TALAMH
protecting natural wealth
THE SECRETARY, TALAMH, KNOCKVICAR, BOYLE, CO.ROSCOMMON
TALAMHNAHEIREANN@GMAIL.COM 00353 (0)89 4928134

Consultation Response and Analysis to Consultation Paper on Safety Case Publication Policy CER/13/109

1. Omission of Information to the public in specified areas

With respect to S.I. No. 74/2006 — European Communities (Control of Major Accident Hazards Involving Dangerous Substances) Regulations 2006 the exceptions to their application are provided in Section 4, Application where it is stated [our emphasis added for clarity],

4. (1) Subject to paragraph (2), these Regulations shall apply to an establishment where a dangerous substance listed in column 1 of Parts 1 or 2 of Annex I to the Directive (which is set out in Schedule 1) is present in a quantity equal to or exceeding the quantity listed in the entry for that substance in column 2 of those Parts, except that Regulations 12 to 18 shall apply to an establishment where such a dangerous substance is present in a quantity equal to or exceeding the quantity listed in the entry for that substance in column 3 of those parts.

(2) These Regulations shall not apply to—

(a) any property occupied by the Defence Forces and any land or premises referred to in section 268(1) of the Defence Act 1954 (No. 7 of 1954);

(b) hazards created by ionising radiation;

(c) the occurrence outside an establishment of—

(i) the transport of dangerous substances by road, rail, internal waterways, sea or air;

(ii) intermediate temporary storage associated with a subparagraph (i) activity;

(iii) the loading or unloading of dangerous substances at docks, wharves or marshalling yards;

(iv) the transport to and from another means of transport at docks, wharves or marshalling yards;

(v) the transport of dangerous substances in pipelines and pumping stations;

(d) ***the exploitation (exploration, extraction and processing) of minerals in mines, quarries or by means of boreholes, with the exception of chemical and thermal processing operations and storage related to those operations which involve dangerous substances****;*

(e) ***the offshore exploration and exploitation of minerals, including hydrocarbons****;*

Clearly subsections (d) and (e) are of relevance. Subsection (d) would appear to delimit the terms of this Statutory Instrument from being applied where it applies to exploration and exploitation of minerals, including hydrocarbons OFFSHORE but to necessitate the provisions being applied where the exploitation of minerals is ONSHORE AND INVOLVES DANGEROUS SUBSTANCES.

The following Section 18 of S.I. No. 74/2006, which deals with the nature of the information that must be provided for the safety of the public and how it must be disseminated, gives an insight into what principles should be included by the Petroleum (Exploration and Extraction) Safety Act, 2010 and by CER in its Consultation. [our emphasis added for clarity],

Information for the safety of the public.

18 (1) ***An operator of an establishment shall****-*

(a) ***inform*** *-*

*(i****) persons*** *other than persons working at the establishment, and*

*(ii****) institutions or organisations serving the public (such as schools and hospitals)***

in the specified area on safety measures and on the correct behaviour which should be adopted in the event of an accident*, and*

(b) make the information referred to in subparagraph (a) and the safety report referred to in Regulations 12 and 13 available to any member of the public who requests it.

(2) In preparing the information referred to in clauses (i) and (ii) of paragraph (1)(a), the operator shall ensure that -

(a) documentation includes the information specified in Annex V of the Directive (which is set out in Schedule 6), and

(b) consideration is given to any relevant provisions in the external emergency plan.

(3) The operator shall ensure that the information referred to in paragraph (1)(a) is supplied to the persons, institutions or organisations referred to in

clauses (i) and (ii) of paragraph (1)(a) in the most appropriate form, without any such person, institution or organisation having to request it, and the operator shall ensure that the supply of the information is repeated at least every 5 years and in any event when there is any material change in the information provided.

(4) The information referred to in clauses (i) and (ii) of paragraph (1)(a) shall be reviewed by the operator at least every 3 years and in any event whenever a modification of an establishment to which Regulation 13(1)(c) refers occurs, and if as a result of such review the information requires to be revised the operator shall make such revisions and arrange for the supply of the revised information to the persons referred to in paragraph 1(a).

(5)(a) The operator of an existing establishment shall review any information provided pursuant to paragraphs (1) and (2) of Regulation 19 of the 2000 Regulations and, where necessary, amend such information in the light of these Regulations and supply the amended information to the persons and establishments referred to in paragraph (1) within 3 months of the commencement of these Regulations.

(b) The operator of an existing establishment to which the requirements of paragraphs (1) and (2) apply for the first time shall ensure that the information referred to in paragraph 1(a) is supplied to persons referred to in that paragraph within 6 months of the commencement of these Regulations.

(6) The operator of a new establishment shall ensure that the information referred to in paragraph (1)(a) is supplied to persons referred to in that paragraph -

(a) in the case of a new establishment which has not yet commenced operations, before it commences operation, or

(b) where the establishment has commenced operation prior to becoming subject to these Regulations, within 6 months of the date upon which these Regulations first apply to the establishment concerned.

(7) Establishments or groups of establishments identified by the Central Competent Authority pursuant to Regulation 26 shall co-operate in informing the public.

(8)(a) The operator of an establishment may request any local competent authority in whose functional area the establishment is situated to enter into an agreement with the operator whereby such authority would arrange for -

(i) the supply of the information referred to in paragraph (1)(a) to the persons referred to in that paragraph,

(ii) the making available of the information referred to in paragraph (1)(a) to members of the public who request it, and

(iii) subject to the provisions of paragraph (12), make the safety report referred to in Regulations 12 and 13 available to any member of the public who requests it.

(b) In the absence of such an agreement the operator shall remain responsible for ensuring that he or she complies with this Regulation.

(c) A local competent authority shall not enter into an agreement referred to in subparagraph (a) unless -

(i) the agreement specifies the information to be provided for the purpose of paragraph (1), and

(ii) the operator undertakes to provide the information in an appropriate form, and

where an agreement is entered into, the authority concerned shall take the measures necessary for the application of paragraph (1) in respect of that information.

(d) A local competent authority may charge the operator a fee in respect of the performance of its obligations under the agreement and any such fee shall be recoverable by the local competent authority from the operator as a simple contract debt.

(9) In this Regulation "the specified area" means that area which is liable to be affected by a major accident at the establishment.

(10)(a) The specified area shall be determined -

(i) by the operator concerned with the agreement of the Central Competent Authority, or

(ii) where the operator concerned and the Central Competent Authority are not in agreement, by the Central Competent Authority.

(b) Where the Central Competent Authority has been obliged, by reason of failure to co-operate, delay or other unreasonable behaviour on the part of the operator concerned, to determine the specified area under subparagraph (a)(ii), then the reasonable expenses incurred by the Authority (or such portion thereof as may be attributable to such failure, delay or other unreasonable behaviour) in determining that area shall be recoverable by the Authority from that operator as a simple contract debt.

(11) Where the Central Competent Authority or such persons or authorities referred to in Regulation 17(2)(b) brings to the attention of a local authority, which is designated as a local competent authority by virtue of Regulation 5(2), that a major accident at an establishment outside the State or its internal waters may potentially affect persons in the specified area within its functional area, the local authority shall—

(a) consult with the persons and authorities laid down in Regulation 17(2)(b),

(b) fulfil the obligations referred to in Regulation 18(1)(a) and (2)(a) in so far as the information required is available, and

(c) ensure that the information provided takes into consideration any relevant provisions in the external emergency plan prepared by virtue of Regulation 16(1)(b).

(12) Notwithstanding the provisions of this Regulation, an operator need not make available such parts of a safety report as the Central Competent Authority agrees in writing may be omitted for the purposes of this Regulation, and which parts relate to matters of industrial, commercial or personal confidentiality, public security or national defence, and in such event the report as so amended shall be furnished to the Central Competent Authority, and such amended report shall be made available to the public in lieu of the safety report prepared pursuant to Regulations 12 and 13.

(13) Where pursuant to paragraph (10)(a) it is established that a major accident may have an effect outside the State then the operator shall provide the information referred to in paragraph (1), in such reasonable quantities as may be requested, to the persons specified in Regulation 17(2)(b).

The "operator" as defined in this Statutory Instrument is the the same as the "petroleum undertaking" as defined in the Petroleum (Exploration and Extraction) Safety Act, 2010.

If the Petroleum (Exploration and Extraction) Safety Act, 2010 is compliant with the European Communities (Control of Major Accident Hazards Involving Dangerous Substances) Regulations 2006 [COMAH] which, as it is an EU Regulation, it must be then the Petroleum (Exploration and Extraction) Safety Act, 2010 must ensure that the petroleum undertakings provide information for the safety of the public to -

"(i) persons other than persons working at the establishment, and

(ii) institutions or organisations serving the public (such as schools and hospitals)

in the specified area on safety measures and on the correct behaviour which should be adopted in the event of an accident".

COMAH also requires for an area to be specified where such persons would be provided with the safety measures and on the correct behaviour which should be adopted in the event of an accident.

The Petroleum (Exploration and Extraction) Safety Act, 2010 fails to either specify such an area nor does it ensure that the persons in that area are properly informed of the dangers by the petroleum undertaking.

Therefore either

(i) The Petroleum (Exploration and Extraction) Safety Act, 2010 is in violation of the European Communities (Control of Major Accident Hazards Involving Dangerous Substances) Regulations 2006 [COMAH] and there is no lawful

statutory basis for the granting of licences for onshore exploration and extraction or

(ii) The Petroleum (Exploration and Extraction) Safety Act, 2010 does not apply to onshore exploration and extraction and there is no lawful statutory basis for the granting of licences for onshore exploration and extraction.

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2. ALARP not meeting necessary criteria for unconventional gas exploration and extraction industry

In our view CER has not carried out a meaningful assessment to our response to the ALARP Demonstration Consultation. Our comments on the Precautionary Principle were entirely ignored. CER's approach to cumulative risk raised by us and other respondents ignores the realities of an onshore unconventional gas exploration and extraction industry.

We are of the opinion that the rights as established by the Aarhus Convention have been seriously violated.

Furthermore the concerns – about the principles of ALARP, in that they obviate the need for fixed values of risk being applied where the undertaking is to be sited onshore and within communities – have not been properly addressed or satisfactorily dealt with.

As can be seen by the following extract (below) from the response by An Bord Pleanála we are not alone in our concerns and as An Bord Pleanála are the granting authority for Land Usage this is a matter which can not be ignored.

The failure of CER to deal with this aspect and its failure to accept that the safety framework so drafted is unsuitable for an onshore unconventional gas exploration and extraction industry shows a serious lack of judgement and leadership by CER Commissioners and their position should be open to question, considering the loss to the public purse and the trauma caused to the local communities by such an exercise.

> ***Comments of the Executive of An Bord Pleanála on the CER Draft Consultation Paper on the High Level Design of the Petroleum Safety Framework***
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> *"Section 65 of the Planning and Development (Amendment) Act, 2010 amends and inserts additional subsections into Section 182C of the Principle Act. It requires, in the case of any application to the Board under this section, that it should request the CER to make observations on "safety or operational matters" including any relevant safety advice or specific recommendations which the Commission considers appropriate", and that "the Board is to have particular regard to the observations of the Commission when considering the likely effects of a proposed development on the environment … and the*

consequences of the development for proper planning and sustainable development."

It follows from the foregoing that we envisage that the Board in processing a planning application for strategic infrastructure and, where relevant when engaging in the pre-application and scoping processes, would engage in consultation with CER. ... Advice may on occasion extend to the attendance of staff from the CER at an oral hearing being conducted by An Bord Pleanála.

We would point out that the detailed consultation requirements set out in section 182C of the Planning and Development Act 2000 do not apply in relation to other possible designated petroleum activities where the applications before the Board are derived from other sections of the legislation. In cases where the consultation procedure is not set out in the legislation it is envisaged that consultation and communication between the CER and An Bord Pleanála would be regulated and facilitated by an agreed Memorandum of Understanding between the bodies in question.

We note that the ALARP principle is derived from best international practice and the Petroleum (Exploration and Extraction) Safety Act, 2010. In acknowledging the adoption of this principle by the CER, it is important to note that the Board's approach in dealing with strategic infrastructure planning applications and development applications in general is prescriptive in nature, whereby there is a requirement for precise and enforceable conditions attached with the grant of planning permission or approval.

When framing a grant of permission, subject to conditions, the Board is cognisant of the advice contained in the Development Management Guidelines for Planning Authorities published by the Department of the Environment, Heritage and Local Government in June 2007. Section 7.3.4 of the guidelines advises that conditions should be precise. Vagueness is to be avoided because imprecise conditions may well prove unenforceable. The Board would be concerned that any condition incorporating words such as "as low as reasonably practicable" (ALARP) may suffer from such imprecision and unenforceability.