

Environmental Permitting Regulations (England and Wales) 2007

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Regulatory Guidance Series, No EPR 1

Understanding the meaning of operator

IMPORTANT NOTE - PLEASE READ

This explanatory note is intended for SPECIFIC INTERNAL ENVIRONMENT AGENCY use to assist officers to interpret and enforce the Environmental Permitting (England and Wales) Regulations 2007. The explanatory note is based on information contained in the EP Regulations and on current understanding. This explanatory note may be subject to change in the light of regulatory changes, future Government guidance or experience of applying the EP Regulations. However, in the interests of transparency, this explanatory note is available to others. It must be stressed that the explanatory note has no status other than as internal Environment Agency guidance to its staff, and that it remains the responsibility of operators to comply with any obligations placed upon them under the EP Regulations.

Record of changes

Version	Date	Change
1.0	March 2008	Issued for launch of EPR
2.0	April 2008	Correction to para 5.2
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1 Introduction

- 1.1. This note provides guidance on understanding the meaning of '*operator*' for the purposes of the Environmental Permitting (England and Wales) Regulations 2007 ('the Regulations').

2 Who is the operator?

- 2.1 The Regulations define '*operator*' as: 'the person who has control over the operation of a regulated facility' (see Regulation 7(a), for 'regulated facility' see Regulation 8). There may be more than one operator of a regulated facility where more than one person is in control of different parts of the facility.
- 2.2 The Regulations explain that: before a regulated facility is put into operation, the person who will have control over its operation is also treated as the operator (see regulation 7(b)); and that after a regulated facility has ceased to be in operation the person who holds the permit is treated as the operator (see regulation 7(c)). Therefore, as Defra and Welsh Assembly Government's *Environmental Permitting Core Guidance* ('the Core Guidance') notes, a regulated facility need not be in operation for legal obligations to be imposed on an operator before and after the operation phase (see the Core Guidance, paragraph 4.4, box 2).
- 2.3 The operator or operators of a regulated facility must be correctly identified, so that a permit can require that each part of the activities is properly managed, and so that we can take appropriate enforcement action against the correct legal person (see Section 7).
- 2.4 Note that under the Regulations a single site-based environmental permit can cover more than one regulated facility. For brevity in this note, other than for Section 4.3, 'regulated facility' includes 'regulated facilities'.

3 How do we regulate operators?

- 3.1 Our effective regulation under the Regulations requires both an initial identification of the operator of a regulated facility and also continued scrutiny that an operator remains in control of the operations.
- 3.2 We must not grant a permit if we consider that the applicant will not be the operator, that is, the person who will have control over the operation of the regulated facility. Similarly, we must not transfer a permit if we consider that the proposed transferee will not be the operator of the regulated facility (see Schedule 5, paragraph 13 of the Regulations). We can only serve enforcement and suspension notices on an operator (see regulations 36 and 37). We may revoke a permit where the holder of the permit has ceased to be the operator of the regulated facility (see regulation 22).
- 3.3 The Regulations allow more than one operator to operate separate parts of a regulated facility (see, for example, regulation 21 which allows the partial transfer of a permit from one operator to another). In such cases, we must grant a separate permit to each operator for the part of the regulated facility they control.

4 What does control mean?

- 4.1 The central issue in deciding whether someone is the operator of a regulated facility is whether they are able to exercise control over its operation. The Core Guidance states that an operator '*must demonstrably have the authority and ability to ensure that the Environmental Permit is complied with*' (see the Core Guidance, paragraph 4.4, box 2).
- 4.2 We can assess whether an operator (or proposed operator) has that authority and ability by considering each of the following factors (this list is not exclusive and other factors may be taken into account).

Does the operator/proposed operator have the authority and ability to:

- manage site operations through having day-to-day control of plant operations, including the manner and rate of operation;
- ensure that permit conditions are effectively complied with;
- hire and fire key staff;
- make investment decisions; and
- ensure that operations are shut down in an emergency?

- 4.3 Where more than one operator will run different parts of a regulated facility, they will need separate environmental permits (see the Core Guidance, paragraph 4.4). Where there is more than one regulated facility at a site and more than one operator, each will need a separate environmental permit covering the parts of the regulated facility or regulated facilities each control. Applications for each part of the regulated facility or facilities should demonstrate that the appropriate person has been identified as the operator. The applications must identify any inter-reliances between the different operators and their parts of the regulated facility or facilities. There should be no ambiguity over which operator has responsibility for which part of the regulated facility or facilities (see the Core Guidance, paragraph 4.4).

5 Must the operator be the legal person who operates the regulated facility?

5.1 In some environmental protection systems the operator does not have to be the same legal person (see Section 7 below for the meaning of 'legal person') as the permit holder. This means that, for example, a holding company (one legal person) can hold a permit and an operating company (a different legal person) can run the operations. Under the Regulations only a person who has control of the relevant part of a regulated facility can hold an environmental permit. If a permit holder loses that control, the Regulations allow us to revoke the permit. Applications for environmental permits can only be made by (or on behalf of a) person who will have actual control of the regulated facility.

A 'deemed' operator

5.2 The one exception to the requirement that only a person who has control over the regulated facility can hold an environmental permit, applies to the holders of Waste Management Licences at the point the Regulations came into force. These holders are 'deemed' to be the operators of the relevant regulated facilities (see regulation 69(2) and the Core Guidance, paragraph 4.5).

5.3 It is important to understand that this position does not apply to waste operations that were granted a PPC permit. The PPC permit had to be issued to the operator (the person who had control over operations) in just the same way as it has to be issued to the operator under the Regulations.

5.4 For waste facilities with a 'deemed' operator, when you read the Regulations every reference to the operator means the 'deemed' operator. Similarly in the environmental permit, where a permit condition says the operator this means the 'deemed' operator.

5.5 This means that it is the 'deemed' operator's responsibility to ensure that there is, for example, a management system in place which meets the requirements of the permit condition.

5.6 With respect to 'operator competence', we expect that the person who is in control of operations should be competent to operate the facility. It is the responsibility of the 'deemed' operator to ensure this is the case and in the event that the management of the site is inadequate, the action we take will normally be against the 'deemed' operator.

5.7 There is no time limit to the former licence holder being the 'deemed' operator. However, if a permit is transferred, it can only be transferred to a person who will have control over the regulated facility.

- 5.8 We are considering how best to encourage the 'deemed' operator and the person in control of operations to apply to transfer the permit. In particular we will be talking to local authorities (and their representative organisations) about the situation for household waste management facilities. While we develop this approach we should not be actively seeking transfer applications for individual sites. We want to approach this in the most efficient way possible both for us and for the businesses we regulate. When the best approach has been determined, we will tell our officers and industry about our proposals.

6 Examples

- 6.1 The following examples are provided to demonstrate the main principles and points you should consider in identifying the operator(s) of a regulated facility. Each example aims to illustrate the main question as to who has control (see Section 4 above). It is the answer to this question, rather than the specific result of these examples, that should determine who is the operator in any specific case.

Where the applicant is a holding company and the operations are carried out by a subsidiary company

- 6.2 An applicant company may argue that it can demonstrate control over operations because it owns the majority of the shares in another company which in fact operates the regulated facility. In this case the applicant company is the 'holding company' of the company operating the facility (the 'subsidiary company').
- 6.3 The applicant company may argue that this means that it has control over operations carried out by the other company. We consider that such arrangements would undermine the intention of the Regulations that an operator should be in actual control of operations. In addition, we would have no way of knowing whether any such shareholdings remained in place. In this example, therefore, the subsidiary company would normally be the operator.

Where activities within a regulated facility will be carried out by contractors on behalf of an applicant

- 6.4 An applicant may argue that it is the operator of a regulated facility because it has entered into a contract with a third party (a contractor) which means that - according to its argument - the applicant retains control over the operations.
- 6.5 Whilst we would consider each case on its merits, we consider that in general such arrangements could undermine the intention of the Regulations that the permit holder should be in actual control of operations. We would have no way of knowing whether any such contracts remained in place and we consider that we should not have to monitor such commercial arrangements between operating companies and contractors. In most cases where a company has contracted out the operation of a regulated facility to a third party, the contractor will be the operator. An exception would be where, although the contractor provides the majority of the staff and perhaps equipment for the regulated facility the applicant company retains the senior staff providing primary management and operational responsibility, and so maintains control of the operations.
- 6.6 Where a local authority provides a facility for householders for the receipt of their waste, the running of the facility is often contracted out. As above in paragraph 6.5, the local authority will only be the operator if the nature of the contract means that the local authority is in control of the operations.

- 6.7 Where a company operates a regulated facility and employs contractors (who may sometimes be referred to as sub-contractors) to carry out certain activities within the regulated facility, this will not automatically result in the contractors needing a separate permit. The test remains whether it can be determined, on the basis of the criteria in Section 4 above, that the contractor is in control of the relevant part of the regulated facility. Where a contractor operates to the exact instruction of the operating company, the contractor is unlikely to be in control of the relevant part of the regulated facility.
- 6.8 A contractor may build a regulated facility and undertake commissioning tests before handover to an operating company. The contractor (often known as a 'turnkey contractor') can only lawfully operate the regulated facility if it either holds the permit or it operates the regulated facility as a sub-contractor to the exact instruction of a permit holding operating company.
- 6.9 In summary, where the responsibility for running part or all of a regulated facility is contracted from one party to another, the key issue remains the question of which party is in control. Significant factors are:
- the extent to which the contractee remains involved in actual management and operational issues; and
 - the extent to which the contractor is free to run the regulated facility as it sees fit, as opposed to being constrained to operating to the exact instruction of the contractee.
- 6.10 There are only three possible results.
- The contractee may remain the operator - see for example paragraph 6.7.
 - The contractor may be the operator - this would often be the position in paragraph 6.5 and see also the example given in paragraph 6.13 below.
 - Both parties may be the operators for the parts of the regulated facility they run - see the examples in paragraphs 6.11-6.12 and 6.14 below.

The regulated facility comprises an installation with a chemical plant and a boiler plant

- 6.11 In this example, a chemical plant is controlled by Company A and its boiler plant is operated by Company B. Company A will be the operator and require a permit to operate the chemical plant. Whether it is Company A or Company B that is the operator for the boiler plant depends upon which Company has control of that plant. This can be determined by application of the tests set out in Section 4 above.
- 6.12 Where Company B employs all of the staff in the boiler plant and is responsible for the operation and maintenance of the boiler plant and for its closure in an emergency, and where Company A merely pays Company B to produce energy, then only Company B could be the operator of the boiler plant.

The regulated facility comprises a landfill that is owned by a local authority but

operated by a private company

- 6.13 In this example a local authority owns a landfill and the equipment at the site. The local authority leases the land and equipment (on a long-term contract) to a company that has agreed to operate the landfill on its behalf. Under the contract the local authority sets the minimum standards of performance which it requires the company to comply with. The company must manage and operate the site, employ the staff at the site, maintain security, and is responsible for the lawful operation of the landfill. In this example only the company could be the operator as the local authority, despite owning the site and equipment and setting minimum standards of performance, would be unable to satisfy the test that it was in control of operations at the landfill.

Where landfill gas from a landfill is supplied to electricity generation plant

- 6.14 This example considers the arrangement of a landfill operator (Company A) supplying landfill gas to a second company (Company B) for combustion in electricity generation plant that is also part of the regulated facility. For example, Company A has a contract with Company B to supply a specified quantity of landfill gas for a price. The contract will contain performance criteria. Company B will be responsible under the contract for the operation of the electricity generation plant and to ensure that all necessary licences are obtained, maintained and complied with. On these facts, and applying the tests set out in Section 4 above, a separate permit would be required by Company A and Company B for the parts of the regulated facility each has control of.

7 An operator must be a legal person

- 7.1 An operator must be a 'legal' person to be granted a permit. The following are all legal persons and can therefore hold permits:
- public limited companies (those with 'plc' in their names);
 - private limited companies (those with 'ltd' or 'limited' in their names);
 - bodies corporate created by statute (such as local authorities and the Food Standards Agency);
 - humans; and
 - Limited Liability Partnerships (recognisable by the acronym 'LLP').
- 7.2 Additional sorts of legal person exist but are rare. Trading or business names (for example "emission services & co") are not legal persons and neither are partnership names (for example "Smith Brothers") and so cannot hold permits. The individual partners in a partnership (who may be people or companies) are legal persons and can therefore hold permits in their own right. However, unless the partnership is a Limited Liability Partnership, the partnership itself cannot hold the permit as it is not a legal person. Where any doubts exist about whether the applicant is a legal person, you should get legal advice before accepting (or rejecting) an application to grant or transfer a permit.
- 7.3 There is nothing to prevent two or more legal persons being issued with a permit jointly (whether that group of legal persons forms a partnership or otherwise) - although any group of legal persons applying jointly would have to demonstrate that they would exercise joint control of the regulated facility. However, there may be practical difficulties both for us and the joint operators in terms of enforcement and liability. For example, we would have to serve notices on each joint holder (and each joint holder would have to serve notices jointly on us) and we might prosecute both joint holders where a permit is breached. These difficulties may make such arrangements unattractive. In each case where more than one legal person wishes to jointly apply for a permit, you should get legal advice.