

Response to SEPA's Revised Compliance Assessment Scheme 2018 consultation

3 November 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.

Response to Consultation Questions

1. Do you have any comments on the proposed timing of the scheme?

The consultation paper states that the new system for assessing compliance will be introduced in January 2018, with the link to charging to be activated from April 2019.

Energy UK fully supports operators' compliance being linked to the charges they are required to pay to SEPA as this is consistent with the Polluter Pays Principle i.e. the poorer performing operators would pay more to reflect the additional costs that SEPA has incurred in regulating their sites. However, this view is unequivocally based on the premise that SEPA would undertake a fair and proportionate approach to assessing compliance.

Regarding the above, Energy UK has a number of significant concerns with the proposals for a revised Compliance Assessment Scheme (CAS) which are set out in response to the following questions. Energy UK is of the view that it would not be appropriate to link the new CAS to operators' charges until these concerns have been addressed. In particular, it is vital that CAS can be clearly shown to be fair, proportionate and ensure that those operators with genuinely poor levels of compliance (rather than operators highlighted via a fundamentally flawed assessment scheme) contribute to the additional costs that they create.

Energy UK would therefore urge SEPA to consider modifying the CAS to reflect operators' concerns to make it more proportionate and reflective of operators' actual environmental compliance, rather than being inherently skewed by the scale and complexity of an operation. Without such modifications, Energy UK cannot support the proposal to link the new CAS to operators' charges from April 2019.

2. Do you have any comments on the proposed new categories?

The proposed four CAS categories of 'not assessed', 'compliance', 'non-compliance' and 'major non-compliance' are very black and white which could potentially create a "cliff-edge" approach whereby operators are placed in a category as a result of a single incident. This could lead to an unstable and disproportionate CAS which would be too sensitive to minor one-off incidents. Under the current scheme, 'At risk' sites are stigmatised by this label, and are therefore incentivised to take realistic and achievable steps to improve their compliance rating. This can allow operators to demonstrate to the public and the Regulator that their environmental performance is improving, and in future will drive an improvement from 'Broadly compliant' to 'Good' and 'Excellent'. By removing this granularity, the new scheme will imply that 'At risk' operators are performing at similar level to 'Good' operators. Not only does this stigmatise 'Good' operators by including them in the same category as 'At risk' operators, but it removes any incentive from 'At risk' operators to improve, as they will by implication be seen as 'Good' operators.

Energy UK appreciates that SEPA aspires for operators to have zero permit non-compliances, however we consider that it is extremely important to distinguish between operators with a single and unforeseeable minor non-compliance, and those who may have multiple minor non-compliances which should have been foreseen, or were easily preventable.

3. Do you have any comments on this approach to defining compliance?

The paper states that SEPA will expect operators to comply with all relevant conditions and will assess permits as being in compliance or non-compliance on that basis. While Energy UK's members endeavour to comply with all relevant conditions at all times and work continuously to improve performance, Energy UK cannot support the approach to defining compliance that is outlined in the paper for the reasons given below.

First and foremost, to operate CAS on the basis that a non-compliance with one permit condition automatically puts the whole permit into the non-compliance category is, in Energy UK's view, completely unrealistic and disproportionate. Such an approach would unfairly penalise more complex sites and, in particular, sites with a high level of environmental mitigation in place.

That is, the greater the number of licence or 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 in a particular month, thus leading to the operator being scored as in "non-compliance" for that month. This can be compared to an operator with only one or two conditions in its licence with no environmental mitigation in place but with a far greater likelihood of being scored as in "compliance". It is not appropriate for sites with the highest level of environmental mitigation in place to appear as the poorer performers when in fact the environmental standards at these sites are much higher than at other sites.

Indeed, the reporting of compliance data on the above basis would clearly misrepresent the environmental performance of such sites. In addition, a large licensee with a single non-compliance would be reported on the same basis as another licensee with 100% non-compliance. This is clearly exacerbated by the proposed narrowing of the CAS categories into 'compliance', 'non-compliance' and 'major non-compliance'. Energy UK considers that assessing and reporting compliance on the proposed basis would be overly simplistic and misleading to both the media and public. Accordingly, it is questionable whether it would provide any meaningful information at all.

In addition, the proposed CAS would introduce a clear incentive on operators to resist implementing any further mitigation on their site as the greater the mitigation in place, the greater the likelihood of being assessed and reported as being non-compliant and the higher the charges to be paid to SEPA. This is clearly not an intended outcome of the revised CAS.

Furthermore, a credible CAS needs to be consistent across different regimes and Energy UK does not consider that, as proposed, this would be the case. That is, the threshold for non-compliance of Environmental Limit Conditions across different regimes can vary significantly, with emissions to air and discharge conditions applying a 95% percentile approach. Whereas, for example, abstraction and compensation flow licence conditions are absolute limits with no margin of error provided for within the condition itself. This concern is further exacerbated by the requirement to effectively continuously monitor (often numerous samples per day). Such permit conditions are clearly not directly comparable across regimes and a fair and proportionate CAS would need to recognise this.

Energy UK therefore considers that the proposed approach to defining compliance would fail to recognise the diverse nature and scale of operations that SEPA regulates and would undermine the commitment to environmental excellence currently demonstrated by many operators in Scotland, for the reasons outlined above. However, Energy UK considers that the above concerns could be effectively addressed by amending CAS as follows.

A credible CAS has to be proportionate across operators and sectors. To this end, we would urge SEPA to consider the application of a percentile approach to non-compliance with permit conditions i.e. an operator is assessed as in 'compliance' if, say, 90% or 95% of its permit conditions are being met. The number of conditions in each permit could also be reported alongside the CAS category. In addition, a 95% percentile approach should be included in abstraction and compensation flow licence conditions to bring them in line with similar conditions in other regimes. These changes would result in a more proportionate, consistent and accurate CAS.

4. Are there any changes that you would like to see in the criteria for defining major non-compliance listed in Annex 1?

Energy UK has one significant concern with the criteria for defining major non-compliances set down in Annex 1 which relates to the numeric water resources limits. That is, a major non-compliance is defined as where abstraction rates exceed standards by more than 20% or compensation flows are less than 80% of the specified flows. Energy UK would strongly oppose this criterion being used to determine whether an incident represented a major non-compliance; indeed, these thresholds can be exceeded with absolutely no environmental impact resulting for such an exceedance. In addition to a set threshold, the duration of any such breach should also be taken into account.

Under the proposed criteria, a permit breach at a hydro scheme which resulted in no impact to the environment would be reported as a "major non-compliance" in the same way that a discharge from a sewage treatment works or major industrial site would. Energy UK would not consider this to be proportionate or indeed fair.

Notwithstanding the above, Energy UK understands that SEPA has recently intimated that the intention is for % thresholds to act as a trigger for SEPA assessment to identify whether any environmental impact had resulted from the exceedance. That is, exceedance of the % threshold would not in itself automatically mean that the condition would be assessed as a major non-compliance. This would represent a more consistent and proportionate approach.

Accordingly, for clarity and consistency in application of the criteria, the guidance in Annex 1 should be updated to reflect this position.

5. Are there any changes that you would like to see to the way in which we propose to assess compliance?

Energy UK has significant concerns regarding the way in which SEPA proposes to assess compliance. We have set these out in some detail in response to Question 3 and have not therefore repeated the same points here. However, Energy UK considers that our fundamental concerns could be effectively addressed by amending CAS as follows.

As already outlined above, a credible CAS has to be proportionate across operators and sectors. To this end, Energy UK would urge SEPA to consider the application of a percentile approach to non-compliance with permit conditions i.e. an operator is assessed as in 'compliance' if, say, 90% or 95% of its permit conditions are being met. The number of conditions in each permit could also be reported alongside the CAS category. In addition, a 95% percentile approach should be included in abstraction and compensation flow licence conditions to bring them in line with similar conditions in other regimes. These changes would result in a more proportionate, consistent and accurate CAS.

6. Are there any other environmental obligations that you consider should be included in the future development of the scheme?

The paper sets out a number of additional environmental obligations that SEPA is considering introducing into CAS from 2019. This includes Duty of Care obligations; Energy UK would be very interested to understand how SEPA would approach this; for example, would a site be considered compliant unless found to be otherwise, or is SEPA proposing specific site audits to assess compliance with Duty of Care provisions?

Environmental incidents not associated with a permit are also listed. Energy UK is concerned that this phrase is ambiguous and there is a risk that an operator could be unfairly penalised for an environmental incident which was outside their control or attributable to the activities of a third party. Accordingly, Energy UK looks forward to commenting on SEPA's consultation on widening the scope of CAS in 2018.

7. Are there any other comments that you wish to make about the proposals?

Energy UK would like to comment on Section 6 of the consultation paper on how SEPA will record compliance. Paragraph 6.8 states that the proposed methodology for recording compliance "provides a simple and easy way to understand assessment of environmental performance at the level of a permit. It answers the question: "Has the operator achieved compliance with the conditions in the permit?"

Energy UK fundamentally disagrees with the above statement. As already set out in detail in response to Question 3 (and not therefore repeated here), the recording and reporting of compliance in the way proposed by SEPA would be disproportionate, unfair and highly misleading. Indeed, it would lead the media and public alike to believe that an operator with 89 permit conditions with one minor non-compliance has the same level of environmental performance as an operator with 100% non-compliance i.e. all 89 permit conditions (or more) in non-compliance.

Moreover, the wider assessment of compliance outlines the ways in which SEPA propose to aggregate up the monthly data. However, the disproportionate, inconsistent and unfair characteristics of the initial assessment of compliance (again, set out in detail in response to

Question 3) will be inherently built into these aggregated figures as the monthly compliance category is the building block used for such aggregate. Therefore, Energy UK does not support the proposals for recording compliance as set out in Section 6 of the paper.

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