



OFFICE OF RAIL REGULATION

Supplementary guidance to HSE's Enforcement Management Model for ORR

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Foreword

It is ORR's policy to adopt the Health and Safety Executive's (HSE) enforcement management model, EMM, as an aid to decision making, when carrying out our enforcement responsibilities. This will help maintain a level of consistency with the HSE as the principal enforcing authority for the Health and Safety at Work etc. Act 1974.

There are however, some enforcement decision making issues that are railway specific, and this guidance sets out additional instructions for using the EMM in the railway context.

1. Determining the EMM benchmark for multi-fatality (catastrophic) public risk

Purpose: For railways, this applies to events that could lead to multiple fatality outcomes to members of the public and includes train collisions, derailments and serious fires, especially in tunnels.

Setting the benchmark

1.1 The benchmark is the level of risk that remains once the actions required of the duty holder in law are being met.

1.2 For multi-fatality risk, we expect the standard of risk control to be very high i.e. we expect the residual level of risk to be very low.

1.3 We compare the level of risk that we encounter on site with the benchmark and determine the risk gap. See Table 2.2 of the EMM.

1.4 To be consistent, we intend to apply the same principles for the benchmark for catastrophic (multiple fatality) risk train accidents as HSE does to its High Hazard/Low Frequency equivalents for example COMAH events.

Our approach

1.5 The duty holder is complying with their legal duties for multi-fatality risk when all slices of James Reason's "Swiss Cheese Model" of its risk management system are in place and are properly specified, designed, manufactured, installed, commissioned, implemented, monitored, reviewed, inspected, maintained, repaired, replaced and operated correctly so far as is reasonably practicable. In these circumstances, multiple fatality risk to persons is negligible, and the benchmark should be nil/negligible likelihood of minor or nil personal injury.

When considering the benchmark for a duty holder for events that can lead to multiple fatalities on the railway, we will use Nil/Negligible likelihood of Minor or Nil personal injury.

1.6 It should be remembered that the EMM only considers a duty holder's statutory duties and it is not intended to consider deliberate rule breaking or criminality by third parties.

1.7 Therefore, when looking at the risk gap, the benchmark equates to the bottom right-hand corner of table 2.2 in the EMM.

Measure of actual risk (where the dutyholder is)	Consequence	Likelihood	Dutyholder complies with or exceeds legal standard			Dutyholder complies with or exceeds legal standard				Dutyholder complies with or exceeds legal standard				
	Minor injury	Remote												
		Possible												
		Probable												
	Significant injury	Remote												
		Possible												
		Probable												
	Serious personal injury	Remote												
		Possible												
		Probable												
Likelihood		Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg		
Consequence		Serious personal injury			Significant injury				Minor injury/ Nil					
Benchmark (where dutyholder should be)														



Table 2.2 Risk gap table: Multiple casualties

2. HSE Enforcement Management Model Tables 6 and 7: Duty holder and Strategic Factors

2.1 This section provides supplementary guidance on the way that Tables 6 and 7 of the HSE EMM should specifically be applied in respect of larger rail industry duty holders. It is not intended or anticipated that this will change the way in which we take enforcement action: more that it will document more accurately the way enforcement decisions are currently considered.

2.2 The guidance clarifies how the duty holder and strategic factors might be considered and applied in respect of rail industry duty holders, particularly the larger corporate bodies such as Network Rail and Transport for London (TfL). These are single legal entities with wide-ranging safety obligations spread over large areas and managed by a number of different teams under one corporate umbrella. Such organisations will have one single safety management system (SMS) that they require to be implemented and followed by all employees.

Background

2.3 Once the Initial Enforcement Expectation (IEE) has been identified through the EMM, Table 6 (Duty holder Factors) is used to either verify or suitably amend the suggested enforcement route, primarily depending on the duty holder's past attitude to, or performance in, meeting their health, safety and welfare obligations. Table 7 (Strategic Factors) is then used to confirm or suggest a reconsideration of the final enforcement conclusion.

2.4 These factors have, however, been written primarily for the enforcement regime of, and duty holders regulated by, the HSE. They do not necessarily take into account the specific (and distinctive) characteristics of the rail industry, in particular the wide ranging cross-network roles of NR and TfL.

Please note: no changes have been made to the wording of the HSE EMM or the flowcharts accompanying Tables 6 and 7 which should still be followed.

Key Principles

2.5 Many of the factors within Tables 6 and 7 require either a 'yes' or 'no' answer. It could be considered as a fairly blunt tool because it does not necessarily allow all relevant factors to be weighted towards a balanced decision. It does, however, guide the Inspector towards the most appropriate course of action and ensures a level of consistency in enforcement which a wider range of options might distort.

2.6 Inspectors do not, however, need to rigidly adhere to the tables and associated flowcharts where the stated factors are not relevant to the issue under consideration. Such factors can be disregarded (with an appropriate record made in the investigation report form (INV1)). The important thing is to consider, and take into account, those matters that are appropriate.

2.7 It is also important to recognise that inspectors are not compelled to adopt the enforcement position indicated by the EMM. The final decision may also involve some level of personal judgement and the model does not seek to constrain professional judgement.

2.8 There is also the additional test of line manager / approving inspector approval which will help to determine the most appropriate course of action. This makes it of key importance that the INV1 is completed as fully as possible, and that Appendix 2 of that document records in some detail how the EMM has been used, the factors evaluated and any concerns over clarity.

2.9 We have identified three key principles which should be considered by Inspectors when applying Tables 6 and 7:

Key principle 1:

Large organisations (such as Network Rail and TfL) should be treated as a single entity rather than individual components.

2.10 Where action is being considered against part of a large organisation, and where a single SMS will be implemented across the whole of the corporate entity, the level of enforcement should be influenced by any similar or related incident that has occurred previously elsewhere within that body.

2.11 For example, NR should generally be treated as a single legal entity. If a health, safety or welfare issue identified in the South West of England subsequently arises in the North East, the initial enforcement action should be strengthened immediately on the grounds that the duty holder has been previously made aware of a failing. Under such circumstances, the onus is on the organisation's senior managers to ensure that risk management is applied consistently across all areas. We should expect that any lessons learnt from incidents or issues identified in one part of an organisation should be communicated and rectified company wide.

2.12 We must recognise, however, that our role is to enforce the law rather than any internal duty holder standard. Therefore, if the standard is being met but that standard is wrong or inadequate, our enforcement action should focus on ensuring that the law is complied with.

2.13 In terms of Table 6, where previous 'written' and 'verbal' enforcement records play a key role in identifying what action should be taken, it is important that investigation / enforcement records contain sufficient information and documentation to allow inspectors to identify where previous action has been taken in respect of a particular issue.

2.14 An issue might arise where the same circumstances of non-compliance are found around the same time in different parts of the organisation. The duty holder may argue that, as the issue is already being dealt with through the issue of one notice, no additional enforcement action should be taken.

2.15 Unless the duty holder can demonstrate to the satisfaction of the Inspector that active steps are being taken to rectify the findings of the first notice, then additional enforcement action should be considered because it:

- (a) should not be assumed by the Inspector that company senior management has taken action to rectify identified deficiencies across the organisation; and
- (b) sends a reaffirming message to senior management that there is an endemic problem that needs to be addressed and will not be tolerated.

Key principle 2:

Further breaches of on-going issues may be subject to additional enforcement action irrespective of arguments that the original matter is being addressed

2.16 Where an Inspector considers that a particular issue needs to be addressed across a larger organisation, then they should encourage the duty holder to produce an appropriate implementation plan with clear milestones. This can then be used by colleagues to evaluate future compliance where the same or similar issues arise.

2.17 We must be careful not to let previous activities unduly influence the level of enforcement action taken. Table 6 focuses on incident and inspection history where numerous examples of poor performance could automatically increase the enforcement expectation. For organisations such as NR and TfL, where frequent action is taken on a wide range of issues, the strict wording of the EMM might cause us to strengthen our approach every time, which might be unjustified. Historical records should inform the action we might take (i.e. whether we need to serve a notice because it appears no action to rectify a specific issue is being taken) but not necessarily to drive the level of enforcement action we take. At the extreme, we could find ourselves prosecuting a large organisation for every new breach of legislation, irrespective of the nature or circumstances of the incident – this would neither be desirable or fair.

2.18 Past incident records should only be applied where the underlying issue is of the same or a very similar nature to that being considered. For example, an unacceptable safe system of work (SSoW) for track maintenance may result in various outcomes being investigated (a derailment, near miss, fatality, etc) on different parts of the network. In such a case it would be the continuing existence of the inappropriate SSoW that should be taken into consideration.

Key principle 3:

Care needs to be taken not to create an unfair and unmanageable process whereby automatic enforcement action is taken against large organisations

2.19 Finally, health and safety issues in respect of railway duty holders will potentially have an impact on other industry stakeholders. For example, serving a prohibition notice which would shut down a section of network, may have an operational and/or financial impact on the infrastructure manager, train operators, passengers and freight customers. Such action might place us, and the serving Inspector, under a great deal of pressure, bearing in mind the level of disruption and financial implications felt by the industry. Such a potential impact could affect our decision to issue a notice in the first place. Clarity of reasoning and recording of decisions is essential in such circumstances.

2.20 Inspectors should be assured that, where appropriate enforcement action is taken based on evidence and risk, and irrespective of the impact of any such action, ORR will fully support such a decision.

Table 6 (Duty holder Factors) guidance

1. These factors should be applied to an Initial Enforcement Expectation (IEE) to understand whether that expectation should be varied.

Table 6 – duty holder factors

Descriptor	Definition	ORR guidance
Does the duty holder have a history of relevant, written enforcement being taken against them?		
Yes	Enforcement action has been taken against the duty holder on the same or similar issues, by notices, prosecutions or letter requiring action.	The key words here are ‘same or similar’. Where previous enforcement has been taken on an issue which should then have been addressed and rectified across the organisation we would not expect to see the same or similar issues occur in future. Where they do, consideration should be given to strengthening the IEE (for example from issuing a written warning to serving an improvement notice).
No	No written enforcement action against the duty holder on the same or similar issues.	We need to be careful not to automatically count all previous enforcement history when considering this factor – the key is whether the previous enforcement relates to a similar failing. That said, a high level of enforcement activity against a single duty holder on a wide variety of issues may be an indication that its management systems are inadequate and/or ineffective. This in itself might justify stronger or additional enforcement

		<p>action.</p> <p>ORR must identify where such previous enforcement action has been taken. The existence of notices and prosecutions can be identified through MOSAIC, our website and Public Register, and (pre 2006) the HSE enforcement and prosecution areas.</p> <p>Inspectors should therefore ensure that sufficient information about an issue is included within MOSAIC (including the addition of any documentation sent to duty holders) to allow colleagues to search for similar incidents.</p> <p>Also, where an inspector considers that an issue needs to be addressed across, or elsewhere within, a larger organisation, then the duty holder should be encouraged to produce an appropriate implementation plan with clear milestones. This can then be</p>
		<p>recorded on MOSAIC and used by other inspectors to evaluate compliance (and the need for additional enforcement action) where the same or similar issues arise in future.</p> <p>Inspectors should also raise the awareness of RSD and RPP colleagues who might also be affected, either by direct e-mail, telephone or through other forums such as team managers' meetings.</p>
<p>Does the duty holder have a history of relevant verbal enforcement being given to them?</p>		

Yes	Enforcement action has been taken against the duty holder on the same or similar issues, by verbally telling them what they have to do in order to comply with the law.	The same approach applied to the 'history of relevant, written enforcement' factor applies here. This is potentially a more difficult area than with written enforcement because the lack of hard evidence that any earlier enforcement action has been taken. It is therefore imperative that inspectors record within MOSAIC that verbal warnings and advice have been given to a duty holder, with sufficient clarification about the issue / incident in question. This will allow some form of searching of the database by colleagues. Such evidence may be gathered by Inspectors providing statements of the issues found, who they saw, what they told an organisation to do and how this was confirmed to them and why this was suitable action at the time. Again, Inspectors should also raise the awareness of RSD and RPP colleagues who might also be affected by whatever means are considered appropriate.
No	The duty holder has not been told previously what they have to do in order to comply with the law on the same or similar issues.	
Is there a relevant incident history?		
Yes	The duty holder has a history of related incidents, or that there is evidence of related incidents, e.g. accidents, cases of ill health, dangerous occurrences.	It might not be appropriate for us to strengthen the IEE each time a duty holder experiences an incident. In particular Inspectors need to critically consider if the issue is the same, not whether the subject is the same. As all investigated RIDDOR reports, inspection findings and other investigation issues must be recorded on MOSAIC it will be possible to identify whether a duty holder has previously experienced problems directly
No	No previous history or evidence of related accidents, ill	

	health, or dangerous occurrences.	<p>relating to the breach under review. Similarly, RAIB reports and advice from specialist colleagues may point to previous incidents involving the same issue.</p> <p>One other matter to consider is the use of these factors to drive duty holders to deliver timely improvement of risk control. For example, where <i>there may not have been a previous incident, but the breach has arisen because of a failure by the duty holder to promptly consider near miss or other intelligence and implement changes to safety arrangements, then stronger enforcement action might be appropriate.</i></p>
What is the intention of the duty holder in non-compliance?		
Deliberate economic advantage sought	The duty holder is deliberately avoiding minimum legal requirements for commercial gain. (For example failing to price for or provide scaffolding for high roof work)	Further examples when considering this factor might be the lack of training provision resulting in lower company costs or, in terms of 'non-safety' risk, the fitment of non-interoperable components which are cheaper than compliant items being fitted by other duty holders.
No economic advantage sought	Failure to comply is not commercially motivated.	<p>This will be a judgement for the inspector to consider in the light of evidence gained during the investigation process. Large corporate bodies should be treated no differently than other organisations (with the exception that the commercial gain for larger companies might arguably be more significant).</p> <p>Depending on the circumstances of the case, advice might be sought from colleagues in the Railway Planning and Performance (RPP) and / or the</p>

		Railway Markets and Economics (RME) Directorates.
What is the level of actual harm?		
Serious	A 'serious personal injury' or 'serious health effect' has occurred as a result of the matter under consideration	In considering this factor inspectors should refer to Table 1 of the EMM (under paragraph 28) which provides definitions of 'serious' and 'significant'. 'Not serious' in this case would also include 'minor injury / minor health effect'.
Not serious	There has been no actual harm, or the harm has been no greater than a 'significant personal injury' or a 'significant health effect'.	In considering 'harm', this term is defined in the HSWA enforcement policy as including 'both physical and economic damage caused to one person by the conduct of another'. It is therefore relevant to also consider this factor in relation to breaches of 'non-safety' legislation. The same approach as outlined in the 'Relevant incident history' factor - a failure by the duty holder to promptly consider and implement changes to safety standards - might also be applied here. Has significant harm been caused because of a duty holder failure which might not have been so serious had new standards / arrangements been implemented earlier?
What is the standard of general conditions?		
Poor	There is a general failure of compliance across a range of issues, including those matters related to the activity being considered through the EMM. For example, failure to address risks arising from hazardous substances, machinery, transport, vibration, noise etc, or inadequate	For larger railway duty holders the wide range of risk issues to be addressed will make it difficult to meaningfully evaluate the overall standard of health and safety performance across the organisation. ORR will regularly evaluate the suitability of a duty holder's SMS by using

	welfare facilities.	the Railway Management Maturity Model (RM3). In using this factor the Inspector should have regard to the elements of the RM3 assessment that are relevant to the issues being considered. For example an incident arising from a failure of a safe system of work should be assessed against the findings of RM3 criteria RCS1 (Safe systems of work (including safety critical work)).
Reasonable	The majority of issues are adequately addressed, with only minor omissions.	

<p>Good general compliance</p>	<p>Full compliance across the whole range of indicators with no notable omissions.</p>	<p>To assist this process, account holders responsible for undertaking RM3 assessments should ensure that these are made available to all Inspectors who may need to use them for this purpose.</p> <p>Evaluation under RM3 may suggest that a duty holder's risk control performance is excellent in certain managerial areas – on inspection this may be generally true and should be acknowledged as such. However, that duty holder may subsequently have a significant failure on one matter that falls way below acceptable standards. The seriousness of such a failure may warrant enforcement action despite the organisation's previous excellent record.</p> <p>The HSE descriptor may also be relevant to general inspections relating to specific sites (for example depots and possessions) where a number of activities might be ongoing at the same time with different potential issues arising, and where a breach has been identified. It will probably not be relevant for a specific investigation scenario where a particular risk is being considered.</p> <p>There may be some crossover of issues to be considered under the 'enforcement and inspection history' and 'attitude' headings, and this may be more relevant for large organisations where similar issues might have been identified at more than one site. This again highlights the need for cross-directorate information sharing and recording.</p>
<p>What is the Inspection history of the duty holder?</p>		

Poor	The duty holder has an inspection history of significant problems, copious advice and poor inspection ratings.	<p>Inspectors should ensure that sufficient information about issues identified during inspections is recorded on Mosaic (including the addition of any documentation sent to duty holders) and advise RSD and RPP colleagues where appropriate.</p> <p>As with the 'general conditions' factor, RM3 will provide Inspectors with a useful assessment of a duty holder's performance which should be used as a tool to aid their deliberations.</p>
Reasonable	The duty holder has an inspection history of nominal or piecemeal problems, where non-compliance has been related to new or obscure duties and where the rating history is in the average range.	
Good	The duty holder has an inspection history of good compliance, effective response to advice, consistently high standards and a low rating.	
What is the attitude of the duty holder?		
Hostile / indifferent	The duty holder is actively antagonistic, or completely uninterested in health and safety issues. Impossible to establish an effective relationship.	In dealing with large organisations, the health and safety obligations are on the umbrella organisation and therefore responsibility for addressing health and safety issues, and ensuring policies are implemented consistently, is with the senior management.
Reasonable	The duty holder is open to discussion and reasoned persuasion and effective communications can be established.	It may, however, be that the corporate message is good but the SMS is not being implemented in a positive or appropriate way. within the organisation. Alternatively, local managers might be enthusiastic but the company

<p>Positive</p>	<p>The duty holder is enthusiastic and proactive towards health and safety issues, actively seeking advice and pursuing solutions.</p>	<p>management is ambivalent.</p> <p>The approach to enforcement in respect of large organisations is a corporate one, and therefore inspectors will need to take a view not only on the attitude of local managers, but also attitude at a senior level. A hostile or indifferent attitude in either case should result in a strengthening of the IEE.</p> <p>As with the 'general conditions' factor, RM3 will provide Inspectors with a useful assessment of a duty holder's performance which should be used as a tool to aid their deliberations.</p> <p>The same approach as outlined in the 'Relevant incident history' factor - a failure by the duty holder to promptly consider and implement changes to safety standards - might also be applied here. Has the attitude of the duty holder, in delaying the implementation of new or revised standards, despite our advice, contributed to an incident occurring?</p>
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Table 7 (Strategic Factors) guidance

2. These factors should be applied to a 'varied' IEE to qualify, rather than determine, the final decision.

Table 7 – strategic factors

Descriptor	Definition	ORR guidance
Does the action coincide with the Public Interest?		
Yes	The action results in a net benefit to the wider community in terms of targeting resources on risk and meeting public expectations of HSE.	The tests in the Code for Crown Prosecutors (for England and Wales) and the Prosecution Code (for Scotland) may be applied to all Inspectors' enforcement activities and must be followed where a prosecution is being considered. One of these is the public interest test.
No	The action results in a net disadvantage to the wider community in terms of addressing risk, targeting resources on risk and failing to meet public expectations of HSE.	<p>The two Codes set out a number of common public interest factors. In relation to all enforcement action, rather than simply prosecutions, it may be useful to consider the following:</p> <ul style="list-style-type: none"> • Was the breach of law premeditated? • Does the suspect have a previous enforcement history which is relevant to the present offence? • Would enforcement action have a significant positive impact on

		<p>maintaining community confidence?</p> <ul style="list-style-type: none"> • Are there are grounds for believing that the breach of law is likely to be continued or repeated? <p>The same approach as outlined in the Table 6 'Relevant incident history' factor - a failure by the duty holder to promptly consider and implement changes to safety standards - might also be applied here.</p>
Are vulnerable groups protected?		
Yes	The action results in control of risks to vulnerable groups, e.g. children, members of the public, patients etc.	<p>This factor should be applied where a risk to a 'vulnerable group' has been identified. The answer 'No' signifies that the proposed action does not adequately ensure that the risk is dealt with, rather than indicating there are no vulnerable people to protect.</p> <p>In terms of 'vulnerable groups' this can be generally applied to passengers on trains. Vulnerable can be defined as being 'exposed to the possibility of being attacked or harmed, either physically or emotionally'. In the same way that the HSE descriptor identifies patients entering hospital as a vulnerable group, once an individual steps onto a train they can fall within this category, i.e. they are unable to influence or have any effect on how the service operates or what happens to them, as this is entirely under the control of the rail company.</p> <p>This factor should also be applied in respect of 'labour-only contract staff'. This group can be considered vulnerable because their lack of secure</p>
No	The action does not result in control of risks to vulnerable groups.	

		<p>employment weakens established mechanisms for raising concerns.</p> <p>For accessibility issues ('non-safety' risk), vulnerable groups will specifically relate to 'persons with reduced mobility', which include:</p> <ul style="list-style-type: none"> • wheelchair users; • people with limb impairment or ambulant difficulties; • people with children; • people with heavy or bulky luggage; • elderly people; • pregnant women; • the blind, visually or hearing impaired; • people who are communication impaired (understanding difficulties for any reason); and • people of small stature (including children).
<p>What is the long-term impact of the action?</p>		
<p>Sustained compliance</p>	<p>The action is sufficient to achieve sustained compliance across the range of risks associated with the duty holder</p>	<p>For ORR the wording of this factor is misleading. It is unlikely that an enforcement action (i.e. issuing an IN or PN) would, in one go, fully address the significant range of potential risks associated with a railway duty holder. The action can, in most cases, only address the specific risk(s) identified by</p>

No long-term impact	The action is insufficient to secure sustained improvements and that problems may be expected at subsequent visits.	<p>an inspector and considered under this EMM. The inspector should therefore contain the question to the specific issue that the proposed action is aimed at preventing or removing.</p> <p>If continued non-compliance is anticipated even after the proposed course of action has been taken then this question should probably be applied in the same way as a Table 6 factor, i.e. the IEE should be strengthened to ensure compliance is achieved.</p>
What is the effect of the action on other duty holders?		
Positive Effect	Other duty holders within the same industry, geographical location or wider business community are deterred from committing similar offences or encouraged to adopt a more favourable view of health and safety requirements. In effect, the action taken broadcasts a positive message about HSE.	This factor remains relevant for ORR inspectors. The negative effect relates to an enforcement decision which would give the impression that we are happy to allow substandard compliance with health and safety and 'non-safety' law. This should therefore be avoided. Such a choice would need to be supported by strong evidence that it was appropriate and still aligned with the principles outlined in the HSWA enforcement policy.
Negative Effect	The course of action undermines both positive duty holders' perceptions of HSE and the wider appreciation of the standards of health and safety required. For example, failure to prohibit construction work causing a danger to the public.	The same approach as outlined in the Table 6 'Relevant incident history' factor - a failure by the duty holder to promptly consider and implement changes to safety standards - might also be applied here. By publicising the impact of one duty holders failure to comply with or implement new standards, we might be able to drive change across the industry at a quicker pace.
What is the initial effect of action?		

Benchmark achieved	The action secures compliance with the relevant benchmark, e.g. COSHH assessment completed, access to dangerous parts of machinery prevented etc.	No additional guidance required.
Incomplete compliance with Benchmark	The action does not secure full compliance with the benchmark.	
What is the functional impact of the action?		
Acceptable	<p>There is a net benefit to the employees, and others who might be affected.</p> <p>Please note that risk is the overriding concern, and that the wider impact may be a qualifying issue, but is not definitive.</p> <p>To illustrate: where risk gap is nominal or moderate and the strict application of the law would result in closure of the workplace or unemployment, then all of the ramifications of the action should be taken into account. The net benefit of the enforcement action in this situation is for the inspector to judge.</p>	<p>Safety issues in respect of railway companies are much more likely to have a wider effect on others, for example serving a notice which shuts down a section of network will impact on the IM, TOCS, passengers and freight customers. This may be a consequence of our enforcement role, but should not unduly influence whether we take action if that is, in the inspector's option, the proportionate thing to do.</p> <p>That said, this factor raises a difficult conundrum: what is an acceptable impact to an employee (i.e. prevention of serious injury) might not be acceptable to another affected person (the duty holder) whose services are disrupted and business lost.</p> <p>It is unlikely that enforcement action taken by ORR will result in unemployment. This factor should therefore primarily consider the safety benefits / disadvantages arising from a decision.</p> <p>The primary focus of the EMM is to inform enforcement decisions that need</p>
Unacceptable	There is a net disadvantage to employees and others who might be affected, from the action taken. Please note that risk is the overriding concern, and that the wider impact	

	may be a qualifying issue, but is not definitive.	to be made in response to breaches of legislation. If an inspector identifies a risk of serious personal injury then appropriate proportionate action should be taken to prevent such harm materialising (e.g. serving a PN) irrespective of any financial or operational implications for the duty holder. If considerable financial implications are identified, and there is time to consider these further before taking the proposed action, it would be prudent to discuss them in advance with ORR colleagues.
Have the principles and expectations of the Enforcement Policy been met?		
Yes	The policy has been followed.	The HSWA enforcement policy statement (EPS) says that we will have regard to the five 'Principles of enforcement': proportionality, consistency, targeting, transparency and accountability. This does not mean that we must follow these principles rigidly, but they must be considered as part of reaching a balanced decision. In doing so it is important for inspectors to record in the INV1 how they have applied these principles in their evaluation process, or whether other (non-EPS) considerations have played a part in reaching the proposed final decision.
No	The policy has not been followed.	

3. ORR non H&S enforcement management model

3.1 The HSE EMM establishes a framework for determining initial enforcement expectation for non-risk-based compliance and administrative arrangements such as the duty to report incidents or assess risk. Table 5.2 in the EMM gives the table for determining initial enforcement expectation.

3.2 However, there is often a strong relationship between the failure to address a compliance issue and the control of risk. In cases where both risk and compliance issues exist, inspector should decide to act principally in relation to the control of risk.

3.3 The HSE EMM also provides a framework for compliance with permissioning requirements such as certification of Entities in Charge of Maintenance, safety certification and authorisations.

3.4 It does not, however, reflect the enforcement of any non-health and safety risk issues arising from our role as enforcement authority for:

- (a) the Railways (Interoperability) Regulations 2011 (RIR);
- (b) the Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 (RVAR) ; and
- (c) the Train Driving Licences and Certificates Regulations 2010 (TDLCR).

3.5 This section provides guidance on how we will make enforcement decisions in these areas by using the underlying principles of the HSE EMM and adapting them to address non-safety issues.

3.6 The principles of health and safety enforcement and those that we will apply to non-risk areas under our new HSWA enforcement policy statement are effectively the same: a proportionate approach, with the level of enforcement reflecting the seriousness of any offence.

3.7 The framework is fundamentally aimed at assessing and addressing risk gaps between the actual risk of harm and personal injury, and the acceptable level of risk once all required health and safety standards have been met. HSE has also included specific sections on non-risk-based compliance and administrative arrangements, and permissioning requirements which we have also adopted.

3.8 We will use a separate, supplementary ORR EMM for other non H&S-risk areas such as RIR, RVAR and TDLCR. This can be found at Annex A.

3.9 Inspectors will be responsible for assessing whether a legislative standard has been breached. If they conclude that it has, then the following approach will apply;

(a) if that breach has a health and safety implication, or relates to compliance and administrative arrangements or permissioning, it will be dealt with under our normal process and using the HSE EMM;

(b) if it relates to another non H&S provision, the inspector will need to assess the seriousness of the breach, in line with the HSWA enforcement policy statement¹. The three levels of seriousness that we have included in Table 1 of the ORR EMM supplement are as follows:

(i) **substantial** – where there might be a total or significant lack of compliance with the legislation;

(ii) **moderate** – where there is a material failure to comply, but not of a deliberate or significant nature; and

(iii) **nominal** – where failures are minor and can be remedied easily.

These descriptors are explained in more details in Table 2 of Annex A.

(c) an indication of the enforcement action applicable to each extenuating impact arising from any breach can then be found at Table 3. This should then be tempered by the normal duty holder and strategic factors outlined in section 5 of the HSE EMM to establish whether the initial enforcement expectation is correct.

3.10 We have discussed this approach with the HSE and they are content with our approach. We have also taken the opportunity to test these principles with our inspectors in relation to existing rolling stock, infrastructure and structures and we are content that, at the current time, it is fit for purpose. Our intention, however, is to continue to test this approach and review it regularly to ensure that this remains the case.

3.11 There may be occasions where a breach of relevant non-H&S legislation results in more than one impact that then needs to be assessed against both the HSE EMM and the ORR EMM. It may be, for example, that a single breach of the interoperability regulations results in both a minor health and safety impact (which might under normal circumstances be dealt with through a written letter) and a significant deliberate financial gain which we might consider worthy of prosecution. In such cases, it is not expected that one enforcement route would necessarily take precedence over the other. We would consider what would be the appropriate enforcement action to take under the particular circumstances, and it may be that action is taken against the operator on both counts.

¹ Available at <http://www.rail-reg.gov.uk/upload/pdf/hswa-enforcement-policy-statement-020810.pdf>.

Annex A - ORR supplement to the EMM

This supplement to the EMM should be used to evaluate breaches of the standards set out in relevant non-H&S legislation¹ for which ORR is the enforcement authority, and where no health and safety risks are associated with an identified breach. The HSE EMM² should be used for all breaches of health and safety law.

Where the consequences of the breach have both H&S and non-H&S impacts, inspectors should consider all impacts and, if necessary, use both EMMs.

Stage 1

Once a breach of relevant non-H&S legislation has been identified, inspectors should use Tables 1 and 2 to assess the level of non-compliance by the duty holder and form an initial enforcement expectation.

Impact	Identified Gap	Initial Enforcement Expectation	Consider Prosecution?
Distance from technical standard	Substantial	Improvement notice⁴	Yes⁵
	Moderate	Letter / improvement notice	
	Nominal	Verbal warning / letter	

¹ 'Relevant non-H&S legislation' means:

- (i) the Railways (Interoperability) Regulations 2011;
 - (ii) the Rail Vehicle Accessibility ([Non-Interoperable Rail System](#)) Regulations 2010; and
 - (iii) the Train Driving Licences and Certificates Regulations 2010,
- where ORR has the power to enforce compliance under the Health and Safety at Work Act etc. 1974.

² Available at <http://www.hse.gov.uk/enforce/emm.pdf>.

³ Any breaches of legislation that present a risk to health and safety will be dealt with in accordance with ORR's normal H&S enforcement procedures.

⁴ Due to the scope of the legislation in question, it is unlikely that a breach will result in rolling stock or infrastructure being determined as sufficiently dangerous to require a prohibition notice to be served. If an item was considered to be dangerous, then it would be dealt with in accordance with ORR's normal H&S enforcement procedures.

⁵ In extreme circumstances, prosecution action should be considered in relation to a particularly serious breach of legislation or continuing lack of compliance with legal obligations by the duty holder / operator.

Table 2 - Compliance with non-safety risk legislation	
Descriptor	Definition
How significant is the non-compliance with the agreed technical standards?	
Substantial	Total or significant lack of compliance with the requirements of UK legislation or EU Regulations. For example, a consistent or deliberate failure to maintain authorised interoperable infrastructure or rolling stock in compliance with agreed TSIs, perhaps for economic gain. This might also affect the performance of either the rolling stock or infrastructure which might in turn affect other duty holders or users of the railway.
Moderate	Only rudimentary observance with standards or inadequate compliance, where such failures are material, but not of a deliberate or significant nature. For example, the unintentional fitment of components which, whilst working adequately, do not comply with the interoperability or accessibility regulations, but which provide no economic or competitive advantage to the operator and no health and safety risk.
Nominal	Deficiencies or inadequacies are minor, have little material impact and can be remedied easily. For example the use of inappropriate labelling or signage, or a failure to produce a train driving licence upon request due to oversight.

Stage 2

Table 3 should then be used to evaluate whether the initial enforcement expectation could potentially be strengthened or lessened in respect of the impact caused by the identified breach. For example, an initial expectation of a 'moderate' breach might be compounded by the fact that the duty holder has consistently failed to meet legal obligations, raising the enforcement expectation to 'substantial'.

Table 3 – Extenuating Factors			
Impact	Identified Gap	Initial Enforcement Expectation	
		Enforcement	Prosecution?
Actual or potential impact on passengers / other railway users / other third parties	Substantial	Improvement notice	Yes
	Moderate	Letter / improvement notice	
	Nominal	Verbal warning / letter	
Consistent failure to meet legal obligations	Substantial	Improvement notice	Yes
	Moderate	Letter / improvement notice	
	Nominal	Verbal warning / letter	
Economic / competitive advantage	Substantial	Improvement notice	Yes
	Moderate	Letter / improvement notice	
	Nominal	Verbal warning / letter	
Actual or potential impact on other duty holders	Substantial	Improvement notice	Yes
	Moderate	Letter / improvement notice	
	Nominal	Verbal warning / letter	

Stage 3

Inspectors should now refer to Steps 5 and 6 of the HSE EMM ('Outputs') and apply the process outlined. They should consider first the 'duty holder factors' which may vary the initial enforcement expectation, and then the 'strategic factors' which may influence the final enforcement conclusion.

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