

IED-TG-44 Pollution Prevention and Control (Scotland) Regulations 2012

Regulation 25(12) – Derogation from BAT-AEL

Guidance on appraising a request for derogation

This guidance may be subject to review and be changed or withdrawn in light of regulatory or legislative changes, future government guidance or experience of its use.

For this guide to be useful it needs to be updated regularly and maintained with the latest information; so, if you are aware of any other information which may be of use and suitable for the guide or you believe that some of the information in the guide is incorrect or outdated, please let us know (ppc@sepa.org.uk).

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Introduction

The Industrial Emissions Directive (IED) requires all installations to use the best available techniques (BAT), and that the BAT conclusions (BATc) documents are the reference for BAT. Compliance with the BAT associated emission levels (BAT-AEL) is mandatory unless derogation from those BAT-AEL is justified.

This document sets out SEPA's guidance for appraising a request for derogation from BAT-AEL. This guidance has been developed to assist and support both SEPA staff undertaking a BATc Review and operators that intend to submit a request to SEPA for derogation.

The purpose of this guidance document is to make clear the roles and responsibilities of both SEPA and the operator, and provide an explanatory overview of the derogation process.

It is important that installations that may require derogation are identified at the earliest opportunity; this is for a number of reasons, including:

- Derogation assessment is not a quick process. It is important that assessment be commenced at the earliest opportunity during the BATc review process. Firstly to allow the operator sufficient time to gather the required supporting information, and secondly to allow SEPA sufficient time to consider the derogation request. It may be impossible to complete the necessary considerations within the statutory BATc review timescales if a request for derogation is submitted at the last minute.
- The success of a derogation request cannot be guaranteed. It should not be presumed that an operator **"can just get a derogation"**. Derogation assessment is a prescriptive process of the IED. There are a number of eligibility checks that must be satisfied before SEPA can consider granting derogation – some installations may never be able to satisfy these eligibility tests and therefore derogation may not be an option.
- This is a developing field, both in terms of technical knowledge and decision-making expertise. Therefore, the approach is being continually refined. Although SEPA has the capability to assess derogation for any pollutant it has a preferred approach that relies on the availability of environmental damage costs. For some pollutants, environmental damage costs are not currently available and so SEPA may need to undertake research and development to fill these knowledge gaps. It is essential that enough time is available to plan and undertake any required research and development work.

It is for the operator of an installation to make the case for a derogation request and for the competent authority to assess and decide whether derogation is appropriate. If you consider that an installation may require derogation from the BAT-AEL for one or more pollutants, or could in the future, please contact SEPA for guidance and support.

What is a Derogation?

The IED specifies two types of derogation.

- Article 15(4) derogation - allows the setting of a less strict ELV that exceeds the BAT-AEL range. This derogation can be granted only if on-site operations are considered BAT (derogation under Article 15(4) is not derogation from BAT). Furthermore, this is not to be considered an indefinite derogation from the BAT-AEL, but rather a temporary relaxation in the ELV.

The operator must justify any derogation with detailed plans to bring operations to within the BAT-AEL range and cease the requirement for derogation within an appropriate timescale. This type of derogation would need to be reappraised again at any future BATc review, and the status of BAT at these future reviews is uncertain. Consequently, the operator may ultimately be faced with greater upgrade requirements in the future.

- Article 15(5) derogation – allows for the testing and use of emerging techniques. This derogation can be granted if site operations are not BAT – however this derogation can be granted for a period of 9 months only.

This guidance is specifically focused on the steps required for assessing an Article 15(4) derogation.

Documentation

SEPA has produced assessment templates for derogation requests that are to be used to record information related to the derogation assessment. The information in these documents will help us to make a decision on whether to grant derogation and can be used as the justification as to how we have reached our decision.

The basis of any derogation SEPA makes when setting Emission Limit Values (ELV) in a permit will be made publically available.

Requesting Derogation

It is the operator's responsibility to request derogation from SEPA.

If an installation's emissions exceed the BAT-AEL range, unless derogation is specifically requested by the operator SEPA should proceed with the BATc review on the basis that ELVs are to be set no higher than the top of the BAT-AEL range.

SEPA's role during the derogation process is to consider the information presented by the operator, assess the outcomes of the derogation eligibility tests, and ultimately decide whether derogation is appropriate.

Basic Principles when considering a derogation request

The following basic principles should be considered during any derogation request.

Derogation at new installations

SEPA has a policy position that derogation from the BAT-AEL range is not appropriate for new installations, unless there are exceptional circumstances.

Where a new installation is being planned or constructed, it should be operated to the full standards of any relevant BAT Conclusions.

How long can a derogation last?

Derogation cannot last for an indefinite period. As BRef elaboration reviews are cyclical and may result in a requirement that each permit is reviewed roughly once every 8-10 years (this is the frequency at which the IED suggests BATc should be republished), the maximum length of time that derogation can be granted is until the end of the next BATc Review period. This means that during the next BATc review any extant derogation must also be reconsidered.

SEPA has a policy position that ordinarily derogation should be granted for a specified period only. This should be whatever is appropriate to allow the operator to make the necessary upgrades to their installation and bring emissions to within the BAT-AEL range. Where the proposals for derogation are justified on the basis of closure in the future, there must be a clear commitment, plan and timescale for closure. Where there is no closure plan but the proposals for derogation are a "do-nothing" option, derogation will only be considered where the operator can demonstrate to SEPA there are exceptional circumstances. This approach is consistent with the European Commission's guidance.

Finally, if the operator is proposing that they are never going to meet the BAT-AELs (on the basis of technical characteristics of the installation) this will be a significant factor in considering whether there is adequate justification for the derogation. While the technical characteristics can include consideration of the intended remaining operational lifetime of an installation (where the operator is prepared to commit to a timetable for closure) it is questionable whether there will be adequate justification for derogation which extends into the next BREF cycle, where the operator never intends to meet the BAT-AELs.

How many installations will need derogation?

It is unclear at this time how many installations in Scotland will need derogation.

It should be noted however that the European Commission has made it clear that derogation should only be considered where an installation's site-specific BAT characteristics are distinct within a European setting – as per the outcomes of the Sevilla process. This means that derogations should only be required where there is a genuine need.

How many derogations will an installation need?

This will depend upon the site-specific factors of the installation and the nature of the proposed derogation.

This means that where an installation exceeds several BAT-AELs it may need to request several derogations. However, there may be circumstances where derogations can be bundled together. This could include where an installation's emissions for multiple BAT-AELs are brought within the BAT-AEL range by the same upgrade measures – i.e. installing a wastewater treatment plant will reduce emissions of COD, TSS, TN etc.

Advice should be sought from SEPA to determine the most appropriate approach

Provision of Information

As part of derogation assessment, the operator will need to provide information to SEPA so that a decision can be made.

Article 21(2) of the IED, as transposed by Regulation 63(2) of PPC 2012 states that, at the request of SEPA, the operator shall submit all information necessary for the purposes of reconsidering permit conditions. The derogation request forms part of the permit review and so therefore the operator has a duty to provide SEPA with the necessary information to reach a decision.

Availability of information

For SEPA to assess a derogation request there are significant information requirements - particularly at the stage of the assessment where disproportionate cost is to be assessed. There are significant information requirements to use the assessment methodology.

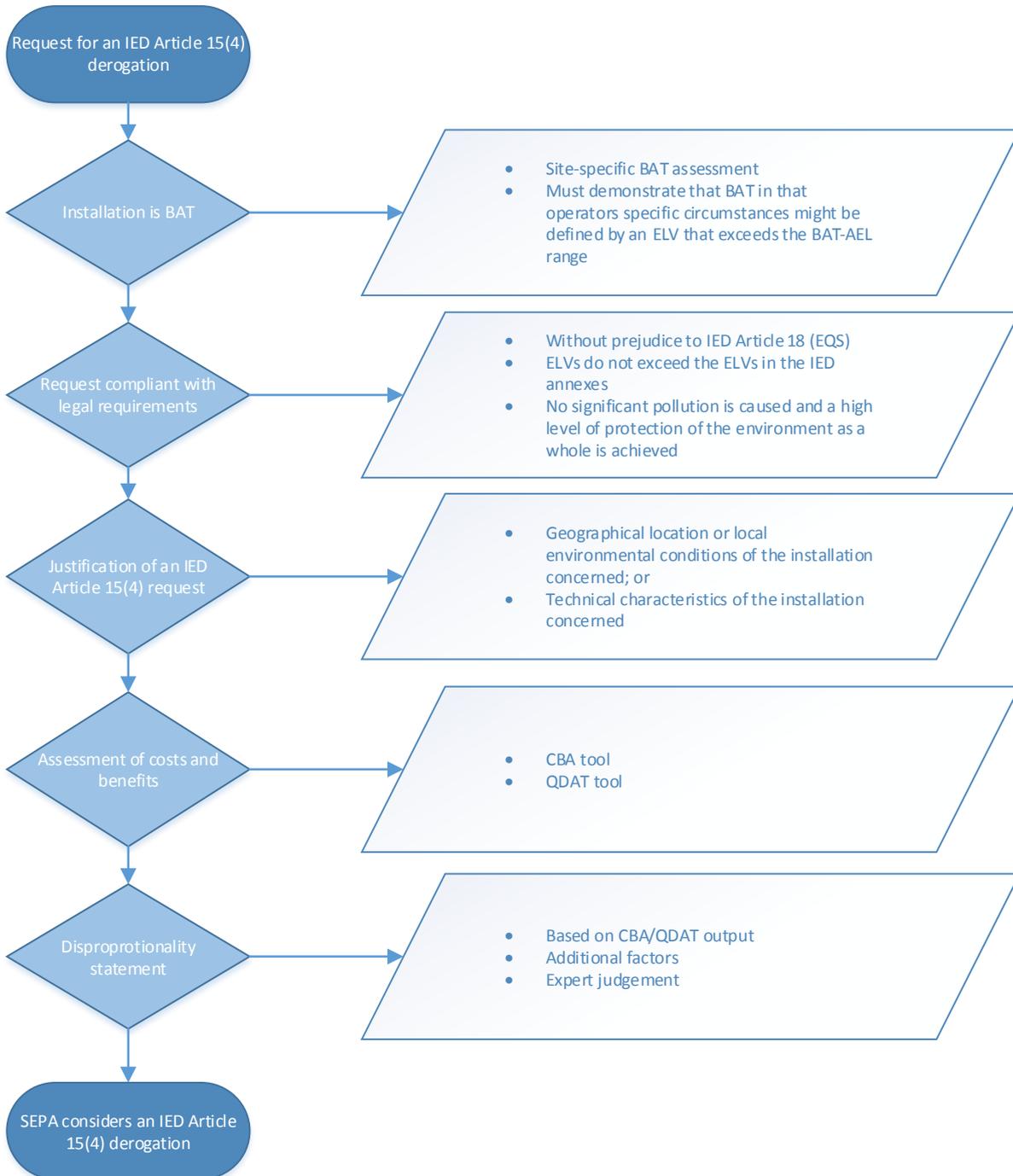
SEPA does not generally hold or generate the types of information (e.g. CAPEX) required to undertake derogation assessment. If an operator wishes to request derogation, it must be prepared to provide SEPA with any required information to reach a decision. If the operator fails to provide such information, SEPA will be unable to complete its assessment and the derogation request will be refused.

Derogation Timescales

Derogation appraisal and approval must be completed within the BATc review statutory timescales – i.e. within the 4-year BATc review period. Gathering the required information may not be a quick process and so it is essential that the derogation assessment process be commenced at the earliest possible opportunity.

Procedure

The derogation assessment process has five distinct stages. If an operator's derogation request fails assessment at any of these stages, it will not qualify for derogation. Each of these stages is described in further detail below.



It should be noted that, if an operator's derogation request is refused, it may be possible for the operator to submit a revised derogation request at a later stage of the BATc review process. However as the BATc review process is time limited, the submission (and consideration of) any revised derogation request would be dependent upon available time.

Stage one – site specific BAT assessment

BAT is the core principle of the IED and derogation does not exempt an installation from BAT.

It is worth noting that BAT is a dynamic concept and where an installation was BAT at the time a permit was originally granted (in many cases decades ago), it does not mean that the installation is still BAT. An installation may have all the most modern technologies, but if these were not correctly specified for the site-specific requirements, or are not operated and maintained effectively, then an installation cannot be BAT. Conversely, if an installation has older technologies, but the operation is optimised and maintenance is exemplary, an installation could be BAT.

As part of any BAT conclusions review a site specific BAT assessment for the Installation as a whole should be carried out - as detailed in steps 3 and 4 of **IED-TG-43**. This will identify any areas of an installation that will not meet the BAT-AELS. Please note that in considering whether an installations emissions are within the BAT-AEL range account should be taken of any footnotes in the BAT conclusions. The Commission has made a distinction between two types of footnotes in the BATc:

- 1) Those that explicitly affect the BAT-AEL range – e.g. footnote 2 in Table 9 under BAT 34 of the BATc for the refining of mineral oil and gas, where the footnote alone increases the BAT-AEL range (the range would be 20-75mg/Nm³ instead of 20-50mg/Nm³) without the need for derogation under IED Art.15(4).
- 2) Those that potentially affect the BAT-AEL range, but which would require derogation – e.g. footnote 1 in Table 11 under BAT 34 of the BATc for the refining of mineral oil and gas, which states that values of up to 450 mg/Nm³ **may** occur. This footnote does not extent the BAT-AEL range, but should be taken into consideration in assessing whether a derogation under IED Art.15(4) is justified.

If the site specific BAT assessment is indicative that derogation may be required the following assessment steps need to be cleared in order to pass stage 1 of derogation appraisal. The steps are:

Step 1 – If you consider that a derogation is likely the BAT assessment should consider whether the techniques used are actually BAT (i.e. listed in the BAT Conclusions) or BAT equivalent. It is the operator's responsibility to demonstrate BAT equivalence.

Step 2 – Can the environmental performance of the areas that are exceeding the BAT-AEL range performance be improved through operational/maintenance/housekeeping changes (optimising performance) that will bring the installation to within BAT-AEL range within 4 years. If yes – then no derogation is required. If no and sufficient justification has been provided that further performance optimisation cannot be achieved then proceed to step 3.

Step 3 – The operator should undertake an optioneering assessment and determine which options are available to bring emissions to within BAT-AEL range in the longer term. These options will form the basis of the derogation and are required in order to undertake a cost benefit analysis.

Derogation can only be considered after a site-specific BAT assessment for the whole installation has been concluded, and if the BAT assessment and optioneering does not demonstrate a BAT option that will achieve emissions within the BAT-AEL range and within the BATc review timescale. The need to consider derogation will arise **only** if SEPA concludes that an operator's BAT Assessment adequately demonstrates that BAT in that operator's specific circumstances might be defined by an ELV that exceeds the upper end of the applicable BAT-AEL range. This should ordinarily be on a time-limited basis to allow the investment necessary to reduce emissions to an appropriate point within the BAT-AEL range.

It is a common misconception that derogation is from BAT or the full requirements of the IED – this is not the case.

Stage two – is the installation compliant with legal requirements?

The IED includes several legislative backstops that an installation must satisfy in order for any proposed derogation to be eligible for consideration. As with the stage 1 assessment, these backstops are prescribed within the IED and apply to all ELVs associated with a derogation, not just those ELVs that it is proposed will derogate from the BAT-AEL range.

Without prejudice to IED Article 18 (EQS)

Emissions from an installation cannot cause a breach of an environmental quality standard (EQS). As such, any emissions associated with a proposed derogation cannot cause a breach of an EQS.

ELVs do not exceed the ELVs in the IED annexes

The IED contains mandatory maximum emissions for certain activities including Combustion (in Annex V) and Waste Incineration (in Annex VI). Emissions from an installation cannot exceed these mandatory limits; derogation in excess of these mandatory maximum emission levels cannot be granted.

No significant pollution is caused and a high level of protection of the environment as a whole

Ultimately, any emission limit value for an installation (including those from a proposed derogation) must ensure that no significant pollution is caused and there is a high level of protection of the environment as a whole.

Stage three – are the derogation criteria justified?

If SEPA believes that BAT for a specific installation may be represented by an ELV that exceeds a BAT-AEL range, it can set an ELV that exceeds the upper end of the BAT-AEL range. SEPA can set such an ELV only where it can be demonstrated that reducing the emissions to within the BAT-AEL range would lead to disproportionately higher cost compared to the environmental benefits for the installation concerned due to:

- the geographical location or the local environmental conditions of the installation, and/or
- the technical characteristics of the installation.

Before SEPA can make a judgment on disproportionality, it must first be satisfied that the justification for the proposed derogation is appropriate.

Geographical location or local environmental conditions

The reasons that could justify derogation to be considered on the grounds of the geographical location or the local environmental conditions might include:

- higher construction and/or energy costs due to remote location;
- the installation uses a locally available raw material that affects the emissions, and importing the raw material upon which compliance with BAT-AEL depends would require substantial infrastructure investment and increased transport costs;
- the uses of alternative techniques at the installation would require additional infrastructure locally (e.g. remote locations without interconnector for power supply);
- the use of certain techniques is impossible due to the location, specifically techniques that do not operate effectively at very high or low temperatures, or at high altitudes;
- the built up nature of the local area may result in higher costs (e.g. because of higher land prices, or lack of available land on or adjacent to the site);
- local planning restrictions limit the nature of developments or their costs; or

- the installation is located where there are fewer people or environmental receptors, resulting in lower impacts (and damage costs) than would apply to a typical installation.

Technical characteristics of the installation

The reasons that might justify derogation to be considered on the grounds of the technical characteristics of the installation might include:

- atypical cross media impacts would arise whereby reducing the emissions of one pollutant increase the emissions of another;
- the configuration of the plant within the site results in practical difficulties and increased costs, including lack of space for the construction of additional plant;
- the general investment cycle for a particular type of installation;
- the history of recent investment in techniques designed to reduce emissions;
- the intended remaining operational lifetime of the installation as a whole or of the part giving rise to the emission of the pollutant(s), where the operator is prepared to commit to a timetable for closure;
- the product must be produced to meet a specific and atypical specification that necessitates e.g. additional purification steps, different reaction chemistry etc.; or
- the characteristics of the gaseous or liquid effluents are atypical e.g. high salt concentration in waste waters sharply reduces or completely inhibits the microbial activity in activated sludge (biological) waste water treatment.

For SEPA to consider the use of derogation, the optioneering BAT assessment (stage 1) must include at least one option for reducing the emissions to within the BAT-AEL range and meet BAT within the BATc review deadline. This assessment will need to demonstrate that the reason such an option was rejected as BAT, or whose introduction is delayed, can be linked to at least one of the relevant qualification criteria mentioned above. If this is not the case, SEPA could not consider derogation and would therefore have no option but to set the ELV within the BAT-AEL range.

Stage four– Assessment of costs and benefits

SEPA must assess whether disproportionate cost has been demonstrated by the operator.

If the reasons for rejecting or delaying the introduction of an option for reducing emissions to within the BAT-AEL range meet the eligibility criteria, then SEPA has to perform an assessment to confirm that the costs of implementing that option are disproportionately higher than the benefits when compared to allowing the installation to achieve the BAT-AELs at a later date.

The consideration of costs and benefits of credible options is an important aspect of a derogation appraisal. Costs and benefits cannot be assessed arbitrarily. Derogation assessment tools are being developed on a UK wide basis to ensure national consistency. These tools must be used where derogation is to be considered.

Cost Benefit Analysis Tool

A cost benefit analysis (CBA) tool for the assessment of derogation for certain emissions to air has been developed in collaboration with DEFRA and the other UK environmental regulators – this is our preferred approach to assessing disproportionate costs. This tool compares different scenarios – i.e. business as usual, proposed derogation, and compliance with BAT-AELs – to reach a conclusion as to whether disproportionate cost is demonstrated. To achieve this, the CBA tool considers a range of factors for each of these scenarios including site specific factors, upfront investment costs, financing costs, operating costs, energy consumption, and pollutant emissions. Where the CBA tool cannot be used (due to environmental damage cost not being available), SEPA will use a qualitative methodology for assessment of derogations under the IED.

Qualitative Assessment Tool

SEPA has developed a qualitative assessment tool (QDAT) as a secondary methodology for assessing disproportionate cost. In the absence of quantitative data (i.e. damage cost functions), this methodology allows SEPA to assess disproportionate cost using qualitative data. The development of the QDAT was based on the existing methodology to assess derogations for polluting discharges to the water environment under the Water Framework Directive, i.e. SEPA's regulatory Method 34 and Supporting Guidance 67.

Consideration of CBA/QDAT outputs

Ultimately, it is for SEPA to use its professional judgement to consider the outputs of the CBA/QDAT and whether, on an installation specific basis, disproportionate cost has been demonstrated. The CBA and QDAT are both simply tools, they do not generate a definitive answer as to whether disproportionate cost has been demonstrated – but rather allow SEPA to reach a considered judgement.

Stage five – Derogation Decision

To facilitate the final decision on whether to grant derogation and provide appropriate oversight and governance, SEPA has put in place the following decision making arrangements.

Technical Oversight Panel

A technical oversight panel has been formed, consisting of relevant technical experts to consider all derogation requests made to SEPA. This panel has been established in SEPA to assess requests, and potential requests, for derogations, and to make recommendations to the relevant decision maker. This approach will ensure a robust and consistent assessment process for considering potential derogations from mandatory emission levels established under the IED.

Derogation Approval

Due to ongoing organisational changes within SEPA, governance arrangements are currently under review.

As an interim position the final decision should be made by the relevant unit manager taking into account the recommendation of the technical oversight panel. Where appropriate the views of SEPA's Agency Management Team should be sought to inform the ultimate decision of the unit manager on whether to grant derogation.

When making its decision the unit manager will consider the recommendations of the Technical Oversight Panel, views of the AMT and any other relevant additional factors.

Public Participation and Public Register

It is a requirement of the IED that, where a derogation is proposed to be granted, the draft decision must first be subject to public consultation to allow public participation in the decision making process. This means that the grounds for granting the derogation will be published on SEPA's website and be open to public comment. SEPA is required to consider any comments made before granting derogation.

It should be noted that all information relating to a derogation request will be held on SEPA's public register, and be publically available, unless a commercial confidentiality claim has been accepted by SEPA.

Permit Annex

Where derogation is granted SEPA must include an installation specific derogation annex within the permit. This should include the length of time the derogation will apply and the agreed actions that the operator must take to conclude the derogation.

Further Information

For further information on derogations, please contact either your site inspector or a member of SEPA's CE Industry Unit.