

**SEPA guidance:**

**Appraising derogations for BAT-AELs for Schedule 20 emissions activities**

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IND-G-016

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# Introduction

The Environmental Authorisations (Scotland) Regulations 2018 (as amended) (“EASR”) requires all installations to use the best available techniques (BAT), and that the BAT conclusions (BATc) are the reference for BAT. BATc include both those that are retained direct EU legislation and those specified in regulations made under regulation 9 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 following the development of UK 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 derogations 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 an application for variation 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 application for variation for derogation. It may be impossible to complete the necessary considerations within the statutory BATc review timescales if an application for variation for derogation is submitted at the last minute.
* The grant of an application for variation for a derogation cannot be guaranteed. It should not be presumed that an operator **“can just get a derogation”.**Derogation assessment is a prescriptive process. 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 and for the competent authority to assess and decide whether derogation is appropriate in determining the application for variation. 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?

EASR, schedule 20, paragraph 10(7) 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 paragraph 10(7) 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 reconsidered 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.

## 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 an application for variation for 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 publicly available.

# Application for Derogation

It is the operator’s responsibility to apply for a variation for derogation from SEPA.

If an installation’s emissions exceed the BAT-AEL range, unless a variation 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 to grant a derogation.

## Basic Principles when considering an application for derogation

The following basic principles should be considered during any application for derogation.

### 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. The maximum length of time that derogation can be granted is until the end of the next BATc Review period, which will depend on the timing of UK BAT development programmes. 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 be 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, 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 installations 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.

EASR Regulation 37(1) gives SEPA the power to require the provision of information necessary for SEPA to exercise or discharge its functions under EASR, in this case, for the purposes of reconsidering permit conditions as part of the BATc review.

Where an application for variation for derogation is made by the authorised person, EASR schedule 1, paragraph 6(2) provides that where SEPA considers that it requires further information to determine an application, it may serve a notice on the applicant specifying the further information and the period within which it must be provided.

### Availability of information

For SEPA to assess an application for variation for derogation 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 make an application for variation for derogation, it must be prepared to provide SEPA with any required information to reach a decision. If the operator fails to provide such information required under notice under EASR schedule 1, paragraph 6(2), SEPA may by further notice deem the application for variation to be withdrawn.

### Derogation Timescales

Derogation appraisal and grant of the variation 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 application for variation for derogation fails assessment at any of these stages, SEPA will not be able to grant a derogation under EASR schedule 20, paragraph 10(7). Each of these stages is described in Appendix 1.

It should be noted that, if an operator’s application for variation for derogation is refused, it may be possible for the operator to submit a revised application 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 application would be dependent upon available time.

Installation is BAT

Disproprotionality statement

SEPA considers an IED Article 15(4) derogation

Request for an IED Article 15(4) derogation

Request compliant with legal requirements

Justification of an IED Article 15(4) request

Assessment of costs and benefits

## Stage one – site specific BAT assessment

BAT is the core principle 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 SEPA Guidance:

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EASR schedules 20 & 26 Permit Reviews following the publication of a BAT Conclusions document found on the SEPA website (reference IND-G-015). 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. There are 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.
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 extend the BAT-AEL range, but should be taken into consideration in assessing whether a derogation 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 EASR – this is not the case.

## Stage two – is the installation compliant with legal requirements?

There are 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 EASR schedule 20 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 environmental quality standards (EQS)

Emissions from an installation cannot cause a breach of an environmental quality standard (EQS). As such, any emissions associated with a prosed derogation cannot cause a breach of an EQS. Under EASR schedule 20, paragraph 4(i), where achieving an EQS requires stricter conditions than those achievable by the use of BAT, SEPA must include additional measures in the permit and may take into account other measures which may be taken in relation to achieving an EQS.

## ELVs do not exceed the ELVs in schedules 21 to 24

EASR contains mandatory maximum emissions for certain activities including Combustion (schedule 21) and Waste Incineration (schedule 22). Emissions from an installation cannot exceed the emission limit values set out in schedules 21 to 24 for a particular industrial emissions activity.

### 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) wastewater 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.

### 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.

### 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.

### Derogation Technical Oversight Panel

A Derogation Technical Oversight Panel (the ‘Panel’) has been formed, consisting of relevant technical experts to consider all applications for variation for derogation made to SEPA. This panel has been established in SEPA to assess requests for variation, and potential requests, 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.

### Derogation Approval

The final decision should be made by the relevant unit manager taking into account the recommendation of the Panel. Where appropriate the views of SEPA’s Senior Leadership Team (SLT) should be sought to inform the ultimate decision of the unit manager on whether to grant a derogation.

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

### Public Participation and Public Register

It is a requirement EASR schedule 20, paragraph 17 that, where less strict ELVs are to be set, public consultation is required and in addition to the requirements of EASR schedule 1, paragraph 8, SEPA must ensure that the draft decision is publicised in such manner as SEPA thinks fit. This means that the grounds for granting the derogation will 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 publicly available, unless a commercial confidentiality claim has been accepted by SEPA.

### Permit Schedule

Where derogation is granted SEPA must include an installation specific derogation schedule to the permit, specifying the reasons for setting a less strict ELV. This should include the result of the assessment of the derogation criteria and the justification for the conditions imposed.

# Appendix 1

# Summary of the derogation application process

1. The applicant submits a request for an IAD Article 15(4) derogation
2. Applicant must demonstrate that the installation is BAT
   1. Site-specific BAT assessment.
   2. Demonstrate that BAT in the applicant’s specific circumstances might be defined by an ELV that exceeds the BAT-AEL range.
3. The request must be compliant with legal requirements:
   1. Without prejudice to IAD Article 18 (EQS).
   2. ELVs do not exceed ELVs in the IED annexes.
   3. No significant pollution is caused and a high level of protection of the environment as a whole is achieved.
4. Justification of an IED Article 15(4) request:
   1. Geographical location or local environmental conditions of the installation concerned. OR
   2. Technical characteristics of the installation concerned.
5. Assessment of costs and benefits:
   1. CBA tool.
   2. QDAT tool.
6. Disproportionality statement:
   1. Based on CBA/QDAT output.
   2. Additional factors.
   3. Expert judgment.
7. SEPA considers an IED Article 15(4) derogation.

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