



13 March 2015

## EEB reaction to discussion point “Key Environmental issues” / disagreement at WI BREF KoM

Dear WI BREF TWG members,

In the email of 06 February 2015 sent by the EIPPCB to the WI BREF TWG, it is stated (the emphasis is ours) that:

- “**some TWG members have expressed concerns** over the manner in which certain discussions during the meeting were held”,
- “the identification of the key environmental issues and its consequences for the outcome of the BREF review process, **did not result in a strong consensus** in some key areas”,
- [the EIPPCB] “is concerned that the **level of consensus** on the slides 8-12 (see attachment) **is not as strong as we would like and may not be sufficient** to take the WI BREF review forward in an appropriate and effective manner.”
- [The EIPPCB believes] “that this important discussion requires more exchanges **amongst the TWG**. Therefore, we would like to engage with you [the TWG] in further discussion on these matters in order **to improve the level of consensus**.”
- [The EIPPCB would therefore] “very much appreciate if **[the TWG members of the WI BREF] could come forward with [...] thoughts on how to make sure the WI BREF review will focus on key environmental issues**. To facilitate this exchange, we will open a **dedicated folder in BATIS** for all interested parties to make suggestions and **for members of the TWG** to react on these suggestions, to **guide the process we will include our initial thoughts** on criteria to consider when deciding on priorities.”
- “[...] it may be necessary to convene a meeting, **in an adequate format still to be defined**, to finalise the discussion on priority setting.”

### I. EEB general reaction / position:

#### 1) A “reality check” is necessary on the consensus level reached (intends 1-3).

It is hard to understand on what basis the EIPPCB can still claim “no strong consensus” (translation: there is some sort of consensus) reached when it is obvious that there is clearly not a consensus on the ‘focused approach’ unilaterally imposed at the KoM of the BREF by DG Environment, as stated under slides 8-12, in particular slides 11+12 of the draft TWG KoM conclusions.

We would like to have clarity and an explanation on the concept of “Consensus” taken forward by the European Commission. How come there is still an impression about a (low level of) consensus? In our view, it has to be assessed on the basis of the consensual / majority positions of the 4 distinct stakeholder groups referred to under the Article 13(1) of the IED. In relation to this topic (in particular slide 11) the situation looks – in our opinion- as follows:

#### **Stakeholder Group 1 “Member States”:**

**Object:** AT, BE, BG, CZ, DE, DK, ES, FIN, IT (different rationale), NL, SE

**Support:** UK

**Conclusion:** Qualified majority objection (According to the Council voting system this proposal is clearly rejected)

#### **Stakeholder Group 2 “Industry Concerned”**

**Object:** ORGALIME (at the meeting)

**Support:** FEAD, ESWET, CEFIC, CEPI, (expressed in writing after the meeting)

**Conclusion:** no consensus, but majority support of positions expressed

#### **Stakeholder Group 3 “E.NGOs”**

**Object:** EEB (expressed clearly during the meeting and in writing)

**Support:** NONE

**Conclusion:** objection

## Stakeholder Group 4“COM”

Support: DG ENV (own proposal)

Conclusion: support

Overall conclusion: **NO “consensus”**. (There is no consensus from the stakeholder group 2, a clear qualified majority objection from the Stakeholder group 2 and objection from Stakeholder group 3).

Whilst the DG ENV suggested “focused approach” **did not receive any consensus**, despite exaggerated insistence by the EIPPCB chair, the following alternative suggestion did not raise any objection: carry out a complete data collection of an extensive list of parameters (from Chapter 2 and 4, Annex II, III and VI of the IED) and additionally those considered relevant by the TWG and decide at a second step on the priority of pollutants to focus on for BAT determination. In fact industry provided a constructive attitude that data is available anyway, so it would not be any problem to supply it in the data collection. We did not note any objection from UK on that alternative suggestion.

**The EEB concludes that the only “consensual” way forward is to keep the current approach taken in the BREF reviews: carry out a data collection exercise on all the pollutants / issues (such as listed in slide 8-11) and only at a next step, based on the sound information basis gathered, take a decision on which issues to focus for the BAT conclusions (more details under point II)**

### **2) It is not appropriate that this (process) discussion is pursued at TWG level (intends 4-6)**

It is the EEB’s view that the discussions held at the KoM are bound to the compliance with the provisions set under the IED and the BREF review rules<sup>1</sup>. It is not within the mandate of the EIPPCB to enable the experts at the KoM to decide which pollutants should be subject to BAT conclusions or to be regarded as “key environmental issues”. That approach is even more unacceptable if based on arbitrary thresholds put forward at the KoM, especially without any sound data basis enabling informed decisions on the matter.

In accordance to the IED Article 13(3), the Forum is the place where general issues relating to the exchange of information (and quality assurance) are discussed and we therefore conclude that enabling the WI TWG members to debate on BATIS is definitely not the adequate format to take this any further.

A DG ENV staff argued that the “focused approach”, as put forward at the WI BREF KoM, was agreed at the IED Article 13 Forum of 6 June 2013. Whilst we note that “frontloading” or focusing on KEI “to fill the gaps” was highlighted, so was the concern to “maintain the level of environmental ambition and ensuring that the existing conclusions on BAT were not weakened”. Deciding an upfront removal of BAT-AEL is obviously a weakening of existing conclusions on BAT. It seems that there is therefore a clear disagreement on what is meant with the focused approach or filling gaps.

In the IED Forum meetings and at the Berlin meeting, the EEB and other IED Forum members have (repeatedly) stated that the number of BAT-AELs / BATAE(P)Ls should rather increase than decrease during a revision process. At worst, the ambition level of existing BAT conclusions is confirmed.

Further to that we wish to highlight that the BREF documents (in particular BAT conclusions) are also used directly for regulating industrial activities outside of the EU (e.g. MENA countries / EEA) or used as reference in other international for a (e.g. Minamata Convention, Gothenburg). Cutting down BAT-AEL / lowering the benchmarks therefore has an indirect negative effect on environmental protection outside the EU, yet they could be an added value for permit writers or finance institutions basing their investment decisions on those benchmarks, provided these are complete and of high quality (i.e. high ambition level and issues comprehensively covered).

## **II. Position in more detail (this applies to all BREFs)**

The EEB supports in full the arguments put forward by Sweden<sup>2</sup> and Austria<sup>3</sup>, also supported by other IED Forum members. At this stage we see no need to repeat them here but endorse the positions made. *In addition to the points made, we would wish to highlight the following in regards to the COM’s interpretation of the “focused approach” and identification of “key environmental issues”*.

<sup>1</sup> Commission Implementing Decision 2012/119/EU ; OJEU L63/1 of 23.3.2012

<sup>2</sup> Memo of the Swedish EPA 11 March 2015 ref NV-00153-13

<sup>3</sup> Statement and comments submitted by the Umweltbundesamt of 05 February 2015 ref 112-14/15

## II.1 the IED and BREF review rules have not been respected, COM has overstepped its mandate

### a) Minimal list of pollutants (hazard based approach)

As already expressed in the EEB's written input to the strategy to review the Chemicals BREF, the IED requires special attention to substances of concern through various provisions, based on an "intrinsic hazard approach", the question on defining on what is a "key" environmental issue or pollutant should therefore be assessed against these criteria:

- a) Annex II (Air) point 12 and Annex II (Water) point 4, 5, and 13 (PHS/PS), refers to substances of concern based on intrinsic hazard properties (similar to REACH Art 57).
- b) Article 14(1) (a) provides that permits have to set measures (such as ELVs) for '*polluting substances listed in Annex II, and for other polluting substances, which are likely to be emitted from the installation concerned in significant quantities, having regard to their nature and their potential to transfer pollution from one medium to another;*'
- c) Annex III point 2 provides that BAT have to meet the "*need to prevent or reduce to a minimum the overall impact of the emissions on the environment and the risks to it*";
- d) The pollution prevention at source is explicitly referred to as the principle approach to address these issues.

Although the IED covers a non exhaustive list of issues<sup>4</sup>, in our view the Annex II pollutants are to be regarded as a minimal list of substances to be scrutinized and addressed in BAT conclusions and that a "hazard approach" is to be taken (point b) to support emissions prevention/control objectives within the industrial activities subject to BREFs.

Whether an activity has been/is heavily regulated or the precise extend of the emission load are irrelevant in this context, it is the intrinsic hazard property of that pollutant (listed in Annex II) which categorizes it as "key". It is worth to remind that we are referring to the EU's highest thresholds in terms of industrial activities. The EEB objects to the introduction of subjective thresholds (minimum pollution levels or risk based approach) for any other BREF review or the reversal of burden of proof to be provided at the KoM to justify covering these substances.

We were astonished to hear from DG ENV that pollutants to water which are explicitly referred to in the short list of the EU's Water Framework Directive as "priority substances" or "priority hazardous substances" were declared as "not key environmental issues" (because emitted in small amounts). This negates the fact that these substances are regarded as the shortlist of substances of highest concern for attaining the EU's good chemical status of surface waters, following a scientific scrutiny process led by the European Commission and a full co-decision procedure.

On the other hand we can understand the irritation from the operators in the WI sector in terms of "proportionality" of the ambition levels of applicable BAT conclusions compared to other IED sectors with combustion activities i.e. NOx, dust emissions levels currently proposed for LCPs. This is a Commission (and Member States) responsibility to respect the pollution prevention at source / polluter pays principle in a proportionate manner in all the BREF reviews. It is in this context that the EEB has suggested using the E-PRTR or other sources as indicators in which IED sectors the BAT ambition levels need to be proportionate to the total emissions contribution<sup>5</sup>.

The E-PRTR is inappropriate insofar that it does not provide an accurate picture of the situation due to thresholds for reporting and does not enable an assessment of the environmental performance of an industrial activity carried out within an installation (input/output relationship etc). Potential emissions / environmental impacts due to accidents or malfunction should also be factored in.

### b) **IED / BREF review rules versus change of Commission working methods**

The BREF review rules provide that the main tasks of the TWG are to:

- Identify and list **new/updated key data and issues relevant for deriving or updating BAT conclusions** for the sector (Section 4.4.2, point 2);
- Actively collect targeted technical and economic information important for the drawing up/reviewing of a BREF, including **in particular new/updated emission and consumption level data** [...] according to the process agreed by the TWG based on a general guidance of the EIPPCB **in line with the principles set out in Chapter 5** of this document [...].

In this context we would like to highlight the following elements of Chapter 5 cross-referenced to, which are relevant to the KEI discussion:

- i) "*the data provided (especially emission and consumption data) should be from recent years*" (section 5.2.3), (the purpose it to check whether BAT-AEL are up to date);

<sup>4</sup> See in particular in Article 3 the definitions on "substance", "pollution", "emission", "hazardous substances"

<sup>5</sup> See slides 12-15 of the EEB contribution to the Berlin meeting

- ii) shortlist of information items relevant to emissions to water (section 5.4.3). *This chapter does not refer to KEY pollutants or any thresholds;*
- iii) List of information items relevant to emissions to air (section 5.4.4). *This chapter does not refer to KEY pollutants or any thresholds. However it should cover only data/information “relevant” for the sector. We consider it as “relevant” if the emissions are >0. The data gathered will then enable an assessment on whether that could be a major / key environmental issue.*

The TWG may decide at the KoM whether the data collection would have to be supplemented<sup>6</sup> by sector-specific aspects for the BREF in question (not to de-list items set under the general principles on data collection).

Section 4.6.2.2 of the BREF review rules sets out the items for discussion for the KoM. Discussions on which BAT conclusions should be deleted or on the “key environmental issues” are not part of the discussion items.

We recognize that section 4.6.1, point 2 of the BREF review rules allows TWG members to indicate whether BAT or BAT-associated environmental performance levels would be “**missing, obsolete, incomplete or unclear**”. The fact that certain pollutants are dealt with under the IED EU Safety net does not mean the BAT-AELs / BATEPL would be “obsolete”. At least we have not heard any technical arguments to the contrary.

**Based on the above the EEB concludes that the Commission has breached its working mandate and that the suggested new working procedure is not in line with the BREF review rules. Unless the BREF rules are changed, the way forward proposed in that form cannot be pursued.**

We are aware that the new Juncker Commission has made commitments to “prioritise and streamline its work”. However internal instructions to the Commission services<sup>7</sup> have by no means any overriding status over nor can they interfere with the agreed IED provisions and the BREF review rules, the TWG members are solely bound to. Narrowing down the items of discussion, in particular scope of the future BAT conclusions due to the mere threat of political blockade at the comitology stage when elaborating the draft BAT conclusions through Commissioner Timmermans is not “better regulation” but undermining democratically agreed procedures and the Sevilla Process as a whole.

We will not tolerate any interference at Commissioners level in blatant conflict with the aims of the IED, the purpose of the BREFs, the mandate laid upon the Commission as agreed under the BREF review rules and the overarching Treaty obligations. *A joint letter from the different stakeholder groups demonstrating commitment to play in accordance to the BREF an rules and IED aims may be helpful.*

## **II.2: Reconciling efficiency (process) with quality of outputs / workload management**

As already expressed by the EEB at several occasions, the BREF review is to be “focused” on outcome and about improving environmental performance of the sector in line with Article 1 of the IED to “*achieve a high level of environmental protection taken as a whole*” and other policy objectives of the EU Environmental protection acquis. The EEB is concerned that the EIPPCB seems more concerned with workload management than the ambition level of the end product it has the responsibility for.

For reviews of existing BREFs –such as the WI BREF- the starting point has to be based on the existing BAT conclusions and the review has to bring added value to environmental protection.

The EEB is concerned with oral statements made by DG ENV suggesting that the BAT conclusions adopted prior to the entry into force have no legal status or are declared “irrelevant”. We strongly disagree with this interpretation<sup>8</sup>, which is also counter-productive because it negates the technical basis behind the BAT conclusions (which do not only contain BAT-AELs) reached in the past by the EIPPCB, and in particular Member States and operators efforts’ taken to comply with those BAT conclusions in accordance to the IPPC Directive. In fact it is only operators that do not yet comply with

<sup>6</sup> Check by native English speakers, means “additional” / “complement”?

<sup>7</sup> Méthodes de Travail, COM SG Implementing the European Commission 2014-2019 Working Methods “instructions to the services”

<sup>8</sup> The Q&A of the European Commission also take a more nuanced position on the legal status of existing BAT conclusions <http://ec.europa.eu/environment/industry/stationary/ied/faq.htm#ch2> Art 14(3) in combination with Article 13(7) of the IED should be compared to the IPPC-D provisions. Members of the EEB hope to have clarity through legal court case very soon (pending on Chlor-Alkali HG cells conversion)

those BAT benchmarks that have an issue with them<sup>9</sup>. Further, this consideration—if shared by others—is badly reflecting on the EU, wasting public resources (financial and civil servants working time) on agreeing on BAT conclusions which the Commission suggests to basically ignore. Is this in line with the “better regulation” agenda?! If the intention is to just align the BREF to politically negotiated EU safety net binding requirements of the Annexes of the IED – here Annex VI-, it would indeed be a waste of time and resources to continue the Seville Process any further, since it would no longer be based on performance levels achievable through BAT which is supposed to be of evolutionary nature, but politically negotiated limit values.

If the data collection shows no improvement potential on certain parameters (e.g. HF or HCL) then we expect the BREF upper ranges of the existing BAT conclusions to at least be maintained. In our understanding the upper range of the HF or HCL to at least <1mg/Nm<sup>3</sup> <8mg/Nm<sup>3</sup> (daily) **is a non-issue (=accepted by the industry)**, it is just the lower range for HCL which is questioned. In this case it would be sufficient to set an upper range e.g. <X, in particular if the emission range is close to the detection limit or triggers measurement uncertainty. We do not expect that maintaining / updating the upper range of the BATAEL on these pollutants will require diversion of resources. It is the EIPPCB's responsibility to steer the process (“non-issues” should not be debated). We refer to the remarks made by the Austrian colleague on this point<sup>10</sup>. Workload should remain the same if 10 or 40 parameters could be dealt with. Contrary to the 2006 situation, the EIPPCB is not “starting from scratch”. If the EIPPCB managed to elaborate a BREF from scratch in 36 months<sup>11</sup> (despite lack of data sources), we do not expect it is unmanageable for the EIPPCB to conclude the update within 24 months. It is rather a question on where to focus time of assessment and discussions. In our view that should definitely not be on the descriptive parts of techniques (currently used) but performance levels achieved (outcome through BAT performance).

At the KoM the EEB suggested a streamlined and focused approach on data collection which could considerably improve the EIPPCB to use its spare resources on assessing data based on the “best” performers only. It would be indeed counterproductive to overload the BREF authors with data not reflecting BAT compliant installations. In accordance to the BREF review rules<sup>12</sup>, evidence (i.e. solid technical and economic information) to support a technique as being BAT “*can come from one or more installations applying the technique somewhere in the world*”. It is not necessary – and counterproductive- to have a high quantity of data from a high number of installation in several Member States (the “all in” approach), what matters is quality and to focus on the “best” ones only, irrespective on where these operate.

The following criteria for a streamlined and focussed data collection are proposed:

- a) Reference installations can only be put forward if they comply with the existing BAT conclusions (knock-out criteria);
- b) Member States should focus on the 3 “best” environmental performers only (for each parameter / key environmental issue);
- c) Techniques used to achieve the “best” environmental performance levels obtained under point (b) are identified;
- d) Cross-media effects / implications on environmental quality standards / objectives set under relevant EU environmental protection acquis are indicated in the submission.

Based on the preliminary information submitted to BATIS / at the stage of the reference list selection at Member States level, industry may submit technical justifications that a technique / performance levels would not be applicable within the sector. These technical justifications would be accompanied by data (such as negative cross-media effects) from reference installations which would be subject to scrutiny for the TWG. The above approach should apply to any other BREF review.

As a practical way forward it was also suggested to adapt the questionnaire used for the LCP BREF review as a starting point, with adaptation in e.g. the sheets on layout (waste input controls), fuel (waste specifications) and residues sections.

Best regards,

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<sup>9</sup> this does not imply any value judgment on the technical basis of non-compliance

<sup>10</sup> See reference no 3, page 7 and following

<sup>11</sup> KoM December 2001, Final TWG November 2004

<sup>12</sup> Section 2.3.8 on BAT conclusions