EnvC 66/17

Response to Environment Agency's informal consultation: Performance Regulation for EPR

26 May 2017

About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 90 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership encompasses the truly diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 26 million homes and every business in Britain. Over 619,000 people in every corner of the country rely on the sector for their jobs with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry adds £83bn to the British economy, equivalent to 5% of GDP, and pays over £6bn in tax annually to HMT.

Fundamental concerns

Energy UK welcomes the opportunity to engage with the Environment Agency's (EA) informal consultation. We have a number of concerns in relation to the proposals presented:

- Considering the development work to be done and the significance of the proposed extension to the role of the EA, the consultation period (both informal and formal) appears to be very compressed. We would question whether the timetable as proposed allows for sufficient consultation.
- We consider that compliance with Environmental Permits is a key part of any responsible operator's duty to protect the environment and are concerned that the proposed move to Performance Regulation may reduce the focus on compliance and could distract from the Environment Agency's core mission. We therefore propose that criteria within the proposed Attributes which fall into the category of 'wider corporate (non-environmental) performance' should not be used to assess Environmental Performance and that the Attributes 'Corporate Transparency' and 'Compliance with Other Regimes' should be removed from the assessment framework altogether.
- Energy UK supports the principle of banding and the industry we represent is currently considered by the EA to be a high-performing sector with the great majority of installations achieving a Band A or B under the current OPRA-based compliance scheme. However, we are concerned that the proposed introduction of an 'Exemplary' performance band based on operators going 'beyond compliance' is potentially flawed and could have a negative impact on the reputation of the sector, which could in turn affect investor confidence. Therefore, we do not support the inclusion of an 'Exemplary' performance band within the assessment framework.

<u>Process</u>

The Environment Agency (EA) has stated that the intention is for performance to be assessed and recorded on the basis of the new framework in 2018 with charges to be provisionally applied on this basis in 2019. A formal consultation is to be issued in July this year.

We are concerned that there has been no earlier consultation on the principle of how an operator's environmental performance is measured. This informal consultation is focused on the detail of a new system without the question being asked if a new system is needed at all. The movement from an OPRA-based compliance banding to a new performance-based regulation system, which is based on entirely different criteria, gives rise to significant concern amongst our members. This consultation also comes at a time when the EA is carrying out a strategic review of charges and it is not clear how these two consultations are connected.

It is vital that there is full transparency and opportunity for engagement in developing a new assessment framework. Considering the development work to be done and the significance of the proposed extension to the role of the EA, the consultation period (both informal and formal) appears to be very compressed. We would question whether the timetable as proposed allows for sufficient consultation.

Assessment Criteria

We consider that compliance with Environmental Permits is a key part of any responsible operator's duty to protect the environment and are concerned that the proposed move to Performance Regulation may reduce the focus on compliance and could distract from the EA's core mission

The proposed criteria within the Attributes of the proposed regime can be categorised as follows:

1. Compliance based criteria (in scope of OPRA)
2. Criteria associated with environmental performance
3. Criteria associated with wider corporate (non-environmental) performance

Criteria in the first of these categories are important as they directly measure an operator's compliance with their Environmental Permit, and therefore their impact on the environment. The second category of criteria is not necessarily covered by OPRA, but is still important and relevant to the impact that an operator has on the environment.

The third category of criteria relates to some important aspects of responsible and sustainable business practices, but is not relevant to the risk posed to the environment by a site, nor to the cost of regulating that site, and so should not be used for assessing an operator's Environmental Performance. Furthermore, the EA's resources and competencies are focused on environmental regulations, and as such, the EA is neither equipped, nor qualified to assess the wider corporate performance of the organisations that it regulates. To do so would be a distraction from the core mission of the EA, and is also beyond the expectations that the public and Government have of the EA. We therefore propose that criteria within the proposed Attributes which fall into the category of 'wider corporate (non-environmental) performance' should not be used to assess Environmental Performance and that the Attributes 'Corporate Transparency' and 'Compliance with Other Regimes' should be removed from the assessment framework altogether.

Regulating 'Beyond Compliance'

Energy UK supports the principle of banding and the industry we represent is currently considered by the EA to be a high performing sector with the great majority of installations achieving a Band A or B under the current OPRA-based compliance scheme.

We would question whether it is the role of the EA as environmental regulator to assess and report on sites which have voluntarily implemented additional practice over and above legal obligations. We would consider it more appropriate for such a role to be undertaken by other bodies. Indeed, by taking on such a role the EA's position as regulator could become both confused and compromised.

We therefore consider that the EA should continue to focus on ensuring that operators comply with their legal requirements which are set at an appropriate level to protect the environment and meet the EA's additional duties. Any actions that an operator chooses to implement beyond these requirements

should not, as a matter of principle, be endorsed by the environmental regulator. To include an 'Exemplary' performance band as proposed would create a fundamentally flawed and highly subjective assessment scheme (and ultimately charging scheme). That is, what constitutes 'beyond compliance' would vary significantly across operators and sectors (with a number of the proposed criteria simply not achievable for particular operators or potentially for entire sectors) and any assessment would not therefore be comparing 'like with like'. Indeed, assessing 'beyond compliance' would necessarily introduce a strong subjective element which would in turn result in inconsistency and a lack of transparency.

To publish details of operators' performance as 'Exemplary' or 'Expected' (with the connotation of doing the "bare minimum" associated with the latter) on the basis of such an assessment would in our view misrepresent the environmental performance of operators, and indeed whole sectors, to the wider public. This would have a negative impact on reputation which in turn could affect investor confidence and tenders for new business, and potentially undermine the level of investment undertaken going forward.

In addition, the proposed extension of the EA's responsibility to assess 'beyond compliance' measures in the 'Exemplary' band will require greater resource, thus leading to an increase in costs which will be recovered via charges. However, given the stated intention to reduce subsistence fees for those sites in the 'Exemplary' band and increase fees for those sites in either of the two 'Improvement Needed' bands, this would appear to represent a disproportionate increase in costs to the poorer performers which would not, in our view, be cost-reflective.

Therefore, to report on operators', and sectors', legal compliance and the voluntary actions taken over and above legal requirements in the same scheme would be both subjective and significantly misleading to the public. Basing subsistence costs on such a system would mean that charges would not be cost-reflective, and would be detrimental to a key aim of the EA to incentivise operators and sectors to continuously improve. We consider that such a scheme would work *against*, rather than *towards,* delivering the six key principles of the EA's regulatory strategy.

In view of the above concerns, we do not support the inclusion of an 'Exemplary' performance band within the assessment framework.

Response to Consultation Questions

1. **Please tell us if there's anything about the attribute 'Attitude' which you think could be improved.**

In terms of the Attribute 'Attitude', there are a number of criteria within both the 'Expected' and 'Exemplary' bands that we doubt are achievable, and we have the following comments.

The requirement under the 'Expected' performance band to *always* satisfy the criteria listed is both unrealistic and unfair for complex sites compared to very simple sites. Indeed, it would appear to unjustly penalise more complex sites, in particular those with a high level of environmental mitigation in place and therefore a greater number of permit conditions (including commitments, monitoring and reporting deadlines) to reflect the level of mitigation. That is, the greater number of permit conditions an operator has (even where this relates to mitigation), the greater the likelihood of an operator failing one or more of these conditions and thus falling into the category 'Improvement Needed'. This can be compared to an operator with only one or two conditions in their permit with little or no mitigation in place, which would have a far greater likelihood of being scored as 'Expected" or even 'Exemplary'. It does not seem appropriate for sites with the greatest level of environmental mitigation in place to be reported as poor performers when in fact the environmental standards at these sites can be much higher than other sites reported as 'Expected' or better.

In our view, therefore, the following criteria listed under 'Expected' should be subject to a test of reasonableness: to [always] ensure commitments or deadlines are met unless for good reason; timely, full and accurate submission of reports, getting it right first time; always meets deadlines unless for

good reason; self-report as required by their permit; undertakes monitoring as required by permit and shares findings; identified problems are resolved with minimal EA input; and required fees or charges are always paid on time and in full. This is essential in order to ensure a proportionate and fair framework. One possible approach to address this concern could be to change the "always" requirement to "typically" or alternatively apply a percentile approach to failure of the criteria i.e. an operator is allowed a percentage of 'minor failures' before it is deemed to have not satisfied the requirement.

The criterion to monitor more than the minimum requirements and share the data, where appropriate, fair and reasonable, does not appear to take into account practicality and purpose of monitoring. The majority of emissions from the power industry are monitored continuously and it is not clear how we would go beyond that. There are also plant that are monitored on a periodic basis due to their nature of operation; it would be unreasonable and costly to expect this type of plant to install continuous emission monitoring.

A further example is 'always courteous and co-operative'. While our members always treat the EA and any other Regulator with respect and have a track record of cooperating with the EA at a sector level and site level, there is some concern that this is subjective and what could be seen by some as legitimate challenge may be seen by others as not being courteous or co-operative, thereby resulting in a downgrading of performance.

The EA also has a part to play in ensuring an operator can achieve the criterion 'required fees or charges are always paid on time and in full'. In many cases EA invoices are sent to incorrect addresses/persons (despite efforts to rectify this with the EA) and this can delay payment through no fault of the operator. It would be unreasonable for operators to be penalised for this.

Similarly, the criterion to "always allow unfettered access to site(s) and records as appropriate" should be subject to a test of reasonableness and also explicitly linked to relevant environmental matters. That is, in order for a request for access to site(s) and records to be reasonable, it should be clearly within the scope of the role of the regulator.

We do not support the inclusion in either the 'Exemplary' or 'Expected' bands of the criterion "internal/external audit findings are shared (unless for good reason)". This is a significant extension of information gathering powers by the EA on a sweeping, unlimited basis with no justification. Audit reports are undertaken by operators in order to identify areas for improvement within their processes and procedures; they are confidential and restricted documents and it would be highly inappropriate to require operators to share the findings of such reports as a matter of course. Indeed, to do so would cut across the principles of good corporate governance.

2. Please tell us if there's anything about the attribute 'Compliance' which you think could be improved.

The proposed criterion listed under 'Exemplary' for permit conditions i.e. "this performance band will reflect operators who have had no permit non-compliances in the last 5 years" is inappropriate, as it would mean that an operator could be penalised for mistakes made 4 years previously. This goes significantly above and beyond the current criteria for enforcement history whereby permit non-compliances are expunged after a period of a year and more significant offences such as prohibition notices cease to be relevant after 3 years, and convictions under environmental regulation after 5 years.

In addition, while operators may be part of a recognised third party assurance scheme where auditors routinely check compliance with the approved Management System, we would not support a requirement for the auditors to provide the EA with detailed compliance reports. Audit reports are undertaken by operators in order to identify areas for improvement within their processes and procedures and contain both findings that are material to the certification as well as opportunities for improvement. A more reasonable and proportionate requirement would be for the operator to make a declaration that no material failures were found during the course of the audit. This requirement also does not recognise that some smaller operators may not be in a position to fully implement a

management system that is accredited by a third party but still provides protection of the environment as a whole and drives continuous improvement.

The consultation states that evaluation of the risks posed by a site in OPRA is in terms of the hazards, which relate to the nature and scale of an activity and its proximity to sensitive receptors. However, moving to a performance-based approach would allow the EA to take likelihood into account as well as hazard. We welcome the recognition in the paper that risk includes the likelihood of an event happening; the level of mitigation in place directly affects the likelihood and, in our view, is a key factor in any assessment of operator performance. We therefore fully support the inclusion of the criterion for compliance: "risk identified and mitigation methods implemented, operator takes a continuous improvement approach throughout lifecycle of activity." However, it is also important that an appropriate weighting is given to this criterion to ensure that the level of mitigation in place is fully taken into account.

3. Please tell us if there's anything about the attribute 'Corporate Transparency' which you think could be improved.

Energy UK is of the opinion that this Attribute should not be included within the assessment framework and would question whether the EA has suitably qualified staff to assess the associated criteria. We consider many of the criteria in the bands to go significantly beyond what is within the remit of the EA, for example the business plan/model criteria. Any such information that is over and above information already in the public domain would be considered commercially confidential and therefore inappropriate to release. Similarly, the requirement to inform the EA of any financial irregularities would only be appropriate where such irregularities are directly relevant to environmental matters or are required to be disclosed under legal obligations. Wider financial irregularities will be dealt with by the Financial Conduct Authority, which has the required expertise in financial matters. For the EA to consider such issues (other than where they are directly relevant to an operator's environmental obligations) would effectively penalise operators twice for the same offence and introduce a clear and significant element of double regulation. We would therefore urge the EA to remove this Attribute from the assessment framework altogether.

4. Please tell us if there's anything about the attribute 'Relationship with the Community' which you think could be improved.

Some of the criteria within this Attribute also need further consideration as under the 'Expected' band it requires a record/complaint log to be made available to the community. This is likely to be difficult to do without breaking data protection legislation or allowing identification of local complainants. It is therefore suggested that this is reconsidered.

5. Please tell us if there's anything about the attribute 'Compliance with Other Regimes' which you think could be improved.

We strongly object to the inclusion of criteria under the heading "compliance with regimes administered by other regulatory organisations". We do not consider that such matters can reasonably be considered to be within the remit of the environmental regulator. For example, issues such as whether an operator submits tax and other financial returns in a timely manner or complies with the requirements of the Gangmasters Licensing Authority are not matters to be assessed by the EA; they will be dealt with by the relevant regulator in that area of expertise. Indeed, for the EA to consider such issues would effectively penalise operators twice for the same offence and introduce a clear and significant element of double regulation into the framework.

We also do not consider that 'compliance with other regimes we regulate' is directly relevant to the EA's assessment of performance for EPR. By including this category, it would appear to bring all other regimes regulated by the EA under the over-arching umbrella of EPR and again would effectively penalise operators twice for the same offence.

We therefore consider that this Attribute – 'compliance with other regimes' – is a significant and inappropriate extension of scope of the assessment framework and as such should be removed from the assessment framework altogether.

6. Please tell us if there's anything about the attribute 'Wider Environmental Performance' which you think could be improved.

We would question the requirement under the 'Expected' performance band that "the installation does not have a derogation from BAT or operate under an enforcement position". A derogation from BAT is an accepted environmental approach used throughout Europe which recognises that, for an appropriate reason, it would not be reasonable (or indeed justifiable) to fully apply BAT. The inclusion of this requirement would put sites that operate under a BAT derogation (even though they are fully compliant with such derogation) into the 'Improvement Needed' performance band, which states that the "regulator has to intervene/support to highlight where activities could improve and why". For many such sites, this would not be the case.

If the intention is that sites operating under a BAT derogation cannot be assessed as fully compliant or 'Expected' then this represents a significant move from current practice and regulatory precedent which we firmly believe needs to be fully discussed with all stakeholders. Indeed, such an approach would appear to directly conflict with the role and validity of the overall BAT assessment process.

Enforcement positions or Regulatory Position Statements can be used by the EA to allow trials of new or different techniques whilst still subject to specific controls by the regulator. If it meant that an Operator changed performance bands as a result of having an enforcement position, they may choose not to do the trial/approach which might lead to unrealised environmental benefits in future.

We would also question the criterion whereby a site issued with an improvement condition cannot achieve the highest banding. Historically there has been a number of improvement conditions applied that require regular reports to the EA; the most recent of these would be those conditions applied to coal-fired power stations requiring annual reporting of ambient air monitoring under the Habitats Directive. Sites subject to these improvement conditions would be unable to meet the upper band simply by the virtue of having to provide an annual report to the EA.

Improvement conditions are also used where new legislation is transposed into UK law. A good example of this is around the implementation of the Eels Regulations 2009 whereby these were implemented at relevant power stations via an improvement condition.

7. Please tell us of any attributes or criteria that you think are missing.

It is not clear from the informal consultation if the intention is for these proposals to apply to sites that have Standard Rules Permits. These permits have fixed fees and are not scored through OPRA at present. We therefore assume that such sites would not be included, but it would be helpful if this could be clarified in the formal consultation in July.

8. How do you think a site should move between the four bands, both upwards and downwards?

As we have stated at the outset, under our Fundamental Concerns, we do not support the inclusion of an 'Exemplary' performance band within the assessment framework. We consider that such a performance band would be inappropriate, subjective, significantly misleading and not cost-reflective and should therefore be removed from the framework altogether.

In our view, in relation to the three remaining performance bands, a weighting should be applied between attributes to reflect the varying importance of the attributes. In particular, the Compliance and Attitude attributes are clearly the most directly applicable to the management of the site and therefore the prevention of pollution, and as such, should be given the highest weighting. Indeed, we would question whether the relative importance of the remaining four Attributes is sufficient to justify their inclusion in the proposed assessment framework or whether a more effective (and far less complex and

bureaucratic) performance measurement methodology would be to focus attention solely on Compliance and Attitude.

In addition, there needs to be a degree of proportionality applied to the measures within each attribute to reflect the scale of the offence. That is, there is a significant difference between an operator being two days late with a data submission on a one-off basis and an operator being consistently 3 – 4 weeks late with a submission.

We would welcome continuous assessment subject to the framework being relatively stable so that operators are not subject to major swings between bands as the result of a single incident. This would be disproportionate, particularly given the ultimate intention to link the framework with charges.

9. What can we do to make the way we assess performance clear, consistent and transparent?

The framework should clearly set out how performance would be measured and marked against each of the criteria for a given Attribute. For example, would the EA visit sites to judge performance against the criteria (in which case sites could face an increased number of inspections) or would each site be required to submit information on each of the criteria along with supporting evidence, which would increase the resource burden for operators and the EA alike.

Details of the scoring system to be applied to each attribute and the criteria within each attribute would need to be clearly set out in advance along with appropriate governance for modifying the scoring system once established. Operators/sites would need to have sight of their scores in order to ensure that they can identify areas for improvement going forward. The ability to appeal an assessment would also be required in the interests of transparency.

The framework would need to outline explicitly the weighting given to the different attributes and, if necessary, the criteria within each attribute. Would operators be required to meet all of the criteria within a performance band across all the attributes or only a proportion and if the latter, which of the criteria would be mandatory and which optional? The methodology for aggregating an operator's performance to group level, where the operator has multiple sites, would also need to be explicit. Such information would need to be set out clearly in advance.

It would also be useful for the new framework to be reviewed after a period of time in order to assess whether it is in fact meeting these aims.

10. We are planning to transition to performance banding from 1 April 2018 for waste facilities and installations, with other Environmental Permitting Regulation regimes being phased in over subsequent years. Because the performance year will be the same as the calendar year, would you be comfortable that the first-year transition would be based on an assessment period of 9 months (Apr-Dec)?

We are concerned that the proposal to transition to performance banding from 1 April 2018 for waste facilities and installations represents a very compressed timetable, particularly given the significance of the proposed extension to the role of the EA (as discussed above). It is vital that there is full transparency and opportunity for stakeholder engagement in developing a new assessment framework. We would question whether the timetable as proposed allows for sufficient consultation.

11. In some regimes, we are seeing a noticeable rise of non-payment of fees and also hostile and obstructive behaviour towards our staff. We want to bring in zero tolerance for extreme situations, for example any site failing to pay fees and charges or demonstrating significant hostile and obstructive behaviour to our staff will move directly into the lowest performance band and we will begin proceedings to revoke that operators permit. As a responsible operator would you support the introduction of a zero-tolerance policy?

Energy UK would support the introduction of a zero-tolerance policy for hostile and obstructive behaviour towards EA staff. However, we are less clear that non-payment of fees in all cases represents an "extreme situation" in the same manner as hostile and obstructive behaviour. That is, a one-off

administrative error resulting in non-payment of fees does not appear to warrant moving the site directly into the lowest performance band (with the associated reputational impact) and the EA beginning proceedings to revoke the operator's permit, particularly where the non-payment is rectified at the earliest opportunity once brought to the attention of the operator. The EA also has a part to play in ensuring an operator can achieve this criterion and in many cases EA invoices are sent to incorrect addresses/persons (despite efforts to rectify this with the EA) and this can delay payment through no fault of the operator. It would be unreasonable for operators to be penalised for this.

For further information contact:

Andy Limbrick
Environment Consultant
Energy UK
Charles House
5-11 Regent Street
London SW1Y 4LR

Tel: 020 7747 2924
andy.limbrick@energy-uk.org.uk
www.energy-uk.org.uk

India Redrup
Policy Assistant
Energy UK
Charles House
5-11 Regent Street
London SW1Y 4LR

Tel: 020 7024 7635
india.redrup@energy-uk.org.uk
www.energy-uk.org.uk