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TO:

All HID Inspectors (Bands 0-4)

## **USE OF ENFORCEMENT MANAGEMENT MODEL IN HID**

### **PURPOSE**

This circular provides general guidance on the application of the Enforcement Management Model (EMM) within HID, in particular on use of EMM Tables 5.1 - 5.3 (which indicate the initial enforcement expectation) and factors affecting the final enforcement conclusion. It should be read in the context of HID's Enforcement Management Arrangements, and in conjunction with supplementary guidance on the application of EMM to specific legislation.

### **BACKGROUND**

1. The guidance is based on the operational version 3.0 of the EMM. Specific advice on its application to permissioning activities particularly relevant to HID is given in EMM section 1, paras 3, 4; Section 3, para 32; and Section 4 para 54 – 56.
2. This SPC develops that guidance to consider specifically the way in which EMM can be applied to permissioning activities in the industrial sectors enforced by HID, both onshore and offshore. It considers, in particular, the dutyholder's performance in compliance & administration matters related to permissioning requirements, for example in the submission of safety reports/cases, application for licences, and response to requests for information.
3. EMM should be applied to all enforcement activity and this guidance covers the work of both regulatory and specialist inspectors, including that of specialist staff carrying out assessment of safety cases/reports.

### **USE OF EMM IN HID**

4. The EMM indicates that Inspectors should consider, in relation to each perceived deficiency, separately:
  - is there any identified risk gap? Annex 1 of this SPC gives further guidance on the use of EMM Tables 2.2 and 5.1 by **all** HID inspectors;
  - are there any compliance /administrative deficiencies? Annex 2 of this SPC gives further guidance on use of EMM Table 5.2 by **all** HID inspectors; and
  - is the activity one covered by a “permissioning regime” to which EMM Table 5.3 can be applied? This has limited application in HID and is relevant **ONLY** to inspectors dealing with Explosives licences, Fire certification and Exemption certificates (e.g. COSHH, Mines, Diving, GMO Regs). Annex 3 gives further information.

## **ENFORCEMENT CONCLUSIONS**

5. The advice in this SPC should assist inspectors to apply the EMM as in para 4 above to lead to an initial enforcement expectation (IEE) in relation to “risk gap”, compliance & administration arrangements and, in specific regimes, non-compliance with requirements of the “Permissioning Document”.
6. The actual enforcement action that it is appropriate to take may be mitigated up or down by the application of the set list of Dutyholder Factors (EMM Table 6) and Strategic Factors (EMM Table 7).
7. Where the term “prosecution” appears in the IEE or Enforcement Conclusions, it means that HSE would normally prosecute subject to the tests set down in the Code for Crown Prosecutors.

## **Dutyholder Factors**

8. These consider the dutyholder's overall performance in administrative matters related to the permissioning requirements. Relevant aspects include:
  - "the attitude of the duty holder" and “the intention of the duty holder in non-compliance”: these should include considering the operator’s performance in the timeliness of submission of safety reports / cases, compliance with notification / submission requirements (e.g. the adequacy of the information) or response to requests for information;
  - the "relevant incident history": this should extend to the immediate industry as well as the duty holder’s own experience. It is reasonable to expect the duty holder with major hazard

responsibilities to be aware of a wider industry performance than that limited to their own establishment;

- "What is the standard of general conditions?": this should be extended to mean, "What is the dutyholders recent performance in the permissioning procedures?"

### **Strategic factors**

9. EMM paras 40-49 discuss the approach to prosecution in some detail. The HSC Enforcement Policy Statement (at para 39) identifies specific circumstances when HSC expects enforcing authorities to prosecute or recommend prosecution. These include where work has been carried out without, or in serious non-compliance with, an appropriate licence or safety case. Similarly, failure to comply with a direction or specification would result in an expectation to recommend prosecution.
10. The IEE for compliance/administrative breach (EMM para 39) does not include prosecution as this enforcement option is not normally appropriate (see Annex 2 of this SPC). However, this holds only if there are no relevant Dutyholder 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 of major hazard issues and of permissioning activities. 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, formal enforcement for serious issues, and not reliance on intention or goodwill to secure compliance.
11. For example, in the case of an installation operating (or being decommissioned) without an accepted safety case or relevant exemption certificate, the IEE would be an Improvement Notice (IN) because of the breach of a statutory requirement (a 'defined' standard). The IEE would be modified by (in addition to any Dutyholder Factors) the relevant Strategic Factors. These should take into consideration (even in the absence of actual risk) that successful operation of permissioning regulations – and the central role of safety cases - is fundamental to public protection concerning high hazard industries. 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.

### **MANAGEMENT REVIEW**

12. Most enforcement situations are such that a conventional line can be taken and the EMM used to derive an initial enforcement expectation. Where, however, there are difficulties, such as ALARP principles, indeterminate risk or uncertain benchmarks, a management review is

recommended. In such cases, form EMM1 should be completed with sufficient detail to make it clear how the final enforcement decision was reached. Annex 1 paras 4 and 5 give more information.

### **ACTION REQUIRED**

13. Regulatory and specialist/assessment inspectors should apply the guidance as appropriate when advising dutyholders directly e.g. verbally or by letter. Inspectors should apply EMM as indicated by HID's Enforcement Management Arrangements. Specialist/assessment inspectors should ensure their advice to the site/installation regulatory inspector (who will normally initiate any formal enforcement action against a duty holder) is consistent with the likely outcome of an EMM consideration. Where necessary they should apply EMM formally (including completing form EMM1) and discuss their EMM conclusions with the regulatory inspector – for example, where there are 'ALARP' concerns.

## Annex 1

### EMM TABLE 5.1 - RISK GAP

1. Inspectors will need to consider the significance and scale of the **risks** arising from any non-compliance. Note that the risk table for multiple casualties (EMM Table 2.2) should normally be used for major hazard permissioning decision making to arrive at a "risk gap". This is because permissioning is usually associated with major hazards and large numbers of people at risk both on and off site.
2. 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 most permissioning activities this should normally be interpreted as being "nil" or "negligible"
3. When determining the IEE (EMM Table 5.1), 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 "interpretive" status is relevant.
4. 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. EMM Table 2.2 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. Further guidance will be issued as these topics develop.
5. The EMM is also not fully developed in relation to risks to the environment (relevant to some enforcement activity by inspectors in CD6). EMM Tables 2.1/2.2 and 5.1 should be helpful in determining an appropriate IEE when dealing with environmental risks but the guidance should be used cautiously. A management review is recommended to support and document the enforcement conclusion.
6. When Inspectors carry out a detailed assessment of a document such as a safety case/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.

7. A site visit is not essential to the process of assessing potential or actual risk in order to estimate the risk gap as required by EMM Section 3. 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.
8. 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 case/report indicates evidence of serious deficiencies (which would indicate need for early verification).
9. EMM section 2 explains the need for inspectors to deal firstly with matters which give rise to risk of serious personal injury. Usually, immediate action will only be appropriate after a site visit / inspection and the collection of evidence. Some permissioning regimes, including COMAH, have their own enforcement provisions and therefore, when immediate action is appropriate, consideration should be given to deciding whether HSW or the specific legislation should be used. For COMAH, for example, Chapter 6 of the COMAH Manual (on Prohibition) recommends that where the consequence is a major accident then a prohibition notice under Regulation 18 of COMAH is preferable.

## Annex 2

### EMM TABLE 5.2 - COMPLIANCE & ADMINISTRATION ARRANGEMENTS

**NOTE:** Table 5.2 should be used for the COMAH and OISCR regimes (and its use may be relevant in some circumstances in the regimes listed in Annex 3). Table 5.3 should **not** be used for the COMAH and OISCR regimes <sup>1</sup>

1. Inspectors will need to consider whether the dutyholder is complying with any administrative requirements. EMM Table 5.2 should be used where a deficiency in a “Permissioning Document” (PD) is purely an administrative matter and the inspector is unable to deal with that through the PD. (Note that, for regimes covered by Annex 3 of this SPC, breaches of a permissioning requirement should normally be dealt with using EMM Table 5.3; the following comments cover situations where that Table cannot be used).
2. The duty holder will have certain duties involving the **processing** of documents, for example those submitted to HSE to notify an activity. The inspector should consider whether the duty holder has fulfilled those duties e.g. that they notified HSE when they should have done, and whether they have submitted adequate information according to the relevant legal requirement. Any failings in such regards are compliance and administrative matters (see EMM paras 33, 38, 52 and 53).
3. In considering the extent of non-compliance, inspectors should use the descriptors in EMM Table 4. EMM Table 5.2 should then be used to determine the IEE and to guide the enforcement action that should be taken to remedy these administrative failings.
4. In general, the administrative issues around permissioning can be dealt with on the basis of inadequacies of written submissions and do not normally require a site visit.

## Annex 3

### EMM TABLE 5.3 – PERMISSIONING DOCUMENT

**NOTE:** EMM Table 5.3 is for use only for the following permissioning regimes: Explosives licenses, Mines exemptions, Fire certification, COSHH Exemptions.

For these regimes, this Table should be used in most (if not all) cases where:

- a. there is non compliance with the PD requirements, and
- b. enforcement action can be taken through the PD

Inspectors dealing with other regimes (e.g. COMAH, OISCR, GMOR) should not normally use this Table (they should use EMM Table 5.2 when appropriate).

1. The high hazard industries regulated by HID, both offshore and onshore, fall generally into the category of “permissioning” regimes within the definition use by HSE. However, this definition is not the same as that used in EMM with the result that EMM Table 5.3 is applicable in only a few areas of HID’s activities.
2. The EMM sections on "permissioning" are based on there being a dutyholder’s “permissioning document”<sup>2</sup> (PD), such as a licence, which the regulator is empowered to issue, to refuse to issue, to amend or to withdraw. These conditions are relevant ONLY for the following legislation enforced by HID: Explosives licenses, Mines exemptions, Fire certification, COSHH Exemptions and Divers licences.
3. In the specific cases given above, inspectors should use EMM Table 5.3 when considering any enforcement action needed to ensure that operators comply with the terms of their licence (or other PD), primarily in relation to any “risk gap”. They will also need to consider whether the duty holder is complying with other, more general, administrative requirements for which EMM Table 5.2 may be more appropriate.
4. The PD is used by HSE as a basis for inspecting the operations and assessing the dutyholders compliance. Inspectors should consider initially whether the duty holder is complying with the requirements of the PD (EMM Table 5.3 cols. 1-3). EMM para 32 explains that, when considering the “gap analysis” (see EMM paras 13 – 16), the terms and conditions in the PD define the benchmark against which any actual risks are compared. The extent of deviation from those conditions, together with the risk gap it generates, identifies the IEE in Table 5.3.
5. The circumstances in which duty holders should seek permission are standards set out in regulations and therefore there is little scope for discretion by either duty holders or inspectors. For example, it is usually clear when applications for licences need to be made or what

information should be sent to HSE. These standards will be “defined” (EMM Table 3).

6. The enforcement action necessary to close the risk gap will usually be achieved through the PD. This may be through its modification, including re-issue, its revocation/refusal or use of any specific enforcement power e.g. a direction, which the permissioning regime may provide.
7. The Table uses terms that are not applicable to all permissioning activities but the guidance can still be used with modification, e.g. in column 3 the action that can be legally taken will vary with the regulatory provisions but equivalents can usually be found.
8. Where the PD has not yet been created by HSE (e.g. a dutyholder has applied for a licence but HSE has not yet issued it) the expression “permissioning document” should be taken to mean the legislative requirements on which the licence (etc.) would be based. For example, operating without an explosives licence should be treated as a breach of the permissioning regime (in this case, the Explosives Act 1875), which specifies that certain operations must be licensed. In EMM Table 5.3 this breach would be a “contravention” and, although column 3 of that Table does not contain an appropriate action in terms of the PD, strategic factors would point towards prosecution being considered (even if the “risk gap” is not “extreme”).
9. Action should be taken to address any permissioning contraventions separately from, and in addition to, any actions to deal with the “risk gap”. Note that the effective resolution of a concern about permissioning activity may be achieved by either permissioning impact or by the enforcement impact and it may not always be necessary to pursue both.
10. It is unlikely to occur but there may be circumstances when there is a “risk gap” despite there being compliance with the permissioning document. A review of the scope and application of the PD (as well as action required to reduce the risk) may then be required.
11. The first column of Table 5.3 uses the words “contravention” and “irregularity”. Where a PD makes specific requirements that are not complied with, there will be a “contravention”. An “irregularity” should be taken to be a deviation from the intention of the permissioning regime, which, whilst not literally in breach of the conditions, nevertheless results in the situation being unsatisfactory. Usually this will be consistent with slightly increased risk and result in a risk gap. For example, a requirement in a PD that persons are trained, without any other reference, may result in a situation where a person has had training but the training is inadequate. However, if the PD qualifies the requirements by “adequate” or “suitable” the concept of “irregularities”

is not then helpful and inspectors will need to identify the benchmark risk in the usual way and address the risk gap (using EMM Table 5.1).

12. Inclusion of the term “none” (which equates to compliance) in column 1 (deviation) of EMM Table 5.3 is explained in footnote 2 to the Table.
13. EMM Table 5.3 shows that a "contravention" or "irregularity" in relation to a PD, coupled with an extreme risk gap, should give rise to consideration of prosecution. This is consistent with the HSC Enforcement Policy Statement.
14. The following chart illustrates the use of EMM Table 5.3 with several examples ranging from application for a licence, to failings found during inspection. In the latter case, the chart also shows how EMM Tables 5.3 and 5.1 are used together to indicate the recommended action. The chart assumes that all benchmarks are Nil and all actual risks are based on a risk of serious personal injury to multiple casualties.

**The IEE in respect of both the Risk Gap and the PD may be modified by Dutyholder/Strategic Factors.**

Regulatory Issue and Examples	Permissioning Document (PD) Table 5.3			Risk gap Table 5.1	
	Deviation from PD /Permissioning Requirement	Risk Gap	IEE	Standard	IEE
<b>OPERATIONS NOT YET STARTED</b>					
Application for Licence /certificate contains incomplete information	Irregularity	Nil	Letter. Refuse to issue PD	N/A	N/A
Application is assessed as having serious failings and omissions.	Contravention	Potentially substantial	Refusal	N/A	N/A
<b>OPERATIONS HAVE STARTED</b>					
Application received to amend Licence /certificate - incomplete information	Irregularity	Nil	Letter. Refuse to amend PD	N/A	N/A
Deficiencies in record keeping. Records not kept up to date.	Irregularity	Nil	Letter	N/A	N/A
Significant failures in action taken to carry out work HSE requires to be done.	Contravention	Assessed as potentially substantial	Revoke PD	Defined	IN (or PN)

	Permissioning Document (PD) Table 5.3			Risk gap Table 5.1	
Failings identified during inspection. Example: explosives used for purposes not in accordance with the terms of the licence.	Contravention	Moderate	Amendment  (may not be necessary if IN deals with the contravention)	Defined	L (or IN)
Failings identified during inspection. Example: fire separation seriously compromised, not in accordance with the fire certificate.	Contravention	Assessed as extreme	Cancel certificate.  (most likely not necessary as PN will remedy the failing)	Established	PN (and PR)

## REFERENCES

1. In significant areas of HID's Permissioning work, the regime does not allow HSE to take action – to prohibit commencement of operations, for example – by withholding approval of, or amending, a “permissioning document”. For both offshore safety cases (OISCR) and onshore safety reports (COMAH), the regulator's power is limited to, at most, refusing to accept a document submitted by a dutyholder. In the offshore situation the dutyholder will be in breach if they operate without such acceptance but this should not be taken as equivalent to the “licence” situation. None of the options in EMM Table 5.3 is open to the regulator and use of that Table is not appropriate.
2. The “permissioning document” (PD) details the **conditions** under which the duty holder is allowed to carry out certain activities. For example, it may authorise the operator to proceed with the design, construction, installation or modification of plant, or the modification of operations; it may specify conditions which require permission for other changes e.g. proposed organisational change or restart proposals following periodic shutdown.