

Cost Recovery Consultation
Health and Safety Executive
6.4 Redgrave Court
Merton Road
Bootle
Merseyside L20 7HS

Telephone: 0151 951 5955

Facsimile: 0151 951 3363

e-mail costrecoveryconsultation@hse.gsi.gov.uk

Health and Safety Executive - Extending cost recovery

The Chemical Business Association (CBA) is the trade association representing the UK chemical supply chain including distributors, traders, warehouse operators and carriers.

CBA's 133 member companies employ in excess of 6,500 personnel and are responsible for the distribution, as well as packing, blending and refilling, of more than 2.9 million tonnes of chemicals each year.

CBA is focused on the needs of small to medium sized enterprises (SMEs): 91% of its membership qualifies for SME status as follows:

- 11% Micro (Less than 10 employees)
- 42% Small (Less than 50 employees)
- 38% Medium (Less than 250 employees)
- 9% are larger than the SME definition

The operating structure of member companies is:

- 50% Office only – Sales, Marketing and Technical support
- 25% Office plus operator warehouse
- 25% office plus operator warehouse and Transport

CBA was the first National Distributor Trade Association in Europe to implement and mandate its membership to comply with Responsible Care. Responsible Care is an ethical commitment to 'go beyond regulatory compliance' and is a major cornerstone of the CBA philosophy.

CBA is committed to a proactive and robust level of engagement with policy makers, regulators and enforcement officers within the field of health and safety.

CBA is an active participant in the following HSE stakeholder groups:

- Chemical and Downstream Oil Industry Forum (CDOIF);
- COMAH and Gas Charging Review Group (CGCRG);
- Process Safety Leadership Group (PSLG);
- COMAH and Pipeline Emergency Planning Liaison Group (CAP EPLG); and
- Small Business Trade Association Forum (SBTAF)

CBA is also keen to become involved in dialogue with the HSE and other stakeholders where we can add value, some of these interactions have led to CBA obtaining HSE endorsement for five 'industry lead' good or best practice guidance documents and are currently working on a sixth covering workplace transport safety.



Name:

Peter Newport – Director and Company Secretary
Douglas Leech – Technical Director

Email:

Peter.newport@chemical.org.uk
Douglas.leech@chemical.org.uk

Address:

Lyme Building
Westmere Drive
Crewe Business Park
Crewe
Cheshire
CW1 6ZD

Telephone:

01270 258200

Fax:

01270 258444

Size of organisation:

Choose one option:

Not applicable

1 to 9 employees

10 to 49 employees

50 to 249 employees

250 to 1000 employees

1000+ employees

Self-employed

Confidentiality

Please put a cross in the box if you do not wish details of your comments to be available to the public. (NB if you do not put a cross in the box they will be made public. This takes precedence over any automatic notes on e-mails that indicate that the contents are confidential.)

What is your type of organisation:	
Industry <input type="checkbox"/>	Local government <input type="checkbox"/>
National government <input type="checkbox"/>	Non-governmental organisation <input type="checkbox"/>
Non-departmental public body <input type="checkbox"/>	Trade union <input type="checkbox"/>
Charity <input type="checkbox"/>	Trade association <input checked="" type="checkbox"/>
Academic <input type="checkbox"/>	Consultancy <input type="checkbox"/>
Member of the public <input type="checkbox"/>	Pressure group <input type="checkbox"/>
Other <input type="checkbox"/>	

In what capacity are you responding:

Choose one option: Trade Association as above.

An employer <input type="checkbox"/>	An employee <input type="checkbox"/>
Trade union official <input type="checkbox"/>	Health and safety professional/Safety representative <input type="checkbox"/>
Training provider <input type="checkbox"/>	

RESPONSE

1. If you do not agree with the proposals outlined in this consultation document for implementing the Government and HSE Board policy of cost recovery please offer reasons for your disagreement and suggest an alternative proposal for delivering cost recovery?

CBA has several strong objections to the principle of extending cost recovery.

Affect on working relationship

HSE has been proud of its pragmatic approach to enforcement and way it interacts with its stakeholders. HSE is also aware of industry's perception that COMAH charges are already excessive and bear little or no relationship to the actual costs involved. Any further extension of the cost recovery regime will only serve to increase the industry's already sceptical attitude. Companies required to comply with the provisions of the first REACH deadline have voluntarily self-declared non-compliance with the new, complex and evolving requirements. Currently HSE, as the enforcement body for REACH, has chosen to assist such companies to return to compliance. The cost recovery proposal as drafted would put an end to voluntary declarations of non-compliance because it would attract the imposition of 'Fee for Intervention' cost recovery charges.

Definition of 'Material Breach'

HSE has so far (in consultation documents or elsewhere) failed to define or justify a definition of 'material breach'. A search of the HSE's website and enforcement policy document also fails to provide a clear definition of what constitutes a 'material breach'. The apparently intentional absence of a transparent definition of material breach conclusively reveals the policy objectives of 'Fee for Intervention' as revenue generation. If it is HSE's intention to leave a decision on 'material breach' to an individual inspector's discretion, CBA believes this may trigger inconsistent variances of interpretation by inspectors and hence a large number of appeals.

Appeal process

For CBA members to have confidence in an extended system of cost recovery there must be genuine accountability. Charges should only be imposed at the formal enforcement notice stage i.e. improvement or prohibition notices only. This provides an established means by which employers can challenge HSE's decision.

There must be a similar opportunity for companies to contest an HSE invoice. The proposed procedure for dispute resolution for cost recovery matters is inadequate. The BIS Statutory Code of Practice for Regulators states that all complaints procedures should include a final stage to allow disputes to be transferred to an external, independent person or body. CBA opposes the internal dispute mechanism proposed by HSE. This is also inconsistent with the COMAH regime where the final stage of a complaint is dealt with by a tribunal. An equivalent, external stage should be added to any extended cost recovery regime.

2. Were you clear about how the cost recovery proposals would operate?

Yes

No

If No please explain the reason for your answer.

The proposal lacks transparency with regard to what will actually constitute a 'material breach.'

Though the hourly rate is clear, at £133 per hour, the number of hours likely to be incurred is vague. There is also no clarity as to the level of costs or controls should external consultants be engaged by HSE. These should be clearly defined and also subject to appeal should cost recovery be extended.

In the Regulatory Impact Assessment, HSE state (5.4.10) that "65% of inspection days will discover a material breach where costs will need to be recovered." It required a specific enquiry by CBA to reveal that the sample data on which this percentage is based did not include any companies in the chemical sector. Even so, this statistic implies that two out of every three inspection days will trigger extended cost recovery. CBA believes this statistic significantly over-estimates overall levels of non-compliance and therefore the revenue potential of extended cost recovery.

There is also limited information as to which areas will or will not be subject to these costs. For instance, there is no mention of whether REACH enforcement or roadside enforcement under the carriage of dangerous goods regulations, will be chargeable.

3. Do you agree with the extent of the regulatory activity for which HSE would recover its costs?

Yes

No

If No what regulatory activities should HSE recover costs?

Our objection is related to the definition of 'material breach' (see above). There is further confusion over what would count as a 'formal intervention'. This requires a clear definition on exactly the same basis as 'material breach'.

If there is no clarity as to what constitutes a 'formal intervention' or 'material breach' there is also no identifiable point at which an extended cost recovery regime is to be activated. From the point of view of revenue generation, this may be an ideal outcome for HSE. From industry's perspective, it is opaque, lacks fairness, or accountability.

For example, from the table of potential costs, it appears there would be a fee if a letter was sent following an inspection. This contradicts HSE's own documents which categorise letters as an informal means of intervention 'where the breach of the law is relatively minor'. CBA members report that much of their current contact with the regulator results in a letter. However, this is rarely a consequence of a serious ('material?') breach of the law.

CBA believes that charging for letters should be excluded, and that only actions following a formal enforcement notice (i.e. Improvement or Prohibition) should come within the extended cost recovery regime.

Any new regime must be transparent if employers are to trust the process. It is therefore essential to be able to track accurately any activity triggering extended charges. The existing, published data on formal enforcement notices would provide a means of comparison against which behaviour under any new charging regime could be assessed.

As well as firmer boundaries on the nature of a chargeable breach, duty holders need precise information on the structure of the new charging regime. For example, delays in HSE work could cause their costs to spiral. Companies' experience of the speed and effectiveness of HSE's communications lead to heightened concerns about accelerating and uncontrollable costs which will be passed on to industry in the guise of cost recovery.

The proposed claw-back mechanism is vague. It could create considerable mistrust with duty holders, even if detailed itemisation was provided. To charge from the point at which an enforcement notice is issued until the conclusion of interventions relating to that notice is a more practical and less ambiguous approach.

4. Do you agree with the proposals for when these costs would be incurred?

Yes

No

If No, please explain the reason for your answer.

See answer to previous question regarding the definition of 'material breach' and 'formal intervention'.

5. Do you agree with the model used for setting the hourly rates for cost recoverable work?

Yes

No

If No, please explain the reason for your answer.

The daily rate of £984 is excessively high and so the corresponding hourly charge (£133) is high. There is no breakdown of the mathematics behind these daily or hourly rates – the salary level involved, the basis for overhead recovery, or consumables.

CBA's membership of the COMAH Cost Recovery Group (CCRG) provides access to an annual analysis of the structure used for COMAH cost recovery. The financial analysis details the direct and indirect staff costs as well as administrative expenses – including accommodation, training and travel. For the 2011/12 year, staff and administrative costs amounted to an hourly rate of £128 with the balance of the total £156 per hour cost being attributed to capital charges and corporate services.

Given the nature of the different tasks involved there appears to be an inconsistency in the proposed charges for 'fee for intervention' and the existing charges payable under the COMAH regime.

Despite the transparency of the COMAH charging regime where every hour is itemised, CBA has challenged the charges levied against member companies on several occasions. In each case, this process resulted in a downward revision of the costs recovered.

Where interventions require expert and external advice from HSL, the level of cost

transparency is non-existent. The consultation proposal is for the actual costs of contractors, such as HSL, to be passed through to the duty holder. Apart from the lack of contractual clarity, this approach obliges industry to issue the equivalent of a blank cheque to cover these external costs. CBA believes any external consultancy charges should be controlled, subject to providing the same level of breakdown detail and subject to the same appeals as any other aspect of HSE cost recovery.

Recent evidence has demonstrated that HSE's use of external contractors following major incidents has led to significantly higher costs payable by industry. CBA proposes that HSE should be required to communicate the fact to duty-holders that external contractors are to be used and that their costs are to be agreed by the duty holder prior to their engagement.

6. HSE will not use cost recovery to drive intervention approaches. Other than clearly stating this policy and the continued application of HSE's Enforcement Management Model and Enforcement Policy Statement, how else do you think that HSE can reassure duty holders it will not use cost recovery to drive its intervention approaches?

CBA does not believe that HSE can achieve this reassurance.

Historically HSE has established a culture of informing and educating duty holders before escalating intervention through correspondence and formal notices to eventual prosecution for non-compliance.

As a result industry has proactively sought HSE input if industry considered it might be non-compliant. REACH enforcement provides a practical example of this process. HSE are proud of the fact that non compliant self-declaration by organisations is being made and that HSE are then aiding the companies gain compliance.

Since March 2009, the HSE have only sought to issue for REACH related con compliance:

- 28 Improvement Notices;
- 5 Enforcement Notices; and
- 1 Prohibition Notice

The number of self-declarations far exceeds this amount.

HSE cannot maintain the status quo ante of using Field Operations Directorate (FOD) to both inform and police duty holders with extended cost recovery as proposed.

If the current proposals are adopted, there will be an inevitable shift in relationship between the HSE and duty holders. HSE's information role will diminish and its policing role will increase. Duty holders are less likely to seek information and advice from HSE. In the light of the reduced level of available inspection resources, there is likely to be a significant increase in undetected incidents of non-compliance.

HSE must be fully transparent with regard to its costing model and explicit with regard to its material breach definition. The introduction and management of COMAH charging led directly to mistrust and suspicion. HSE and industry have since worked hard to build bridges and increase the transparency of the process.

Despite the best efforts of HSE, the interpretation of guidance and policy still varies from inspector to inspector and region to region. Many of our member's operations span the UK and they are regularly confronted by differences in interpretation – a factor which adds unnecessarily to business costs.

7. Do you agree with the two level dispute process outlined in this consultation document?

Yes

No

If No, what alternative system would you propose to ensure a practical, fair and transparent dispute process?

If CBA members are to have any confidence in an extended system of cost recovery there must be genuine accountability. In order to achieve this charges should only be imposed at the formal enforcement stage (Improvement and Prohibition notices), as there is an established means by which employers can challenge the decision to issue such a notice by HSE.

With regard to disputes over costs, there must be a similar opportunity for duty holders to contest an invoice both in respect of HSE and any consultant's charges. CBA members do not believe that the proposed dispute resolution procedure for cost recovery matters is adequate. According to the BIS Statutory Code of Practice for Regulators all complaints procedures should include a final stage whereby disputes are transferred to an external, independent person or body. CBA members are strongly opposed to the entirely internal dispute mechanism proposed in the consultation document. Under COMAH the final stage of a complaint is passed to a tribunal and an equivalent, in our opinion and external independent stage must be added to any extension of the cost recovery regime.

8. Do you agree that Containment Level 3 and Containment level 4 containment laboratories should be exempt from fee for intervention for a short interim period until the SRF is implemented?

Question not relevant to CBA members

Yes

No

If No, can you explain why you believe they should not be exempt?

9. Do you agree with the proposal that HSE recovers full costs in relation to Boreholes, irrespective of material breach?

Question not relevant to CBA members

Yes

No

If No please explain the reason for your answer.

10. Do the assumptions made in the impact assessment look reasonable in relation to the estimates made for:

Familiarisation costs	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
Cost of processing invoices	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>

10a. What are your estimated costs for familiarisation?

10b. What are your estimated costs for processing invoices?

11. Are there any costs or benefits not detailed in the impact assessment which HSE needs to consider?

Yes

No

Please provide additional details.

12. The impact assessment details risks and uncertainties. Which of these are most likely to be realised? Please provide your views/comments.

13. Do you think there are any other risks or uncertainties HSE need to consider in the impact assessment?

Yes

No

Please provide your views/comments.

14. Are you satisfied with the conclusions of the Equality Impact Assessment related to this consultation document?

Yes

No

If no what conclusions are you concerned about?

15. Are there any additional factors which you believe should be taken into account in the impact assessment?

Yes

No

If yes what additional factors need to be taken into account?

16. Do you have any specific comments on cost recovery not covered by the questions above?

Yes

No

Local Authority section

Please only answer the questions in this section if you are responding on behalf of a local authority.

Are you responding on behalf of a local authority?

Yes

No

Are there any further comments you would like to make on the issues raised in this consultation document that you have not already responded to in this questionnaire?

A number of CBA member companies are regulated through their local authority and in general the level of knowledge and expertise is understandably lower than that of an HSE inspector. Due to the cuts in local authority budgets, there is deep fear within these regulated members that inspectors will be given targets for revenue generation. Before any extension of cost recovery to the local authorities, there should be a detailed and thorough impact assessment performed and discussed through consultation.

It is unreasonable to ask questions within this consultation to influence a regime that is due to enter into force in April 2012. There should be a further review and extension to local authorities should be delayed until 2013 to allow further consultation and debate.

Is there anything you particularly liked or disliked about this consultation?

CBA believes the scope of the consultation to be inadequate in that it assumes implementation of extension to cost recovery and merely seeks comment on how implementation is to be achieved.

CBA believes the consultation should have asked whether an extension of cost recovery should be introduced. CBA also believes that the proposed extension should be subject to the formal review process of the Government under its one in one out initiative as the clear purpose is to increase the regulatory burden cost on industry.