

## Summary

This guidance is to clarify the respective roles and responsibilities of NDA and its principal contractors (the Site Licence Companies or SLCs) for safety and environmental protection at nuclear licensed sites. The potential for ambiguity or conflicted responsibilities arise from the separate, but at times overlapping duties in law of NDA (drawn from the Energy Act 2004) and the SLCs (drawn from Health, Safety, Environmental and other legislation) and include the SLC's obligations as holder of a nuclear site licence and environmental permits. **The summary and overview sections (pages 1 to 3) set out the key principles and issues. The Annexes provide greater depth if required.**

### Key Principles

- A. The SLC is licensed and authorised to operate the site(s) of which it is the main, or principal User. This means that the SLC has the primary responsibility for safe operation of the site(s), has the management systems operated by competent staff to underpin this, and is closely regulated for the delivery of this.
- B. NDA is also the enduring owner of the sites, facilities and materials on its Estate. The general provisions of the Health and Safety at Work Act (HSW) give NDA certain ownership responsibilities for health and safety, which it discharges through its SLC contractors. The Energy Act extends NDA's ownership responsibilities to environment and security as well.
- C. By virtue of its duties and responsibilities under the Energy Act, NDA carries out functions which affect how the sites on its Estate are operated and thus has an influence on how safe operation is achieved. Under other general duties of HSW, NDA has obligations to ensure the safety of those 'not in its employment' affected by its activities, ie the employees and contractors working on licensed sites and the public. This makes NDA a secondary 'User' of its sites in respect of its Energy Act duties.
- D. In pursuing its policies and strategies and making its decisions arising from its Energy Act duties, NDA must take account of any consequences these may have for the operation of the sites on its Estate. This is part of NDA being an 'Intelligent Client' for its actions and decisions.
- E. A key principle of safety law is that employers or organisations with overlapping duties must co-operate to ensure safe outcomes.
- F. NDA's Nuclear Assurance staff are a source of expert advice to NDA staff working in this area.

Principles A, B&D which cover NDA's relationship with the SLC are explored in greater detail in Annexe A and potential implications of NDA's principal duties (Principle C) are covered further in Annexe B. The various organisational roles and relationships are shown in the diagram at Appendix A on page 14.

## Overview – User of the Site & Intelligent Client

1 The “Directing” or “Controlling Mind” has variously been used to describe the locus of control of an organisation but the term has also become a source of ambiguity in its own right. This document replaces earlier guidance in this area and uses the more specific terminology of ‘User’ and ‘Intelligent Client’. The need for clarity in this area results from features of NDA’s Operating Model<sup>Ref1</sup>. Under this model NDA retains ownership of the nuclear sites designated to it under the Energy Act, but contracts out the operation of these sites to Site Licence Companies (SLCs) which are owned by Parent Body Organisations (PBO). In its role as the enduring owner of the sites and liabilities, NDA runs competitions to select PBO best suited to strategically manage and bring innovation and change to the SLCs. NDA sets and co-ordinates strategy for decommissioning across its estate and manages the funding of this work. Consequently a **secondary User** of the site (i.e. not the principal one nor the holder of the nuclear site licence) NDA has its own duty in law to be mindful, so far as is reasonably practicable, of the safety, security and environmental consequences of its actions as these affect the SLC’s day to day responsibilities for managing the sites and liabilities. Regulators have made clear<sup>Ref2</sup> that they expect NDA to be an **Intelligent Client** for these potential consequences. Appendix A shows these key relationships diagrammatically.

2 The SLC holds a unique combination of responsibilities relating to the operation of nuclear sites. As the holder of a nuclear site licence, it is the site operator responsible for nuclear safety; as the employer it is responsible for the health, safety and welfare of its employees and others who may be affected by its activities; as an organisation holding special nuclear materials and sensitive information, and having responsibility for the physical protection of strategically important facilities it is responsible for complying with the security regulations; and as holder of a radioactive waste disposal authorisation or permit it is responsible for the protection of the environment. Through the “day to day” exercise of these responsibilities the SLC is the **principal User** of the site and it is regulated for this under a regulatory regime unique to the nuclear industry with failings enforceable under criminal law.

3 The Energy Act places a number of specific duties on the NDA. Mindful of the overlap with the specific duties on the SLC, for which it is the competent and regulated organisation, Section 9 (1) of the Energy Act states:

“It shall be the duty of the NDA, in carrying out its functions, to have particular regard to each of the following:

- (a) relevant Government policy;
- (b) the need to safeguard the environment;
- (c) the need to protect persons from the risks to their health and safety from activities involving the use, treatment, storage, transportation or disposal of hazardous material; and
- (d) the need to preserve nuclear security.”

4 This guidance note seeks to provide clarity of the respective roles of SLC as principal User of the Licensed Site and NDA as Intelligent Client and a secondary User for its Energy Act duties. These duties on the NDA clearly overlap those of the nuclear site licensee. However the Energy Act did not modify the existing safety, security or environment related legislation, regulations, or alter the SLC’s primary responsibility as the organisation in day to day control of the site. Consequently NDA’s Energy

Act duties are set within the context of the SLC's responsibilities as principal User. This juxtaposition is set out in greater detail in Annexe 1.

5 NDA has its own functions under the Energy Act which are detailed in Annexe 2 of this guide set out in line with NDA's core processes. As part of these functions NDA makes choices and decisions and exerts influence which will, or will have the potential to, affect how the SLCs exercise day to day control of the sites they are licensed to operate. Thus NDA's Energy Act duty to have regard to safety, security and the need to safeguard the environment requires it to be an Intelligent Client and take account of the consequences of its choices and decisions. Nonetheless NDA's estate wide responsibilities for strategy and prioritisation are unique to NDA and we have our own duty in law to exercise these diligently.

6 The Regulators have made it clear that if the NDA were to unduly constrain the SLC's exercise of its primary responsibilities for the safety of operations at nuclear licensed and authorised sites and thus effectively act as the decision making body for day to day control, regulators could come to see the NDA as the principal User of the sites and require us to become the holder of the nuclear site licences and the disposal authorisations. Not only would such an outcome be incompatible with current Government policy for the cleanup of our nuclear legacy sites, ie to separate strategy from delivery and introduce innovation through competition, but would require NDA to be competently staffed and organised to undertake these much broader duties which would be a significant additional administrative burden and potentially impede the delivery of NDA's key functions.

7 The NDA Operating Model gives us our own duties under the general provisions of Sections 3 & 4 of the Health and Safety at Work Act. Section 3 gives us obligations for the safety of those not in its employment (i.e. the public or employees of the SLCs) arising from our activities – the choices or decisions we make or requirements or constraints we place on the SLCs. Section 4 sets out residual safety obligations on 'owners' of materials or facilities which are used by others in the course of their employment which the Energy Act S9 duties in 3 above confirms and extends to security and environment. NDA's obligations under HSW Sections 3 & 4 could be used to subject NDA to enforcement action if it were deemed to have breached, or be likely to breach its obligations. NDA's HSW derived duties are included in Annexe 2 and enforcement mechanisms are set out in Annexe 3. While the obligations on NDA will be viewed through the lens and expectations of the nuclear sector, they do not constitute 'licensing' or other regulatory permissioning of NDA's activities.

8 The Health and Safety at Work Act also sponsors the Construction, Design and Management Regulations (CDM) which requires that all relevant parties sponsoring a project share the role of 'Client'. However NDA is not able to exercise the responsibilities of a client role on its licensed sites insofar as it cannot direct or manage such activities without infringing the SLC's unique responsibilities. NDA manages this conflict by asking the SLCs, through their M&O contracts to 'elect' themselves as sole clients for CDM purposes. See 1.5 of Annexe 1 and Reference 4 below for more information.

9 For the purposes of this document where reference is made to an SLC's responsibility for 'Protection of the Environment' or 'a radioactive waste disposal authorisation or permit' this is a reference to the SLC's legal responsibility to fulfil its statutory and regulatory obligations to comply with the limits and conditions of the various environmental permits that have been issued e.g. Environmental Permitting Regulations, RSA Authorisations, PPC Authorisations, Water Abstraction Licences, Discharge Consents etc. and to comply with other statutory requirements e.g. duty of care with regard to non-radioactive wastes.

## References and Appendices

1. NDA Guidance Note NSG31 – NDA Operating Model; The roles of the Site Licence Company and the Parent Body Organisation.
2. HSE correspondence to NDA (Hall / Earp, 6/5/2006)
3. Guidance to NII (ND) Inspectors; Clarification of NDA role & duties under HSW. (Draft dated 19/3/08)
4. NDA Guidance Note HSWI06 – Application of CDM by NDA Employees on NDA owned Nuclear Licensed Sites.
5. NDA Procedure NSG35 – Guidance on Transition.
6. NDA Procedure NSPR09 – Arrangements for responding to emergencies.

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**This guidance note replaces Revision 2 of NSG 33 which is hereby withdrawn.**

## Annexe 1. NDA and the 'User' of a licensed nuclear site

1.1 Nuclear site licences, disposal permits or authorisations are issued to the organisation which is in day to day control, ie to the organisation known as the principal 'User' of the relevant site. In nuclear industry terms the principal User is the organisation which not only takes the key decisions but also owns and understands the safety and environmental basis of those decisions and has the suitably qualified and experienced staff and managements systems to underpin these. A key duty of the principal user is to ensure that the legal obligation of "Reasonable Practicability" which underpins UK Health, Safety and Environmental legislation, which covers the balance of risks and benefits and the legal test of "Gross Disproportion", is correctly applied within the nuclear industry context and reflects the SLC's absolute liability for the nuclear matter originating on the site. It is the proper discharge of this framework of responsibility that enables the SLCs to make appropriate decisions about how safety, security and protection of the environment is managed at sites that they operate on NDA's behalf.

1.2 NDA should operate by discussing and agreeing outcomes which respect the SLC's legal obligations. The SLC must not be put in the position of being unable to address immediate safety issues or regulatory requirements on the sites that it operates without first having to consult NDA for permission or funding. NDA's relationship with the SLC must be such as to leave the SLC with sufficient discretion, access to funding and flexibility to act and respond in a timely manner to emerging safety issues and immediate regulatory requirements.

1.3 On behalf of the Government, and through the Transfer Schemes which set it up, NDA is the enduring owner of the sites which have been designated to it, and the facilities and nuclear materials thereon. As part of its contractual arrangements, NDA leases the sites to the SLCs so that they can be operated on NDA's behalf. However Section 4 of the Health and Safety at Work Act (hereinafter HSW) confirms NDA's enduring owners responsibilities for sites over which we retain an interest. NDA discharges these obligations by ensuring that its contractors work to appropriate standards, behaviours and outcomes which meet NDA's responsibilities as owners.

1.4 NDA undertakes a number of Energy Act derived activities which have the potential to unduly constrain the proper exercise of the SLC's principal User obligations if inappropriately carried out. These include setting Strategy and Priorities, Securing and Allocating Funding for its Estate and the Governance, Sanctioning or Incentivisation of activities. NDA also runs competitions to select and appoint replacement PBO for its SLCs, and contracts with both SLC and separately with the PBO to achieve outcomes. While these duties will clearly influence how its sites are operated, they do not constitute NDA being the principal User and thus do not require NDA to hold the nuclear site licence or discharge authorisation. NDA's safety responsibilities during the discharge of its Energy Act duties, for which it needs to be an Intelligent Client derive from the HSW Section 3 and 4 duties and the Section 36 duty on NDA arising from its "act or default" (ie that we do the wrong thing or fail to do that which we should have done), and Section 37 which extends the enforceability of these duties from NDA as body corporate to any "director, manager ...or similar officer" deemed to have given "consent, connivance or ... attributable neglect". Whilst, as above, NDA is not the holder of the nuclear site licence the 'so far as is reasonably practicable' (SFAIRP) test of our activities - and thus the tests of duty of care or default - are likely to be judged within the context of the regulated industry, i.e. to a high standard of care.

1.5. NDA staff should also recognise that the requirements of Construction, Design and Management (CDM) regulations can give rise to further challenges for NDA in the conduct of its intelligent client role while respecting the SLC's principal User obligations. Through the M&O contracts NDA has agreed that the SLCs will 'elect' to act as CDM client for work on licensed sites. However, notwithstanding the contractual election, through inappropriate action or influence by its staff, NDA could be deemed in law to have acted as the CDM client - a role which NDA is not able to exercise on licensed sites. For activities off the licensed site, but where it is still appropriate for the SLC to be the CDM Client the above structure still applies, though NDA will have no defence in law that it should not have been the co-client. Further guidance<sup>Ref4</sup>, and advice is available from the Nuclear Assurance and Legal teams.

1.6. The framework above provides clarity about the respective responsibilities of the SLC and NDA for the protection of both parties. If this division of responsibilities breaks down, then it is possible that a breach of a legal duty will be considered to have taken place<sup>Ref3</sup>. The SLC cannot, and must not be given the impression or opportunity to think that it can share its unique responsibilities with the NDA. To do so would itself breach the SLC's obligations and would also place NDA at risk of accountability for decisions which it is not qualified, experienced or have the necessary management systems to take.

1.7. If the legal obligations relating to nuclear safety, industrial health and safety, security or environmental protection were breached, there are various legal routes that enable action to be taken against organisations or individuals that are deemed to have caused these offences. While the SLC is the primary duty holder and thus most likely be subject to regulatory action, the legislation also provides for action against other organisations or individuals if this were appropriate. This includes NDA's obligations as an Intelligent Client for its own decisions as these have the potential to affect safety or compliance arrangements on the sites. Potential enforcement routes are explored in more detail in Annexe 3.

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## Annexe 2. Key NDA Activities and their impact on the User / IC roles

2.1. The following sections discuss NDA's roles and responsibilities in key areas it is expected to operate as an Intelligent Client, taking into account the NSSE consequences of its decisions. NDA recognises that this is not the primary competence area of many of its staff. NDA's Nuclear Assurance team have significant individual and collective experience in this area and are available to advise and support teams and individuals as required.

2.2. NDA's Energy Act duty to have regard to safety, security and the need to safeguard the environment, and its HSW Section 3 & 4 duties require us to be an Intelligent Client for the consequences of the choices and decisions we make. However NDA's estate wide responsibilities for strategy and prioritisation are unique and NDA would be remiss in law not to exercise these diligently. NDA can legitimately exercise its influence in areas within its responsibility and where it has the competence to do so, though clearly it must respect the SLC's obligations as principal User. A diagram showing how NDA exercises its key Energy Act duties to influence the SLCs through the lenses of "User" of the site and "Intelligent Client", and is scrutinised for the conduct of these, is attached at Appendix A. While NDA's decisions take stakeholder views into account, ultimately NDA is responsible for decisions its takes in the context of its duties and responsibilities under the Energy Act.

### Strategy

2.4 Strategy. One of the key duties on NDA in the Energy Act is to set the overall strategy for its estate. NDA's interests are to make sure that its requirements are complete, coherent, co-ordinated, properly communicated and that its estate is organised to achieve these expectations. NDA will strive to set its strategies co-operatively with its SLCs and Regulators, but in setting its strategies NDA must ensure that it allows SLCs to determine how activities will be carried out, and to ensure, so far as is reasonably practicable, that these can be carried out safely, securely and with due regard to the environment. Where NDA exercises choices about strategies based upon long term scenario planning and option studies, these must be informed by the NSSSE consequences of these choices.

### Planning

2.5 Prioritisation. As owner of the sites and legacies which make up its estate, NDA will inevitably need to make choices about relative priorities both between and within sites. Such choices need to be informed by the potential NSSSE consequences of the options, including the duties on the individual SLCs to comply with their obligations under safety and environmental legislation to ensure that the activities which they manage are, so far as is reasonably practicable, safe.

2.6 Securing Funds. One of NDA's key roles is to negotiate with Government to secure funds for the operation, maintenance and decommissioning of its sites. The outcome of such activities can have direct implications for the SLC's management of their safety, security and the environment responsibilities. As an intelligent client for the work on its estate, NDA would be expected to take these into account in marshalling and presenting its bid for funds to Government, and to ensure that decisions on options and funding levels were made in the full light of the NSSSE consequences of those decisions.

2.7 Allocating Funds. NDA allocates funding between its SLC contractors on the basis of its choices about strategies and relative priorities. Our contractors also have direct obligations in law for the safety, security, safeguarding and environmental protection of the sites they manage on NDA's behalf, and for complying with relevant regulatory requirements. As an intelligent client for the work on its estate, NDA would be expected to take these into account and to ensure that decisions on relative funding levels were made in the full light of the NSSSE consequences of those decisions.

### Incentivisation

2.8 By design, the incentivisation process is intended to focus SLCs on matters which are important to NDA. In setting out its expectations NDA should ensure that it does not drive inappropriate behaviours within the SLCs, or set constraints or priorities which unduly constrain the SLC's ability to manage its sites safely, securely or with due regard to environmental consequences.

### Sanctioning

2.8 Sanction of expenditure. As part of the governance process arising from its own delegated authority from Government, NDA requires that its approval is given to expenditure above certain prescribed levels, or it may influence or constrain how an SLC manages its delegated authority. As an intelligent client for the work on its estate, NDA would be expected to ensure that decisions on project funding were made in the full light of the NSSSE consequences of those decisions.

2.9 NDA Recommendations to Government. In relation to SLC proposals that are about its own delegated authority or which are novel, contentious or repercussive, NDA is required to make recommendations to Government as a basis for the latter's endorsement. In relation to proposals that affect the operations on a site, NDA recommendations could have an impact on safety, security and environmental performance. NDA staff must take care to ensure that they fully understand the SLC proposal with regard to its NSSSE implications so that these can be properly discussed within the NDA and adequately articulated in any onward submission to Government.

### Performance monitoring

2.10 Performance Assessment and potential fee abatement following incidents or events at sites. As the enduring owner of the sites on its estate, NDA has an interest in any events which occur on its sites in respect of the implications for future operations on the sites, the stewardship displayed by the SLC/PBO towards NDA's assets, and the performance by the SLC/PBO in respect of its contract commitments. The SLC is also closely scrutinised by independent regulators for its safety and environmental performance which includes the prospect of criminal sanctions for breaches of arrangements and for events. There is thus an overlapping interest with regulators in this area which NDA staff must be mindful of, particularly if actions could be seen to prejudice potential criminal proceedings or to incentivise non-reporting. In recent times NDA has avoided penalising individual events as such, but has considered financial sanctions where there has been evidence of poor or inappropriate response to events or other management performance failings.



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## Contracts and Commercial Activities

2.10 Competitions. A key part of NDA's mission is to use competition as a vehicle to introducing innovation and thus securing value across its estate. Procurement law requires that public sector contracting authorities such as NDA are open and transparent about the scope and basis of competitions and that award decisions are focussed on the work that is being contracted for. NDA staff involved in PBO competition negotiations should be clear about the NSSSE duties that the bidder is being asked to consider, and how these interface with the duties, obligations in law and related governance of the SLCs.

2.11 PBO Selection. NDA staff should also be careful in relation to their role in the selection of the PBO staff who will be seconded into the SLC. Clearly, the NDA has an interest in the credentials of the proposed management team and these should continue to be assessed as part of the tender evaluation process. However, the Board of the SLC is the body accountable under the law for its overall competence and hence the SLC corporately must be able to account for the suitability of the staff it needs to meet these responsibilities. In conjunction with an incoming PBO, the SLC will have to satisfy the Regulators that the individuals who make up the new Board will be suitably qualified and experienced to meet the SLC's collective NSSSE duties.

2.12 Transition activities post contract award. The transition period where PBOs change over as a result of NDA's contract award is a particularly onerous period as it involves simultaneous duties under European Procurement Law, the duties of directors of companies under the Companies Act, 2006, and the duties of Site Licence holders under Health and Safety, Environmental and derivative law. Specific NDA guidance<sup>Ref5</sup> has been produced to cover this period which maps out these responsibilities and how they need to be dealt with. Again, as an intelligent client for the work on its estate, NDA would be expected to ensure that its actions were taken in the full light of all of their potential consequences including NSSSE matters.

2.13. As the PBO's tenure progresses it is to be expected that there will be a changeover and refresh of their senior staff, for which NDA permission or acknowledgement may be required. NDA has a legitimate interest in the capabilities and balance of the PBO team to secure its commitments to NDA, but NDA needs to be mindful that it is the SLC's obligation under both Companies Act and Site Licence 'Management of Change' obligations to determine the balance and capabilities of its own Board.

2.13 Contract negotiation. Care should also be taken to ensure that contract negotiations do not result in NDA staff telling the contractor HOW he should be organised to manage health and safety, security or environmental protection.

2.14 Contract contents. The NDA Contracts provide NDA with certain rights and obligations which allow the NDA to effectively monitor and supervise the SLCs. Care should be taken when exercising NDA rights pursuant to such clauses to ensure that the NDA is acting reasonably in enforcing its rights and not abusing its powers such that the SLC's control is compromised. Examples of such clauses include;

- Dispute resolution procedures which grant sole discretion to the NDA,
- Areas where the SLC is required to seek NDA approval of procedures with implications for management of safety,
- Obligations to not perform work outside of the agreed Lifetime Plans without NDA prior consent,

- NDA having the right to approve the award and management of sub-contracts and requiring its authorisation for enforcement action against sub-contractors,
- NDA having the right to direct the SLC on certain limited safety or security issues,
- NDA having the right to request that specific persons be removed from work activities or the site.

### Risk and Opportunity Management

2.17 Risk and Opportunity management is another area where there is the potential for the NDA to impose inappropriately on the SLC's sole legal obligations. In support of its Lifetime Plans, SLCs must set out their assessment of Risks and Opportunities. This information is important because where these are realised, the scope objectives, safety, schedule, budget and quality may be affected. Such potential changes to the basis of a work scope may significantly change the technical, cost and schedule components of the Lifetime Plans. These risks or opportunities can either be those entirely managed within the SLC's scope of responsibility or could be more appropriately carried and managed by NDA, or could be shared between the two. NDA's key interest is in any strategic or generic implications arising from these risks and opportunities.

2.18 For the SLC managed risks, NDA staff should take care to ensure that where NDA input is required in relation to assessing or managing risks that can have an effect on safety, security and environmental protection, the NDA input is only advisory and does not instruct the SLC. Further information on the management of Risks and Opportunities is set out in NDA procedures PCP10 and PCP16.

### Ownership and related interests

2.3. The Energy Act designated a number of nuclear sites to NDA, and the enacting Transfer Schemes transferred these, thereby making NDA the legal owner of these sites and the assets and nuclear materials thereon. NDA's operating model is to contract with SLCs as the competent organisations to operate these sites on its behalf, to lease them to the SLCs pursuant to this, and to compete for Parent Bodies to own and thereby provide strategic management and new ways of working to the SLCs. However as the enduring owner of the materials and facilities on the sites designated to it NDA has a duty to take reasonable measures to ensure, so far as is reasonably practicable, that the sites continue to constitute a safe place of work. We discharge this obligation by making sure the SLCs manage the sites, assets and nuclear materials appropriately on our behalf and in accordance with our expectations and requirements as the 'Intelligent Client'. This is exercised through the work of the Delivery and oversight of the Nuclear Assurance teams and through safety, security and environmental performance metrics and reports which are collected, analysed and reported to the NDA Executive and Board.

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## Events, Accidents and Major Incidents

2.19 As part of its ownership responsibilities, when an event, accident or major incident occurs on a site there will always be the temptation for NDA staff to want to investigate the cause. However the primary legal obligation rests with the SLC, both as User of the site and as the organisation with the relevant technical competencies. Thus care must be taken to allow the SLC to conduct the principal investigation itself. For significant events, where the SLC sets up a 'Board of Inquiry', NDA's Nuclear Assurance staff may observe the process to provide confidence, on behalf of the enduring owner, that the SLC has identified the root causes of the event. Individual NDA staff may be required to co-operate with such inquiries. As enduring owner of the sites and legacies, NDA may require action to be taken to prevent a recurrence at that or other of its sites, but again care needs to be taken so that the NDA is not seen to be telling the SLC how to manage safety. NDA will also collect data from SLCs to be able to satisfy itself that NDA's sites and nuclear materials are being appropriately managed.

## Emergency Response

2.20 The NDA is not set up as an emergency response service and it does not have an operational role to play in a Nuclear Emergency. NDA may have a role after any such emergency has been brought under control. At such time, the NDA will need to assess the implications of any recovery plan on strategies and contracts. Again NDA staff, possibly in conjunction with the Regulators, can agree what needs to be done but it should be for the SLC, in conjunction with other responsible agencies, to determine how any recovery plan will be implemented.

2.21 In real incidents or emergencies NDA staff should not seek to take a controlling role as this would be a direct challenge to the responsibility of the SLC and their obligations to ensure the safety of staff and external responders. SLCs have well established Emergency Plans which have been agreed and co-ordinated with other responding agencies and include a number of predetermined response and action criteria. NDA staff should respect the primary responsibility of the SLC and the responding agencies and avoid getting involved. NDA has a legitimate interest as owner of the site and has agreed how it will interact with SLCs and Government to exercise these. These arrangements are set out in NDA's Arrangements for Responding to Nuclear Emergencies.<sup>Ref6</sup>

2.22 NDA does not have a role in on-site emergency exercises. These are carried out as a requirement of the Nuclear Site Licence or Security Plan and are therefore a matter between the SLC and the Regulators. NDA staff should avoid getting involved in the conduct of emergency exercises as these could be seen as the NDA taking a part in the SLC's emergency response decision making. If a regulator determines that the SLC fails the exercise it will be for the SLC to determine what work will be required to repeat it. If a site fails its exercise for a second time it is likely that the site will be subject to further regulatory requirements and as this is likely to have adverse implications for income and programme targets, would be a legitimate concern for NDA on contract performance grounds.

2.23 For off-site exercises where the recovery phase of an emergency is simulated NDA staff may have a role to play. The details of how NDA staff should be involved are given in Reference 6.

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### Annexe 3. Potential routes to enforcement of User & Intelligent Client interface issues

3.1 There are a number of routes to enforcement action under Health, Safety or Environmental legislation which can be enforced against either an organisation (such as NDA) or against individuals who are considered to have caused accidents or breaches in legislation. The following list is not exhaustive but covers key enforcement provisions. Regulators have enforcement guidance which they will use to guide their actions. Potential enforcement actions include the issue of 'Notices' requiring actions (used pro-actively before a breach, or in response to low level breaches) or legal proceedings in various courts. The threshold for a pro-active Improvement Notice can be relatively low, and one could be issued, for example, where an inspector believes a breach of a relevant duty is likely to take place.

3.2 In respect of NDA's obligations to be an Intelligent Client, Section 3 of HSW places a duty on every employer (including NDA in this respect) to "conduct his undertaking in such a way as to ensure, SFAIRP, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety". If NDA failed to act as an Intelligent Client in respect of the potential consequences for the health and safety, and given the overlap and interlinking of these responsibilities, for the security, safeguarding or environmental responsibilities of the SLC's or any relevant legal compliance obligations, NDA itself could potentially be subject to enforcement action as above.

3.3 As the enduring owner of the materials and facilities on the sites designated to it NDA has a duty under HSWA Section 4 to take reasonable measures to ensure, SFAIRP, that the sites constitute a safe place of work. We discharge this obligation by making sure the SLCs manage the sites, assets and nuclear materials appropriately on our behalf and in accordance with our expectations and requirements as the 'Intelligent Client'. If we failed to act as a cogent Intelligent Client, or failed to take reasonably practicable measures then we could be subject to measures as above.

3.4 Section 8 of HSW states that "No person shall intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety or welfare in pursuance of any of the relevant statutory provisions." Therefore, it could be argued that if NDA interfered with, or failed to properly respect the licensee's management systems which implement its responsibilities under the nuclear licensing regime, NDA could be subject to enforcement action as above.

3.5 Further specific legal duties are also provided in Sections 36 & 37 of HSW. Section 36 (Offences due to fault of other person) states "Where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first mentioned person." Similarly, but more specific to individual management responsibility, Section 37 states "Where an offence under any of the relevant statutory provisions committed by a corporate body is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

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3.6 In relation to the environment, under Section 37 of the Radioactive Substances Act sets out that if a person was to direct or influence the SLC to undertake something that resulted in an offence to be committed under the Radioactive Substances Act, that person could be prosecuted whether or not the SLC itself is prosecuted.

3.7 In extremis proceedings are also possible under the “Corporate Manslaughter” Act if a work related death is deemed to be attributable to the actions or neglect of an organisation.

APPENDIX A

FRAMEWORK OF NDA RESPONSIBILITIES

