

# Guidance: The use of the Enforcement Management Model in ND

**G/INS/030**

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## 1 Purpose & Scope

1.1 This guidance sets out how the Enforcement Management Model (EMM) is to be used within ND and its application within the nuclear licensing regime. The guidance should be read in conjunction with BMS procedure INS/030 The Use of the Enforcement Management Model (EMM) in ND, Operational Circular OC 130/11 and the Enforcement Management Model.

## 2 Introduction to the EMM

2.1 The Enforcement Management Model sets out a framework for making enforcement decisions which meet the principles in the HSC Enforcement Policy Statement It captures the issues inspectors consider when exercising their professional judgement and reflects the process by which enforcement decisions are reached. It is intended to:

- 1) Promote enforcement consistency by confirming the parameters and the relationship between the many variables in the enforcement decision making process;
- 2) Promote proportionality and targeting by confirming the risk based criteria against which decisions are made;
- 3) Be a framework for making enforcement decisions transparent and for ensuring that those who make decisions are accountable for them;
- 4) Help Inspectors assess their decisions in complex cases, allow peer review of enforcement action, and be used to guide less experienced Inspectors in making enforcement decisions.

2.2 A key principle in the EPS is that of proportionality, which means relating enforcement action to the risks. Those whom the law protects, and duty holders, expect that action taken by enforcing authorities to achieve compliance or bring duty holders to account for non-compliance, should be proportionate to any risks to health and safety or to the

seriousness of any breach which includes any actual or potential harm arising from the breach of law.

2.3 The authors of the EMM have sought to define proportionate enforcement by reference to a risk gap (Section 3 of the EMM). Essentially this demands that Inspectors make an informed judgement to assess the actual risk arising from the duty holders' activities. They then compare this to the risk accepted by the law or guidance and decide the benchmark i.e. the level of risk remaining once the actions required of the duty holder by the relevant standards enforceable by law are met.

2.4 The difference between where the duty holder is and where they should be is the risk gap. The size of the risk gap determines the proportionate enforcement action. The term enforcement action is used in its widest sense from verbal advice through to prosecution.

2.5 The concept of risk gap is not appropriate for those aspects of legal requirements which in themselves do not relate **directly** to risk control e.g. the requirement to notify HSE of an incident. In this case rather than using the concept of a risk gap, the EMM refers to compliance and administrative arrangements and these are considered separately from risk based issues. Proportionate enforcement action is then determined by considering the extent of the non compliance and the standards expected.

2.6 Matters which give rise to serious personal injury are dealt with on the spot using powers under HSWA Sections 22-25. The next stage of the EMM process requires inspectors to determine the "initial enforcement expectation". This is an EMM term meaning the enforcement action solely reflecting, and proportionate to, the risk to health or safety or the seriousness of any breach of the law.

2.7 The EMM process continues by inspectors considering their initial enforcement expectation together with factors relevant to the specific dutyholder, eg whether there has been previous enforcement action on the same issue, as well as strategic factors eg whether the proposed action is in the public interest. Consideration of these factors may or may not vary the initial enforcement expectation to produce the enforcement conclusion.

2.8 Experience with the EMM since it was first published has resulted in more specific guidance to inspectors particularly on its application to health risks. OC 130/11 Application of the EMM to Ionising Radiations is of particular relevance to inspectors in ND.

### **3 The EMM and the Nuclear Licensing Regime**

3.1 The EMM makes reference to the use of the EMM within permissioning regimes. The EMM uses the phrase permissioning document(s) to mean the document(s) defining the terms and conditions of HSE granting permission for those seeking to undertake specific activities. These might include, licences, exemptions, safety cases, approvals etc.

3.2 Table 5.3 in the EMM relates the risk gap to contraventions/ irregularities in compliance with the permissioning document. This table was originally drawn up using the asbestos licensing model and so the initial enforcement action table generally reflects the courses of enforcement action available through that regime.

3.3 Table 5.3 also introduces the concept of irregularity which is intended to describe a situation where there may not be a contravention of the permissioning document in an absolute sense, but nevertheless the situation is unsatisfactory and results in a risk gap. For example a requirement in a permissioning document that persons are trained without any other reference, may result in a situation where a person has had training but the training is inadequate.

3.4 Given the wording of Licence Conditions generally refers to requirements for "adequate" or "suitable" then the concept of irregularities in the EMM permissioning table is not helpful when considering enforcement action within the nuclear permissioning regime.

3.5 Unlike some other permissioning regimes, the nuclear site licence conditions give HSE some additional powers ( eg specifications and directions), which HSE can use to require the licensee to do something. Because the EMM Table 5.3 is generic, it does not reflect effectively the options available in the nuclear licensing regime. However the relevant tables in OC 130/11 have incorporated these additional powers.

3.6 The terms of the NI Act give NII powers to grant, vary and revoke licences and to add conditions. The special nature of the nuclear permissioning regime and the nature of the hazard means that the option of revoking a licence is only likely to be exercised very infrequently and indeed may be of doubtful effect in some circumstances. There is therefore little point in including this option in a table designed to give guidance on enforcement in day-to-day situations which ND inspectors are likely to encounter. Guidance on licensing is given elsewhere in the BMS.

3.7 The release of information by ND, for example through published reports, may stimulate public interest which could be an additional influence on licensees propensity to effect improvements and to meet commitments. This is not reflected in the EMM tables. It is not possible to provide general guidance on this aspect because of all the different variables involved and so it is not considered further in this guidance.

## **4 The Application of the EMM to Nuclear Safety**

4.1 For the purpose of simplicity, the application of the EMM to enforcement decisions relating to nuclear safety in this guidance is considered under three broad headings to reflect differing types of enforcement decisions inspectors are called on to make within the life cycle of a nuclear installation.

### **The EMM and permissioning decisions**

4.2 This covers the range of situations covered by Licence Conditions which require the licensee to seek permission from HSE before proceeding with a particular activity. It includes design, construction, installation, modifications to design of plant under construction and commissioning. Proposals for modifications or experiments on existing plant or processes which may affect safety and proposed organisational change are included as well as restart proposals following periodic shutdown.

## **The EMM and non permissioning decisions**

4.3 This covers the range of day to day enforcement decisions inspectors make to ensure licensees are complying with the law outwith the situation where the licensee is seeking permission from HSE before proceeding with a particular activity.

## **The EMM and decisions on some long term safety issues**

4.4 This refers to the application of the EMM to some long term safety considerations such as those related to radioactive waste.

## **4.5 The EMM and permissioning decisions**

1) The nuclear licensing regime which ND regulates is unique within the permissioning regimes regulated by HSE. For new operations and modifications to existing operations, the licence conditions provide for a series of hold points which ND Inspectors may use to regulate using the powers provided in the licence conditions. These hold points cover design, construction or installation, modifications to design of plant under construction, and commissioning. Such hold points are also available for modifications or experiments on existing plant or processes which may affect safety as well as for organisational change. In effect this means that when the licensee wishes to move from one position to another and there is a safety implication, then HSE's permission is required in one way or another.

2) At these hold point stages, where the licensees are seeking HSE permission, they are not implementing or operating the proposed new or modified operation. So there cannot be any actual risk, as envisaged by the EMM risk gap table, associated with the proposal in itself at that point. This is also the situation with a proposal to start up a plant or process following a periodic shutdown.

3) ND inspectors make a judgement of the adequacy of the demonstration of safe operation of the particular proposal as set out in the safety case, principally through the assessment process. In making that judgement the inspectors compare the licensees' safety case and the arrangements derived from it, against the inspectors' expectations of what the demonstration of safety needs to achieve, in order to ensure compliance with the law and that risks are ALARP. In this situation it is the size of the "expectation" gap rather than a risk gap which informs the enforcement decision.

4) Where such an expectation gap exists, then inspectors make use of the normal enforcement tools such as verbal advice, letters and the various legal instruments which are available. The ultimate enforcement action is that HSE withholds permission for the proposal to go ahead. This is in fact the enforcement starting position; permission is withheld until such time as the expectation gap is nil or negligible when the licensee is able to demonstrate the proposal (including a start up proposal) meets legal requirements including ALARP, immediately or through implementation of agreed forward action plans. This range of enforcement options provides the proportionate response required under the EPS and the principles within the EMM.

5) In the case of periodic safety reviews the licensee is in effect seeking permission for continued operation. However unlike the permissioning decisions discussed so far, where

the particular activity has yet to take place, the periodic safety review covers existing activities. The review may indicate a previously unrecognised risk gap, in which case the principles outlined in the next section are used to inform enforcement decisions.

6) Separate guidance (T/AST/005) has been produced for inspectors when considering demonstration of ALARP.

7) The use of the various licence powers within the permissioning hold point process is outside the scope of this guidance.

#### **4.6 The EMM and non permissioning decisions**

1) In the permissioning process inspectors are concerned with making judgements, based on sampling, on the adequacy of the licensee's demonstration of safe operation through the safety case related to their proposals. In making decisions outwith the permissioning process, inspectors' judgements involve:

- i) evaluation of compliance with the requirements of licence conditions, the adequacy of, and compliance with, licensees' arrangements made under licence conditions, compliance with safety cases and arrangements derived from it, and compliance with relevant legal requirement.
- ii) identification of immediate and underlying causes of non-compliance and the associated risks, through planned inspection and assessment, and through investigation of incidents;
- iii) deciding on, and taking, appropriate action to secure compliance and prevent recurrence of circumstances which may give rise to non-compliance; and
- iv) promotion of continual improvement in health and safety.

2) In coming to a decision on the action to take to ensure compliance, Inspectors exercise their professional judgement and discretion. The EMM provides a framework for making such judgements without fettering discretion.

#### **4.7 Dealing with risk of serious personal injury**

1) Chapter 2 of the EMM provide link deals with the processes inspectors should follow to deal with a situation where there is a risk of serious personal injury. It covers the use of Section 22/25 HSWA powers. In addition to the use of prohibition notices in such circumstances, Licence Condition 31(1) gives power to the Executive to direct the licensee to shut down any plant , operation or process on the site within such period as the Executive may specify.

#### **4.8 Determining the Risk Gap**

1) Once the risk of serious personal injury has been dealt with then inspectors should proceed through the stages of the EMM process in the usual way. Where the hazard is ionising radiations then the risk gap should be determined by following the guidance in OC 130/11.

2) Having determined the risk gap then the next step is to determine the initial enforcement expectation (the enforcement action solely reflecting, and proportionate to, the risk to health or safety or the seriousness of any breach of the law).

#### 4.9 Initial Enforcement Expectation - The use of OC 130/11 Table 5.1

1) The judgements about risk gap are considered with the legal "authority" of the standards which establish the benchmark ie where the duty holder (licensee) should be, in order to arrive at an initial enforcement expectation. Chapter 2 of the EMM discusses these standards in some detail.

2) In essence "Defined standard " relates to minimum standard specified by Acts, Regulations, Orders and ACoPs and so the Licence Conditions would fall into this category.

3) "Established standards" include codes of practice and other standards linked to legislation and so would include for example, the SAPs and IAEA standards and other sources of relevant good practice.

4) "Interpretative standards" include standards put forward by HSE specialists which are not published or available generally also standards interpreted by inspectors from first principles.

5) The initial enforcement expectation tables in the EMM have been adapted within OC 130/11 so that they better reflect the enforcement options for ionising radiations and actions available within the nuclear licensing regime and these are shown as Tables 5.1 and 5.2 of OC130/11. (Note that LC 12(5) and 13(5) provide for the additional option of notification in particular cases).

6) Table 5.1 in OC 130/11 should be used by NSD Inspectors to determine the initial enforcement expectation outwith the permissioning process discussed in [Section 4.8](#), in situations where there is a risk gap . Note that the use of prohibition notices is not included in the table. This is because any situation presenting an immediate risk of serious personal injury has already been considered and dealt with where appropriate. ([See Section 4.7 above](#)).

7) When determining the initial enforcement expectation for non nuclear safety issues ND Inspectors should use Table 5.1 or Table 5.2 of the EMM as appropriate. There may be situations which demand consideration of both nuclear and non nuclear issues rather than one or the other. In such a case then each issue is dealt with in turn, and the balance of risk considered before deciding the priority for action.

8) Table 5.1 in OC130/11 has two columns for enforcement expectations, the first relating to securing compliance with the law and the second relating to prosecution. Where

the term "prosecution " appears in the table then this means that HSE would normally prosecute subject to the tests set down in the Code for Crown Prosecutors.

9) Paragraph 39 of the HSC Enforcement Policy Statement 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. Also where there has been a failure to comply with an improvement or prohibition notice. By extension the failure to comply with a direction or specification would result in an expectation to recommend prosecution. Paras 40-49 of EMM discuss the approach to prosecution in some detail.

#### **4.10 Initial Enforcement Expectation - The use of OC 130/11 Table 5.2**

1) Table 5.2 in OC130/11 should be used when considering enforcement action outwith the permissioning process covered in [Section 4.5](#), for those legal duties which in themselves do not directly result in control of risk. They are referred to in the EMM as compliance and administrative arrangements and are considered separately from risk based issues. However there is a strong relationship between control of risk and failures to address compliance (within the EMM meaning of the term "compliance") issues.

2) Again the relevant EMM table has been adapted to reflect the additional enforcement options available to ND Inspectors.

3) Unlike Table 5.1, Table 5.2 does not include a column indicating an initial enforcement expectation of prosecution. This is because it is not usually appropriate to prosecute in relation to compliance and administrative arrangements that do not in themselves give rise to risks unless there are relevant duty holder/strategic factors, ([see para 2.7](#)) as well as [Section 5](#) below on Outputs, for clarification of these terms) or the matter is specified in the Enforcement Policy Statement.

#### **4.11 Improvement Notices and Licence Powers**

1) In situations where the EMM produces initial enforcement expectation of an Improvement Notice/Specification/Direction, then the Inspector has to make a judgement as to which of the options is the most appropriate in the particular circumstances.

2) In considering the issue of an Improvement Notice the Inspector has to be of the opinion that the duty holder is contravening, or has contravened, one or more of the relevant statutory provisions in circumstances that make it likely that the contravention will continue or be repeated. Such an opinion is not necessary in the case of the licence powers.

3) It is outside the scope of this guidance to detail the benefits and disadvantages of using specific licence powers available within the various licence conditions.

#### **4.12 The EMM and decisions on some long term safety issues**

1) The concept of risk gap in informing enforcement action is not helpful in some situations faced by ND in regulating long term safety issues, for example those associated

with waste and decommissioning. While the risk gap concept and the associated Table 5.1 are useful in dealing with the acute risks associated with these issues, they are not so useful when dealing with the longer term safety considerations. Here the issue is ensuring effective hazard management and the proportionate enforcement action necessary to ensure that this is in place.

2) In considering enforcement action related to long term safety then it is more appropriate to consider the issue as one of compliance with the relevant licence conditions and associated good practice guides than of risk control. Table 5. 2 is therefore more appropriate than Table 5.1 in these circumstances, in providing an initial enforcement expectation. Enforcement strategy relating to waste and decommissioning is currently under review and this section of the guidance may change in the light of that review.

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## **5 Outputs**

5.1 The EMM uses the term "outputs" to cover the final stages in the process which then determines the enforcement conclusion. The use of Table 5.1 or Table 5.2 results in an initial enforcement expectation which is the enforcement action solely reflecting, and proportionate to, the risk to health or safety, or the seriousness of any breach of the law.

5.2 Section 5 of the EMM considers the factors specific to a particular case which may vary the initial enforcement expectation derived from the use of the tables. Inspectors need to consider duty holder factors and strategic factors which influence the final enforcement conclusion.

5.3 In certain cases ND inspectors may also need to consider the requirements of the relevant protocols for liaison with EA/SEPA before reaching a final enforcement conclusion.

5.4 Table 6 of the EMM lists a series of duty holder factors which may influence the enforcement decision. This is a generic list and the associated flowcharts apply the various elements to the initial enforcement expectation.

5.5 Table 7 of the EMM and the associated flowcharts test the proposed enforcement action against the strategic factors which include the public interest. Para 5.12 of the EMM recognises that public interest is a difficult issue to assess and inspectors are directed to ask themselves "what would a reasonable person expect from HSE in the circumstances." In a major hazard permissioning regime it is reasonable to assume that the public would demand assurance of safety and formal enforcement for serious issues, and not rely on intention or goodwill to secure compliance. A further test is whether the particular decision could be justified in any public forum or inquiry. Tables 6 and 7 of the EMM should be used by NSD inspectors to arrive at their enforcement conclusion.

## **6 Management Review**

6.1 The flowcharts associated with EMM Table 7 lead to a confirmed enforcement action which the EMM requires to be subject to a management review where the enforcement action does not fully address all the strategic factors or accord with the Enforcement Policy Statement. In such a case the inspector should complete the form - the Enforcement Assessment Record, (EMM1) to review the circumstances with their line manager. This allows them to review the conclusions reached at each stage.

6.2 The final question the inspector and their manager must ask is: does the proposed action meet the principles and expectations in the HSC Enforcement Policy Statement?

6.3 Decisions made in the management review should be recorded on the form in sufficient detail to make it clear why and how the enforcement decision was reached. This includes situations where the application of the EMM process leads to consideration of prosecution, but the final enforcement conclusion is that prosecution should not proceed.

6.4 There is an HSE requirement to apply the EMM formally in the following circumstances.

- 1) When considering enforcement action following the investigation of all fatalities.
- 2) Prior to enforcement action in all decisions to prosecute.

6.5 Formal application means that progress with the application of the EMM is recorded on the Enforcement Assessment Record (EMM1). The reason for this is to provide both the inspector and their line management with a permanent record of the process of making any enforcement decisions. This will prove valuable if at a later date there is a need to review the decision.

6.6 ICG has made the decision that in addition to the circumstances described in paragraph 6.4, the Enforcement Assessment Record (EMM1) should be completed where the application of the EMM process leads to an initial enforcement expectation of an improvement notice, direction or specification, irrespective of the final enforcement conclusion.

6.7 OM 2002/113 and OM 2002/116 provide guidance on disclosure of completed Enforcement Assessment Record forms and on discussion of enforcement decisions in particular cases.

## **7 References**

7.1 HSC Enforcement Policy Statement.

7.2 Enforcement Management Model (EMM)

7.3 BMS Procedure INS/030 The Use of the Enforcement Management Model in ND.

7.4 OC 130/11 The Application of the Enforcement Management Model to Ionising Radiations.

7.5 T/AST/005 Demonstration of ALARP.

7.6 BMS BMM Annex 5c - The working relationship between HSE and EA on nuclear safety and environmental regulatory issues - A Statement of Intent: T Walker (Director General, HSE) and Barbara Young (Chief Executive, Environment Agency) 8 August 2001.

7.7 BMS BMM Annex 5e - Memorandum of Understanding between (i) The Health and Safety Executive and (ii) The Environment Agency on Matters of Mutual Concern at Licensed Nuclear Sites in England and Wales: Barbara Young (for the Environment Agency) and Timothy Walker (for HSE), 23 April 2002.

7.8 BMS BMM Annex 5g - Memorandum of Understanding between The Health and Safety Executive and The Scottish Environment Protection Agency on Matters of Mutual Concern at Licensed Nuclear Sites in Scotland: Patricia Henton (for the Scottish Environment Protection Agency) and Laurence Williams (for HSE) 21 March 2002.

7.9 OM 2002/113 Enforcement Management Model Disclosure of Completed Forms - Public Interest Immunity.

7.10 OM 2002/16 Enforcement Management Model Discussing Enforcement Decisions in Particular Cases.