

EXPLANATORY MEMORANDUM TO
THE HEALTH AND SAFETY (FEES) REGULATIONS 2012

2012 No. 1652

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 These Fees Regulations revoke and replace the Health and Safety (Fees) Regulations 2010¹. They reproduce almost all of the charges set out in the Health and Safety (Fees) Regulations 2010 and introduce two new charges. These fees are made for the performance, mainly by the Health and Safety Executive (HSE), of a wide range of statutory functions in areas such as licensing and equipment approval, inspection and approvals regimes regulating on-shore major hazards, gas transportation and offshore oil and gas industries.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Fees Regulations do not increase any of the existing fees, and propose two new fees: a fee for assessment of onshore boreholes notifications and a new type of fee, referred to as “fee for intervention”.

3.2 Fee for intervention is a general fee, applicable to most business activities, where a breach is sufficiently serious. As it is a new way of charging for costs incurred by HSE it may be of special interest to the Joint Committee. The Health and Safety at Work Act 1974 provides wide powers to charge fees for, or in connection with, the performance of functions conferred by the relevant statutory provisions and different provision can be made for different circumstances or cases. The power in section 2(2) of the European Communities Act 1972 is relied on only for the fee described in regulation 13 and Schedule 10; this is because activities involving genetic modification under the Genetically Modified Organisms (Contained Use) Regulations 2000 involve risks to the environment as well as human health.

4. **Legislative Context**

4.1 The Regulations reproduce most charges from the previous version of the Fees Regulations and introduce a new charge for assessment of onshore

¹ S.I. 2010 No. 579. <http://www.legislation.gov.uk/ukxi/2010/579/contents/made>

borehole notifications. In addition they introduce a new fee for intervention to implement Government policy announced in March 2011 that businesses that are found to be in material breach of health and safety law should bear more of the related costs incurred by HSE in helping them put things right.

5. Territorial Extent and Application

This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7 Policy background

What is being done and why

Existing charging schemes

7.1 The Government's and HSE's policy is that it should charge fees for a range of activities described as "permissioning work" in order to recover its costs. This allows the dutyholder, for example, to trade in a dangerous substance or carry out work in hazardous conditions, once HSE is satisfied with the control mechanisms in place.

7.2 Permissioning activities that are charged for include:

- i) assessing and accepting safety cases;
- ii) issuing licences;
- iii) issuing certificates;
- iv) granting approvals;
- v) granting exemptions from regulations;
- vi) accepting notifications.

7.3 HM Treasury guidance requires full cost recovery for chargeable statutory functions. The charges set out in the Fees Regulations are reviewed annually with a new set of regulations made if necessary to implement any changes.

7.4 There are no fee increases proposed for existing fees. This is because inflationary impacts have been offset by increased efficiencies and reduced overhead costs. Fees in relation to the approval of a classification of explosives are no longer included because the legislation on which they were based² has been revoked³.

² S.I. 1983 No. 1140. <http://www.legislation.gov.uk/uksi/1983/1140/contents/made>

³ S.I. 2011 No. 1885. <http://www.legislation.gov.uk/uksi/2011/1885/contents/made>

Fee for intervention

7.5 The policy rationale for this fee is that those who are found to be in material breach of health and safety law should pay a fee to recover the costs which HSE incurs as result. At present, these avoidable costs are borne by the taxpayer. As well as shifting the cost burden, this fee would also deter those who would otherwise fail to meet their obligations and provide a level playing field for those who do. It is not a punitive charge – the fee reflects the cost of HSE performing its functions – this is currently £124 per hour. An explanation of how the hourly rate has been calculated and further information on the cost of the fee can be found in the guidance which has been published on HSE’s website⁴. Compliant businesses will not have to pay this fee and no fee will be charged where the breach is trivial or technical.

7.6 A fee is payable where an inspector notifies a person in writing that, in the inspector’s opinion, there is or has been a contravention of one or more of the relevant health and safety obligations.

7.7 Before notifying a person in writing, an inspector must have regard to HSE guidance to ensure that a fee is not payable in respect of any breach which is not sufficiently serious. The guidance, sets out a number of different factors which should be considered, and reflects the principles set out in two frameworks within which HSE and its inspectors make enforcement decisions.

7.8 HSE will recover its costs of performing functions in consequence of a material breach, as well as its performance of other statutory functions from the beginning of any site-visit at which an inspector identified that material breach.

7.9 Where an inspector forms the opinion, during a site-visit, that more than one dutyholder is in material breach of its health and safety obligations, the aspect of the fee relating to the costs of that visit will be divided between the dutyholders in breach.

7.10 The fee will be payable until the point that HSE’s work in consequence of the breach is concluded or, if sooner, up to the point that an information is laid in court in England and Wales initiating a prosecution. Any further costs incurred by HSE from that point on would be recovered through an application to the court for costs. In Scotland, the equivalent point is when HSE submits a report to the Procurator Fiscal for them to consider prosecution. As the Scottish courts do not award the prosecution costs at the end of a criminal trial, HSE would recover no further costs incurred in a case after submission of this report to the Procurator Fiscal.

7.11 The fee will not apply to the extent that another fee is payable in respect of HSE’s performance of any functions; e.g. by virtue of existing cost recovery regimes. In addition, no fee is payable:

⁴ www.hse.gov.uk/publicity/pubns/hse47.htm

- by a person in his or her capacity as an employee;
- by a self-employed person if s/he did not expose any other person to risk;
- in relation to certain activities involving genetic modification;
- in relation to licensable work with asbestos, by a person who holds a licence to carry out work with asbestos; and
- in respect of the performance by HSE of functions conferred on it by specified Regulations.

7.12 **Queries and Disputes:** HSE will operate a queries and disputes procedure for handling enquiries from dutyholders about this fee. Queries may include requests for further information, or other issues such as whether there was a material breach or the time taken to put right a material breach with a particular dutyholder.

7.13 All initial enquiries about an invoice will be treated as a query for which no fee is payable. If the query cannot be resolved or if the dutyholder seeks to challenge the fee on grounds of its lack of reasonableness or accuracy, or because the inspector was wrong to determine that a breach had been committed or was sufficiently serious as to be notified, then they may dispute the invoice, or the part of the invoice they do not agree with. HSE would recover the costs of any dispute that is not upheld, based on the fee for intervention hourly rate for the time taken to handle the dispute.

7.14 Dutyholders are not required to pay the disputed invoice or the disputed part of an invoice until the dispute is resolved (if the dispute is upheld).

7.15 The proposed disputes procedure has two levels. At Level 1, the dispute is reviewed by an HSE senior manager and at Level 2, the dispute is considered by a panel consisting of two HSE senior managers and one independent member drawn from a list of business representatives.

7.16 **Repayment provisions:** HSE must repay part, or all, of any fee paid in 'error'. This includes cases when it is subsequently shown that a particular fee was not payable, or was payable by another person. The extent of repayment will depend on the particular circumstances and, wherever it can, HSE will identify specific costs attributable to any such error and make appropriate repayment.

7.17 Where HSE brings a prosecution but there is no conviction on one or more offences, it will repay any fee which wholly and exclusively relates to the offence(s) for which there has been no conviction.

7.18 Similarly, where HSE serves Improvement or Prohibition Notices, and one or more are subsequently cancelled by an Employment Tribunal, HSE will repay all or part of any fee paid as outlined above.

Onshore boreholes

7.19 HSE assesses notifications of intended operations at onshore boreholes for oil and gas to satisfy itself that the risks to employees and the public are properly understood and managed. HSE already recovers its costs for such regulatory work ‘offshore’, and this regulation would introduce similar arrangements that are consistent with the Government’s and HSE’s policy onshore.

8. Consultation outcome

8.1 HSE undertook a twelve-week formal consultation on fee for intervention and onshore boreholes which concluded on 14 October 2011⁵.

8.2 Nearly 300 responses were received from a wide range of stakeholders including industry, trade associations, local authorities and trades unions, mainly on fee for intervention. Through the consultation, stakeholders requested more clarity on which contraventions will be a “material breach” and attract fee for intervention. This is dealt with in published HSE guidance and the Regulations require inspectors to have regard to this when deciding whether to send a written notification regarding a breach. HSE has responded to a request to add a degree of independence to the disputes process by including a member from the business community on the Level 2 disputes panel (see paragraph 7. 15 above).

8.3 A significant number of responses, including a number from local authorities themselves, strongly recommended that local authorities be excluded from the fee for intervention provisions. As a result, the new provisions do not provide for local authorities (or any other body other than HSE on which functions are conferred by health and safety law) to recover their costs through fee for intervention.

9. Guidance

9.1 HSE has approved and produced cost recovery guidance for dutyholders on its web site Guidance⁶ on the application of Fee for Intervention [HSE 47] and the Boreholes Notification Fees [HSE 49]. This guidance provides further explanation for those affected by the schemes, how they will be operated and how any disputes will be addressed. The guidance has been developed and tested with stakeholders and includes a quick start leaflet that will be provided when inspectors visit businesses. Hardcopies of the guidance will also be available, at cost, from HSE Books.

⁵ <http://www.hse.gov.uk/consult/condocs/cd235.htm>

⁶ www.hse.gov.uk/publicity/pubns/hse47.htm

10. Impact

10.1 In relation to the wider Health and Safety (Fees) Regulations, as there is no increase in fees from the 2010 Regulations, there is no additional impact on business, charities or voluntary bodies.

10.2 An Impact Assessment for fee for intervention and the boreholes notification proposals is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

10.3 The estimate of benefit is that there would be a transfer of £39m per annum of the costs of regulation from taxpayers to non-compliant dutyholders who are in material breach (and onshore borehole operators) once the scheme beds in. In addition, it will help incentivise compliance and level the playing field between compliant and non-compliant businesses; and the avoidance of the costs of work related injuries and ill health to businesses, society and individuals. The Impact Assessment also concludes that there will be additional familiarisation and administration costs for UK industry falling mainly in the first year of implementation estimated at £0.5 million, and £0.068 million a year thereafter. The set up costs for HSE are estimated at £0.74 million in the first year with estimated operational costs of £0.38 million a year thereafter.

11. Regulating small business

11.1 In July 2011 the Government confirmed that the moratorium on the application of new domestic legislation to micro-businesses and new business start-ups, announced in the 2011 Budget, does not apply to fee for intervention, but the Government agreed that the self-employed who are not putting others at risk would be exempt.

11.2 The fee for intervention proposal therefore applies to all businesses except the following:

- those who are already subject to cost recovery by HSE e.g. offshore oil and gas production facilities and first aid approvals;
- those activities where health and safety law is enforced by the local authorities;
- those who are self-employed where they are putting no-one else at risk by their work activities.

11.3 There is no automatic relationship between the size of a business and the risks that it gives rise to. HSE has said that it will proactively inspect comparatively higher risk sectors because of the evidence that they present the highest risks. These are currently construction, waste and recycling and certain manufacturing activities. Additionally, employers who do not take seriously the protection of their employees, or those affected by their work activities, will face intervention by HSE. Those businesses that comply or are in technical breach of the law will not pay a fee.

12. Monitoring & review

12.1 The Fees Regulations are reviewed annually and updated if necessary. In preparing proposals for changes in rates charged, HSE takes informal industry soundings of those affected. For example, for larger schemes Cost Recovery Review Groups (CRRGs) are consulted at meetings in the Autumn of each year about proposed changes (and given an opportunity to consider the proposals and respond) before formal proposals are presented to the HSE Board and then Ministers. The Boreholes notifications provisions will be considered as part of the annual review process.

12.2 HSE will carry out ongoing monitoring and evaluation of the policy change from implementation onwards to learn from feedback from staff and business and to enable continuous improvement of the processes relating to fee for intervention.

12.3 One small part of the fee for intervention proposals (where a dutyholder successfully challenges HSE using the query and dispute procedures) falls within the scope of the Government's One-in, One-out policy. Therefore, in addition to the commitment by the HSE Board and in the Impact Assessment to publish a report after 12-18 months, and a post-implementation review after three years, HSE has included a review provision within the Fees Regulations that requires a statutory review of the fee for intervention proposals within three years of commencement of the Fees Regulations.

12.4 In accordance with BIS/BRE guidance, a sunset clause is included in the Fees Regulations such that the regulations will automatically expire within five years of coming into force.

13. Contact

13.1 Kathleen Woolley at the Health and Safety Executive (Tel: 0151 951 4447 or e-mail: kathleen.woolley@hse.gsi.gov.uk) can answer any queries regarding the instrument.