required to familiarise from one hour to a range from 2-4 hours with a best estimate of 3 hours.

Q31. Do you have any other comments on the impact on businesses, including other assumptions made, that are not covered by questions 22-30?

Total responses: 1

One respondent asked us to consider the effect on island communities, if compliance makes carriage of domestic gas and other hydrocarbons difficult.

HSE response: We have not identified any adverse impact that the changes would have for such operations.

Is there anything you particularly like or dislike about this consultation? Please provide comments.

Total responses: 3

One respondent wanted it to be clearer that questions in the online questionnaire could be skipped. Another wanted a ‘yes with comments’ option, noting that we had only asked for comments when the respondent disagreed with a proposal.

Do you have any other comments on the proposals that have not been covered by the questionnaire?

A number of additional comments were made on various aspects of the proposals.

- The Office of Rail and Road (ORR) asked us to clarify that that ORR retains an enforcement role for railway safety in harbours to the extent specified in The Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 (as amended).
  HSE response: HSE will discuss with ORR how best to achieve this in the regulations and guidance.
- One respondent raised the use of acronyms in the consultation and asked us to finalise a standard abbreviation and short title for the regulations.
  HSE response: This will be done in the final documentation.
- One respondent asked us to ensure that dangerous goods carried on a vessel for the purposes of safety on board, such as SOLAS flares, were exempted from the regulations. They also asked us to consider exempting dangerous goods when they are being used within the confines of the port. Examples would include transport of flammable gases for welding, or the transport and use of fireworks for a display within the port area.
  HSE response: We believe there are already exemptions covering these scenarios but we will clarify this in the ACOP.
- One respondent asked us to address the issue of the relatively small volume, but fairly frequent transit of hazardous goods through the various ferry ports for the Scottish Islands, and asked us to ensure that any changes do not have
an adverse effect on the ability of such ports to handle the transit of such goods

**HSE response:** As mentioned earlier, the changes are aimed at removing redundant material from the existing regulations and simplifying and update the remaining sections. Dutyholders are not expected to take any different action to comply so we do not believe the changes will have any adverse effect.

- One respondent wanted us to retain the current statutory basis for a harbour authority to take enforcement action under the regulations (this is in fact our proposal). They were also pleased the existing explosives licensing regime is being retained, citing cost and time implications if we were to move to one of the other possible systems.