



European Union Network for the Implementation
and Enforcement of Environmental Law

Experience of Derogations from IED BAT-AELs

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Introduction to IMPEL

The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) is an international non-profit association of the environmental authorities of the EU Member States, acceding and candidate countries of the European Union and EEA countries. The association is registered in Belgium and its legal seat is in Bruxelles, Belgium.

IMPEL was set up in 1992 as an informal Network of European regulators and authorities concerned with the implementation and enforcement of environmental law. The Network's objective is to create the necessary impetus in the European Community to make progress on ensuring a more effective application of environmental legislation. The core of the IMPEL activities concerns awareness raising, capacity building and exchange of information and experiences on implementation, enforcement and international enforcement collaboration as well as promoting and supporting the practicability and enforceability of European environmental legislation.

During the previous years IMPEL has developed into a considerable, widely known organisation, being mentioned in a number of EU legislative and policy documents, e.g. the 6th Environment Action Programme and the Recommendation on Minimum Criteria for Environmental Inspections.

The expertise and experience of the participants within IMPEL make the network uniquely qualified to work on both technical and regulatory aspects of EU environmental legislation.

Information on the IMPEL Network is also available through its website at:

www.impel.eu

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This report is the result of a project within the IMPEL network. The content does not necessarily represent the view of the national administrations or the European Commission.

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1 Executive summary

Project 2016/02 followed on from the 2014 IMPEL project, 'Sharing of draft proposals between Member States for implementing derogations from BAT-AELs under Article 15 paragraphs (4) and (5) of the industrial emissions Directive 2010/75/EU'.

The aim of this project was to identify good practice in managing, assessing and granting or refusing derogations against BREF BAT-AELs, under Article 15 of the Industrial Emissions Directive; through sharing the experiences of regulators from different member states.

IMPEL Members were invited to respond to a questionnaire; providing information about the processes, procedures and guidance used in their country, details of the number of derogations sought to date according to industrial sector and the basis and outcome of those derogation applications. 18 members responded to the questionnaire, analysis of which identified 6 key areas for discussion:

1. Is there a need for EC guidance to assist operators and competent authorities in preparing and assessing derogation applications, such as the nature and level of detail of the information provided?
2. What basis and justifications should be accepted for derogation applications and is there need for direction?
3. What types of cost, associated with an improvement, should be taken into consideration and how can they be validated?
4. How should disproportionate cost be measured against environmental benefits?
5. Interpretation of the wording of many BAT conclusions and associated footnotes is resulting in many derogation applications.
6. Addressing claims of confidentiality in relation to the breakdown of capital and project costs or timing of investment.

A workshop was held in Manchester, England to discuss these findings, which was attended by 31 delegates from 21 member organisations and the European Commission.

Conclusions from the workshop:

1. Many members have produced, or were planning to produce, guidance and there was broad agreement on the type of evidence needed to support a derogation application; there is no need for general European derogation guidance at the moment. However, specific direction on what can be included as a cost associated with "geographical location or the local environmental conditions of the installation" concerned would avoid local inconsistencies.
2. There is an absence of damage costs for emissions to water, which makes it difficult to determine disproportionality for water derogations. This is something which should be considered at a European level to avoid local inconsistencies.
3. Derogation case assessment is very resource intensive and often requires a high degree of technical expertise, which the competent authority does not always have in house.

Outputs from the workshop:

1. It was agreed that a register of problematic BAT conclusions which could or have resulted in unnecessary derogation assessments would be set up on Basecamp, periodic output from which would be shared with the EIPPCB. An initial extract is provided in Annex 1

2. An informal implementation technical working group would be set up for the Refining Mineral Oil and Gas BREF, as a trial forum to address transboundary differences in interpretation of BAT conclusions identified by multinational operators and trade bodies.
Proposed Areas for future work:

1. Examination of the ways in which the environmental impact on the aquatic environment can be quantified, with the aim of publishing standard damage costs or development of a methodology for use by competent authorities for developing local costs.

2. Development of guidance or EC direction on what factors can be considered when assessing disproportionate costs due to the geographic location or the local environmental conditions of the installation concerned

2 Background

In 2014 there was an initial derogations project conducted, which was led by the Scottish Environment Protection Agency, at that time there were not many examples of actual derogation requests and so the project proposed that some follow up work be conducted once there was more practical experience across Europe. Project 2016/02 led by the English Environment Agency, picks up that thread.

A project team was formed and met in London in April 2016. Following this the team produced a derogation experiences questionnaire which was circulated to all IMPEL members. A workshop was organised in June 2016 in Manchester, England; to discuss the findings from the questionnaire responses and to give members an opportunity to share their experiences face to face.

3 Findings from the questionnaire responses and workshop discussions:

It was apparent from the number of responses received and detail provided in those responses that the assessment of derogation applications is something which most IMPEL members are carrying out, but finding challenging and resource intensive.

Below are some key points to come out of analysis of the questionnaire and discussions at the workshop.

1. Over half of member states have received applications for derogations with an outcome determined on 15.
2. Roughly 1/3 of member states and 1/3 of competent authorities have produced guidance on assessing derogation applications, which they were keen to share. For most, electronic links have been provided which are available in a file on Basecamp, although many are not available in English.
3. There are differences between competent authorities in the factors considered when assessing a derogation application. Most notably some Competent Authorities were willing to take account of affordability and socio-economic effects, like employment, when assessing impact on the environment. This was not supported by the European Commission representative at the conference.
4. Most derogations that have been accepted are time-limited; only 2 of the 13 approved so far have an indefinite term, i.e. no end date. The bases for the time limitation included;
 - investment cycles greater than 4 years – Refineries, Iron and Steel, cement and lime
 - lead time to obtain specialised plant/contractors – Refineries, Iron and Steel
 - existing plant nearing end of life so not warranting upgrade – Iron and Steel
 - Need to tie work into planned major shutdown due to the time required to shut down or start up an integrated plant or need to rebuild or significantly overhaul continuous units like furnaces once stopped – Glass, Iron and Steel, refineries
 - There was one example of the testing of an emerging technique leading to a derogation request [Art 14(5)]

5. Only one Competent Authority so far has rejected a derogation request. There is a nervousness about potential political repercussions from a refusal to grant a derogation request that could jeopardise the future viability of a facility.
6. There were differences in opinion about the extent to which the public and NGO's should be involved in the derogation assessment process.
7. Assessment of costs and benefits was universally found to be challenging; 8 countries have produced guidance.
8. Croatia and the UK have both developed a cost benefit analysis tool, the current versions of which is available to other IMPEL members via Basecamp.
9. Identified challenges in assessing costs and benefits include;
 - a. defining the level of detail needed to support costs
 - b. lack of available harm cost data, particularly for emissions to water and amenity impacts such as noise and odour.
 - c. How to take account of local environmental factors in assessing benefits. Should damage costs vary with geographical location?
10. Poorly determined or unclear worded BAT conclusions were identified as a cause of derogation applications. Delegates provided many examples, such as;
 - failure to recognise cross pollutant effects (reduction in one pollutant leads to increase of another. Examples;
 - addition of DeSO_x catalyst to catalytic crackers on refineries reduces emissions of SO₂ but increases emissions of dust;
 - Addition of N-containing additives to glass causing high NO_x emissions.
 - use of ambiguous phrases such as "other than normal operation" and inclusion of footnotes which make it unclear whether a BAT-AEL applies or not.
 - Ambiguous wording of footnotes and confusion about whether they should be treated in the same way as applicability criteria. This is a particular issue in the Manufacturing of Glass BREF, issued in 2013, as its review was started prior to implementation of IED.
11. Regulatory structures vary a lot across member states. There are 4 principal models; single central authority, autonomous regional authorities, non-autonomous regional authorities, a mixture of regional and central authorities. This can result in variations in approach both within and between member states, which can lead to complaints from large companies, operating sites in multiple locations, about inconsistency. The refineries sector was identified as a particular concern.

4 Workshop Conclusions

1. There is a need to improve the clarity of the wording of BAT conclusions, which will reduce the number of derogation applications. The project will create a register of such conclusions, which members will contribute to and will be shared with the EIPPCB.
2. It is recommended that the European Commission develop and publish more extensive environmental damage cost data, in particular for impacts on the aquatic environment and for a wider range of air pollutants, which would help both operators and competent authorities in dealing with derogations and would improve consistency of IED implementation.
3. It is recommended that the European Commission provide additional direction or guidance on interpretation of Article 15(4)(a), i.e. what can be considered a cost associated with geographical location or the local environmental conditions of the installation concerned, to avoid inconsistency between member states.
4. Multinational operators and trade bodies often seek to reduce their obligations by “playing off” competent authorities from different regions against each other in an effort to generate the lowest level of implementation. It was agreed that there would be value in creating EU-wide BREF implementation TWGs under the auspices of IMPEL to support competent authorities in interpreting and delivering BAT conclusions. It was agreed that this would be trialled on the Refining Mineral Oil and Gas BREF.

5 Recommendations for further work

1. It is recommended that the European Commission examine ways in which impact on the aquatic environment can be quantified, with a view to then developing and publishing aquatic cost of harm data, as well as values for a wider range of air pollutants.
2. To prevent inconsistent interpretation of Article 15(4)(a) with regard to which factors can be considered as costs associated with geographic location or the local environmental conditions of an installation; it is recommended that the European Commission develop guidance or issue a direction specifying the types of costs which should and should not be considered.
3. Further work is also needed to identify ways in which impacts such as noise, odour and amenity impact can be taken account of in a cost benefit analysis, as at present they cannot be monetised.

Annex 1: BAT Conclusions causing challenges in implementation due to interpretation or clarity of intent

Extract from the register which will be published on Basecamp for access by all IMPEL members

Register of BAT Conclusions which are difficult to implement or raise interpretation queries							
The purpose of this spreadsheet is to collate a list of BAT conclusions the wording of which may result in differences in interpretation between member states that in turn could result in different derogation decisions being reached under article 15(4).							
Types of Problem				Example			
1	Use of ambiguous words such as 'some' or 'may' to define applicability criteria			Retrofitting on some plants may not be possible			
2	Conflict between outcomes of BAT conclusions			High levels of deSOx catalyst additives to fluidised catalytic crackers [REF BAT26] leads to additional emissions of dust [REF BAT25]			
3	Applicability restricted or BATAEL only applies to 'normal operation' without clarification of what should be considered normal.						
4	BATAEPL set so uncertainty as to whether deviation from the standard should						
5	Other						
	BREF	BREF Descriptor	Conclusions Number	Problematic wording	Explanation of problem	Type of Problem	Identified by
1	REF	Refining Mineral Oil and Gas	BAT12	"Not all parameters and sampling frequencies are applicable to effluent from gas refining sites"	This does not make clear which of the parameters and sampling frequencies are applicable to gas refineries and so is open to challenge.	1	From questionnaire responses
2	GLA	Glass Manufacturing	BAT9	Conflict in outcomes	CO emission levels are increased by application of primary NOx reduction techniques, which cause a conflict between 2 BAT conclusions	2	From questionnaire responses
3	CLM	Cement Lime and Magnesium Oxide	BAT19	The BATAEL for NOx emissions from cement kilns applies during 'normal operation'	Cement kilns often fire waste derived fuels, which is energy efficient and results in lower NOx emissions, however they also fire commercial fuels. Some have argued that only periods when waste derived fuels are being fired should be considered normal operation, whilst the regulator takes the view that any period of manufacture of clinker is normal operation, regardless of the fuel used.	3	From questionnaire responses
5	CLM	Cement Lime and Magnesium Oxide	BAT21	The BATAEL for SO2 emissions from cement kilns applies during 'normal operation'	Cement kilns can operate with the raw mill on or off. When it is on it provides some reduction in SO2. Some have argued that only periods of operation when the raw mill is on should be considered normal operation, whilst others take the view both modes of kiln operation are normal.	3	From questionnaire responses
6	REF	Refining Mineral Oil and Gas	BAT27	BATAELs 100 (1) - "May not be achievable when not operating the boiler at full load"	It is not clear what should be considered full load,	3	From questionnaire responses
7	IS	Iron and Steel	BAT22	conflict in outcomes	BAT is to use one or a combination of techniques I-V, however a different BAT-AEL is set for options I-IV from that for V, therefore the applicable BATAEL is unclear	2	From questionnaire responses
8	REF	Refining Mineral Oil and Gas	BAT25/ BAT26	conflict in outcomes	there is a conflict between BAT26 and BAT25, when the technique of use of SOx reducing catalyst additives is applied, this increases emissions of dust from attrition, which is in conflict with the requirement to reduce dust and metals emissions to air. Use of an attrition resistant catalyst is a technique specified in BAT25.	2	From questionnaire responses
9		#N/A					