

USE OF THE ENFORCEMENT MANAGEMENT MODEL BY THE COMAH COMPETENT AUTHORITY

the Competent Authority



1. PURPOSE

- 1.1 This circular provides general guidance on the application of the Enforcement Management Model (EMM) within the COMAH Competent Authority (CA), in particular on the use of EMM Tables 5.1 and 5.2 (which indicate the initial enforcement expectation) and factors affecting the final enforcement conclusion. It should be read in conjunction with the full EMM guidance documentation on the HSE intranet and website.
- 1.2 This guidance should be used in accordance with the relevant HSE/EA/SEPA enforcement policies, the Code for Crown Prosecutors and the Regulators' Compliance Code.

2. BACKGROUND

- 2.1 The EMM is a tool that was originally developed by HSE to provide inspectors with a framework for making enforcement decisions. It is intended to:
 - promote enforcement consistency by confirming the parameters, and the relationships between the many variables, in the enforcement decision making process;
 - promote proportionality and targeting by confirming the risk based criteria against which decisions are made;
 - be a framework for making enforcement decisions transparent, and for ensuring that those who make decisions are accountable for them; and
 - help experienced inspectors assess their decisions in complex cases, allow peer review of enforcement action, and be used to guide less experienced and trainee inspectors in making enforcement decisions.
- 2.2 This guidance considers specifically the way in which the EMM can be applied to enforcement decisions under COMAH. It introduces some modifications to the EMM to improve its applicability to the control of major accidents, including major accidents to the environment, and explains how the EMM can be used to inform our decisions about enforcement in relation to notification and safety report requirements. It is not intended to change existing enforcement procedures in HSE/EA/SEPA, which will continue to be followed where the EMM indicates that formal enforcement is appropriate. However, enforcement conclusions derived from the EMM will be taken into account when applying those procedures.

3. USE OF EMM BY THE COMAH CA

- 3.1 The EMM should be applied to all enforcement activity and this guidance covers the work of both regulatory and specialist inspectors in all parts of the CA. Inspectors are expected to apply the principles of the EMM to all their enforcement decisions but they are only required to apply the EMM formally and record the outcome in certain specified circumstances.
- 3.2 **Annex 1** contains a flow chart that provides an overview of the various steps in the EMM in the context of COMAH enforcement. Further guidance on each of the steps is provided below.

STEP 1: ENFORCEMENT PRIORITIES

- 3.3 In the course of assessment, inspection and investigation activities CA inspectors collect information about hazards and control measures and prioritise issues for action in order to achieve sustained compliance with COMAH (in addition to considering the need for punitive action, such as prosecution). Step 1 is intended to capture this process, which forms a central part of the work of an inspector and involves the use of professional judgement.

STEP 2: SERIOUS DEFICIENCIES

- 3.4 Step 2 of the EMM addresses the need for inspectors to deal firstly with matters that give rise to a risk of serious personal injury, taking immediate action to deal with any such risks by issuing a Prohibition Notice (PN). For COMAH purposes, this step needs to be modified such that it reflects the need for inspectors to assess the evidence of serious deficiencies in operators' measures for the prevention and mitigation of major accidents, including major accidents to the environment. Usually, immediate action will only be appropriate after a site visit / inspection and the collection of evidence to verify the actual situation, before issuing a reg.18 COMAH PN where appropriate.

STEP 3: GAP ANALYSIS

- 3.5 The "risk gap" is the difference between where the operator should be if risks are well controlled and where he actually is. Inspectors need to determine whether the gap is extreme, substantial, moderate or nominal and the size of the risk gap is then used (at Step 4) to identify the initial enforcement expectation.
- 3.6 There are two tables in the EMM to assist inspectors in determining the size of the risk gap, one for risks that are likely to result in single casualties (Table 2.1) and a second where multiple casualties are more likely (Table 2.2). Because COMAH major accidents are likely to result in multiple casualties, Table 2.2 is the more relevant when determining the risk gap. However, this table was devised with conventional health and safety risks in mind and is not so well suited to major hazard risks to persons and the environment. For this reason, an amended version of this table has been developed for use when making enforcement decisions under COMAH. The amended table (Table 2.2A) and guidance on its use may be found at [Annex 2](#).
- 3.7 A number of the duties under COMAH are not risk based, namely those relating to notifications (reg.6), submission of safety reports and provision of further information (reg.7) and review and revision of safety reports (reg.8). Where operators fail to meet their obligations under these regulations it will not be possible to identify a risk gap and inspectors should move directly to Step 4.

STEP 4: INITIAL ENFORCEMENT EXPECTATION

- 3.8 Having determined the risk gap, the next step is to identify the initial enforcement expectation (IEE). This is defined in the EMM as “the enforcement action solely reflecting, and proportionate to, the risk to health or safety (*and for COMAH purposes also the risk to the environment*), or the seriousness of any breach of the law”. The IEE will be converted into an actual enforcement outcome only after applying duty holder factors (Step 5) and strategic factors (Step 6).
- 3.9 The IEE is determined using Table 5.1, which takes into account both the risk gap identified at Step 4 and the nature of the applicable standards (defined/established/interpretative). Many of the control requirements, based on industry codes and good practice etc., should be considered as “established” standards. Where this is not the case, then a first principles approach is needed and “interpretative” status is relevant. “Defined” standards are those specified by regulations.
- 3.10 When determining the IEE in relation to duties that are not risk based (paragraph 9), inspectors should refer to Table 5.2 of the EMM: “Compliance and Administrative Arrangements”. Further guidance on the use of Table 5.2 is contained at [Annex 3](#).

STEP 5: DUTY HOLDER FACTORS

- 3.11 Having determined the IEE, inspectors must next consider the following factors that are specific to the duty holder and their activities, to enable the CA to take into account the duty holder’s overall performance in relation to the requirements of COMAH:
- relevant enforcement history/previous advice;
 - relevant incident history;
 - all COMAH relevant factors;
 - intention of duty holder (i.e. was non-compliance commercially/financially motivated?);
 - level of actual or potential harm to persons or the environment;
 - standard of general conditions;
 - inspection history of duty holder;
 - attitude of duty holder.
- 3.12 “Relevant incident history” should extend to the immediate industry as well as the duty holder’s own experience. It is reasonable to expect duty holders with major hazard responsibilities to be aware of wider industry performance than that limited to their own establishment.
- 3.13 “The standard of general conditions” should include consideration of the duty holder’s recent performance in relation to safety report requirements.
- 3.14 “All COMAH relevant factors” should include consideration of non-COMAH breaches/history including HSW and environmental performance that could have a bearing on the control of major accident hazards when considering enforcement outcomes.

3.15 “The attitude of the duty holder” and “the intention of the duty holder in non-compliance” should include consideration of the timeliness of submission of safety reports, compliance with notification /submission requirements (including adequacy of the information) and response to requests for further information.

STEP 6: STRATEGIC FACTORS

3.16 There is a range of strategic factors that may impact on the final enforcement decision, specifically:

- Does the action coincide with the public interest (e.g. by providing a net benefit to the wider community/environment)?
- Are vulnerable groups (e.g. children, patients, members of the public) protected?
- What is the long-term impact of the action (i.e. is it sufficient to achieve sustained compliance from the duty holder)?
- What is the effect on other duty holders (positive or negative)?
- What is the initial effect of the action (i.e. does it secure compliance with the relevant benchmarks)?
- What is the functional impact of the action (e.g. is there a net benefit to employees/others or could action lead to closure of the workplace/unemployment)?
- Have the principles and expectations of the CA's enforcement policy been met?

STEP 7 – ENFORCEMENT CONCLUSIONS

3.17 Having worked through steps 1 to 6 of the EMM the inspector arrives at an enforcement decision. Step 7 comprises a series of questions that provide a final check that the level and focus of enforcement is appropriate and that the action is properly targeted.

3.18 Where the term “prosecution” appears in the IEE or Enforcement Conclusions, it means that the CA would normally prosecute subject to the tests set down in the Code for Crown Prosecutors. The expected response to a COMAH major accident is prosecution.

3.19 There may be circumstances where the IEE is for a prosecution, but the duty holder and strategic factors indicate that a lesser response is warranted in the particular circumstances under consideration. In such cases it may be appropriate to issue a **warning letter**. Such a letter should state explicitly that the duty holder is not complying with the law. It should be written on CA headed paper, with the words “Written Warning” in the title, and should clearly identify the offence. It should be made clear in the text that the warning will be taken into account as an aggravating factor when considering future enforcement action.

3.20 Where the Enforcement Conclusions indicate a prosecution, it may subsequently be decided (England and Wales only) that a **formal caution** is appropriate. Formal cautions (also known as 'simple cautions') may only be issued where there is sufficient evidence to support a prosecution but it is not in the public interest to prosecute. As a result, a prosecution report should be prepared in the normal way, following existing HSE/EA procedures, with decisions about the use of a formal caution versus prosecution falling outside the scope of the EMM. In Scotland, decisions about whether to proceed with a prosecution rest with the Procurator Fiscal.

MANAGEMENT REVIEW

- 3.21 Most enforcement situations are such that a conventional line can be taken and the EMM used to derive an initial enforcement expectation. However, some standards are not yet well developed, in particular those relating to some technical issues (e.g. where relying on ALARP principles) and safety management systems (SMS). Where the standard is not well defined it may be difficult to identify the line between what is required by law and what, in terms of good practice, goes beyond it.
- 3.22 EMM Table 2.2 (and Table 2.2A in **Annex 2** of this document) is not sensitive enough to determine the risk gap where there are both indeterminate actual risks and uncertain benchmarks. The enforcement link between SMS/ALARP issues and the EMM have not been tested and therefore the EMM guidance must be used cautiously and a management review is recommended to support and document the enforcement conclusions. In such cases, form EMM-C should be completed with sufficient detail to make it clear how the final enforcement decision was reached.
- 3.23 The 'Management Review' section of form EMM-C should also be used to record details of recommendations made by the Regulatory Review Team in SEPA or the Area Enforcement Panel in the EA, particularly where those recommendations result in a decision to take a different course of action than that indicated by the EMM.

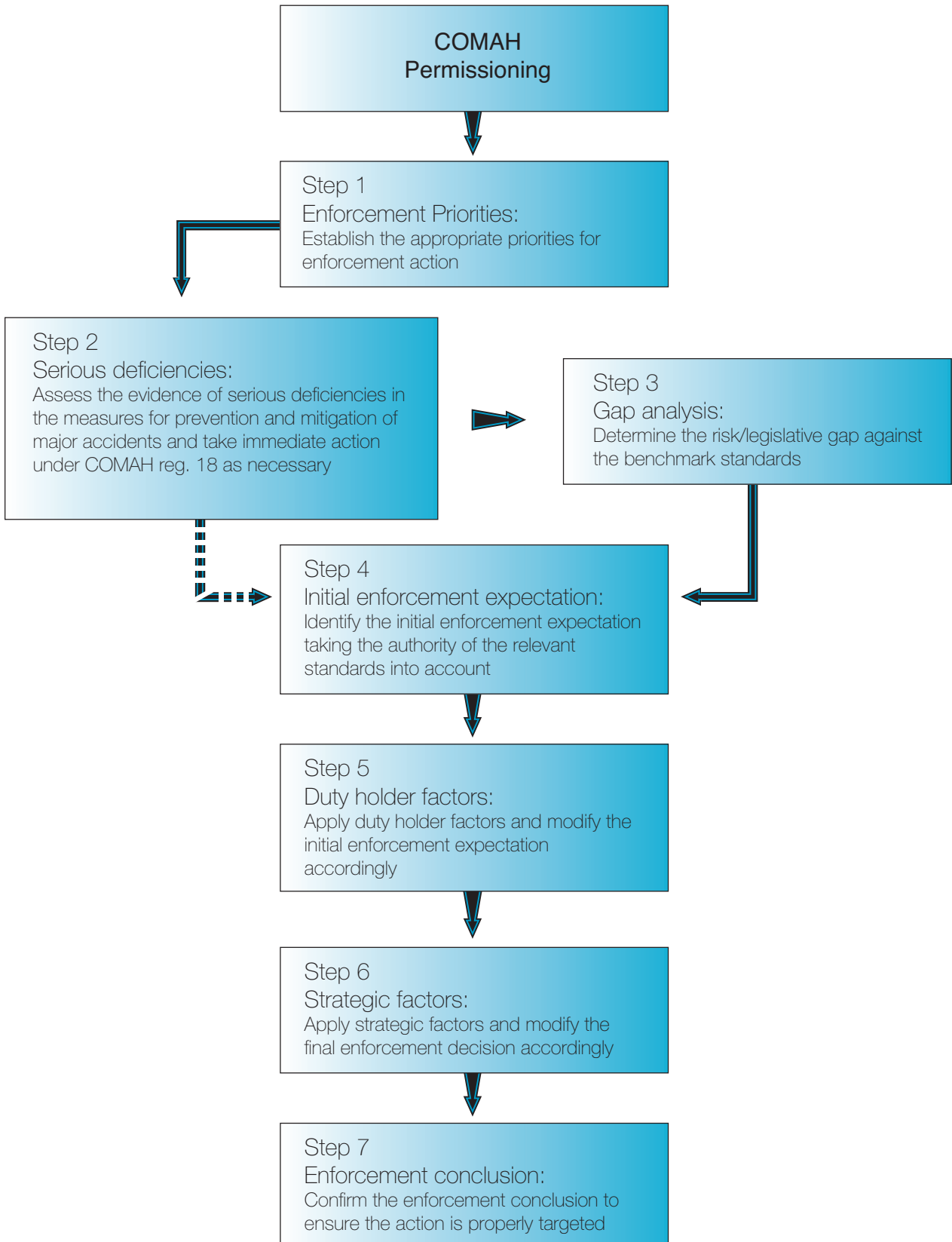
4. ACTION REQUIRED

- 4.1 Regulatory and specialist inspectors/assessors should apply this guidance as appropriate when advising duty holders directly e.g. verbally or by letter. Specialist inspectors should ensure their advice to the site regulatory inspector (who will normally initiate any formal enforcement action against a duty holder) is consistent with the likely outcome of an EMM consideration.
- 4.2 In certain specified circumstances, set out in **Annex 4**, inspectors should apply the EMM formally and record details on form EMM-C.

5. FURTHER INFORMATION

- 5.1 Further information may be obtained from HID CI4A, VPN 503 4220 or 523 4885.

Annex 1: Enforcement Management Model Overview



Annex 2

TABLE 2.2A - RISK GAP

1. The benchmark is the level of risk that the duty holder should achieve when complying fully with the suite of measures required by the legislation. For COMAH purposes this should normally be interpreted as being “nil” or “negligible”. Partly for this reason, and partly to better reflect the situation with regard to the control of major accident hazards to people and the environment, a modified version of Table 2.2 is appropriate when determining the risk gap under COMAH:

Table 2.2A

Risk Gap Table: COMAH Major Accidents

ACTUAL RISK		
Consequence	Likelihood	
COMAH Major Accident	Nil/negligible	
	Remote	
	Possible	
	Probable	
	Likelihood:	Nil/negligible
	Consequence:	COMAH Major Accident
BENCHMARK		

RISK GAP:

EXTREME	SUBSTANTIAL	NIL
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2. Inspectors should refer to Agency guidance when assessing and classifying probable or actual environmental harm. This guidance includes the DETR MATTE guidance and the EA's Common Incident Classification System.
3. When inspectors carry out a detailed assessment of a safety report to identify the risks from actual or proposed work activity, a verification visit is often not immediately possible. The inspector may then have to determine “actual risk” purely from submitted documents. Similarly, when dealing with proposed changes of processes or proposals for new plant or processes, inspectors have to fall back on their professional judgement and consider the potential risk rather than the actual risk. The assessment of that risk can be based on current knowledge and experience.
4. A site visit is not essential to the process of assessing potential or actual risk in order to estimate

the risk gap. The absence of a site visit may increase the uncertainty in the outcome of the process but such judgement has to be made to estimate the consequences of identified deficiencies. However, formal enforcement of issues such as management arrangements, risk control systems and workplace precautions would usually only follow a site visit at which inspectors can judge the extent of the actual risk without placing reliance on submitted information. This is particularly the case where scrutiny of the safety report indicates evidence of serious deficiencies (which would indicate need for early verification).

Annex 3

TABLE 5.2 – COMPLIANCE AND ADMINISTRATIVE ARRANGEMENTS

- Where deficiencies are purely administrative, with no implications for the effectiveness of the control of major accident hazards at the site, it is not appropriate to use EMM Table 5.1 to determine the IEE. For COMAH purposes such deficiencies may arise as a result of an operator's failure to comply with notification requirements under regulation 6 and safety report requirements under regulations 7 and 8. Such failings are compliance and administrative matters and should be dealt with using EMM Table 5.2, with reference to the descriptors in EMM Table 4.
- As notification and safety report requirements are specified in the COMAH Regulations, the appropriate standard will be "defined" in all such cases. The following table gives examples of the IEE in relation to a range of administrative deficiencies that might arise under COMAH. It is derived from EMM Tables 4 and 5.2 and serves to illustrate that use of these tables gives rise to an appropriate IEE for COMAH purposes.

Compliance and administrative arrangements – initial enforcement expectation (IEE)		
Descriptor	Standard	IEE
Absent (e.g. failure to notify, safety report not submitted)	Defined	Improvement Notice (requiring notification/submission) ¹
Inadequate (e.g. key information missing from safety report)	Defined	Improvement Notice (requiring resubmission of inadequate safety report)
Minor (e.g. gaps in safety report prompting requests for further information) ²	Defined	Letter (requiring provision of further information)

Note 1: In the majority of cases service of an Improvement Notice will be appropriate. However, regulation 18(2) of COMAH gives the CA the option of prohibiting the operation or bringing into operation of an establishment or installation if the operator has failed to submit a notification, safety report or other information required by the regulations, so the need for this should also be considered. Guidance on the circumstances under which it would be more appropriate to serve a COMAH-PN which is contained in Chapter 6 of the COMAH Manual – Guidance on the application of regulation 18, prohibition under COMAH.

Note 2: The minor descriptor does not apply to 5 year Review and Revision Safety Reports – from 1 April 2010 requests for further information will not be made under the revised arrangements for 5 year review and revision safety report assessment.

- The IEE for a compliance/administrative breach does not include prosecution as this enforcement option is not normally appropriate. However, this holds only if there are no relevant Duty Holder or Strategic Factors pointing towards prosecution and, in many such enforcement considerations, Strategic Factors will be particularly relevant. The public can rightly expect a high degree of enforcement and control by the regulator at major hazard sites. Therefore, when the question is asked "Does the action coincide with the public interest?" it is reasonable to assume that the public would demand assurance of safety, with formal enforcement for serious issues, and not reliance on intention or goodwill to secure compliance.

4. As an example, in the case of a top tier COMAH establishment operating without submitting a safety report, the IEE would be an Improvement Notice. In addition to considering the Duty Holder Factors (Step 5), the IEE would be modified by the relevant Strategic Factors (Step 6). These should take into consideration (even in the absence of actual risk) that successful operation of the COMAH regime – and the central role of safety reports – is fundamental to the protection of the public and the environment. Strong enforcement would be in the public interest as it would have a positive effect in ensuring sustained compliance. The enforcement conclusion is therefore that prosecution should always be fully considered.
5. In general, the administrative issues around safety reports can be dealt with on the basis of inadequacies of written submissions and do not normally require a site visit.

Annex 4

WHEN A FORMAL RECORD IS TO BE KEPT ON FORM EMM-C

- 1 Inspectors should decide whether a ‘management review’ is necessary, e.g. where the action that the inspector is proposing does not fully address one or more of the strategic factors, such as meeting the principles and expectations of the CA Enforcement Policy, or where the inspector is proposing action that differs from that indicated by the EMM. In such cases the COMAH Enforcement Assessment Record form (EMM-C) should be completed, and the proposed action reviewed with the line manager.

- 2 In addition, the EMM-C form should be completed, to facilitate management monitoring, in the following circumstances:

Situations requiring MANDATORY recording of enforcement decision-making process on the COMAH Enforcement Assessment Record Form (EMM-C) by all relevant job bands		
COMAH Major Accidents	All	-
Prosecutions	All	-
Investigations	COMAH Relevant Incidents	See note 1
Serious deficiencies	All	See note 2
COMAH Prohibition Notices	All	See note 3
Improvement Notices	Served under COMAH	See note 4
Other	As required by line manager	See note 5

Notes:

- a). In addition to COMAH major accidents, the term ‘COMAH Relevant Incidents’ includes accidents, incidents, dangerous occurrences or other near misses that involve dangerous substances or involve a failure of part of the safety management system that is, or could potentially become, the root cause or a contributory factor leading to a COMAH major accident. COMAH relevant incidents may come to light from reported incidents (e.g. under RIDDOR) or from complaints received.

- b). An EMM-C form should be completed in all cases where there is evidence of serious deficiencies in the measures taken by the operator of a COMAH establishment for the prevention and mitigation of major accidents and the initial enforcement expectation is prohibition under regulation 18 of COMAH, whether or not a COMAH-PN is subsequently served.

- c). Where time allows, all prohibition notices served under regulation 18 of COMAH (including those served by Agency inspectors) require approval by the appropriate Band 1 Head of Unit in HSE and the EMM-C form provides a mechanism for recording that approval.



- d). An EMM-C form should be completed in all cases where Improvement Notices that cite breaches of COMAH are proposed to be served.
- e). Line managers may, within their discretion, require an EMM-C form to be completed in other circumstances, e.g. as required for the purposes of training and competence assessment.