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Environmental Permitting Regulations (England and Wales) 2010

Regulatory Guidance Series, No RGN 1

Understanding the meaning of operator

Document owner: National Services/ Knowledge, Strategy & Planning (KSP)

Record of changes:

Version	Date	Change
1.0	March 2008	Issued for launch of EPR
2.0	April 2008	Correction to para 5.2
3.0	Sept 2008	Minor editing and clarification of deemed operator
Draft	Dec 2009	Draft for informal consultation with trade associations. Changes for water discharge, groundwater and radioactive substances activities. More flexibility in the way we apply the factors in deciding if a company is sufficiently in control to be considered the operator. No changes necessary for mining waste operations or batteries.
4.0	April 2010	Minor editing after considering submissions. Deemed operator no longer in Regulations for ex-WML but we have decided to continue the arrangements – Annex 1.
5.0	October 2014	Rebrand for Natural Resources Wales

Published by:

Published by:

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SUMMARY

This is our high level guidance to who can be an operator and therefore hold an environmental permit.

The operator is the legal person or organisation who has control over the operation of a regulated facility.

We consider every set of circumstances on its merits but the following factors help us decide if somebody has sufficient control. Can they:

- 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;
- decide who holds key staff positions and have incompetent staff removed
- make investment and/or financial decisions affecting performance of the facility;
- ensure that regulated activities are suitably controlled in an emergency.

A site owner can continue to be the operator and hold the permit where it lets a contract for activities at a site provided they continue to take responsibility and exert sufficient supervision, depending on specific arrangements. It is less likely that a remote holding company could be in sufficient control, unless it had quite detailed arrangements in place.

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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 2010 ('the Regulations'). It is written for our staff but we make it available to help customers too.

2 Who is the operator?

- 2.1 Regulation 7 defines operator as: "the person who has control over the operation of a regulated facility". (For regulated facility, see regulation 8 and regulatory guidance note RGN 2). See Annex 1 for transitional arrangements for some Waste Management Licence holders.
- 2.2 Where different operators run different parts of what would otherwise be one facility (e.g. an installation), each part is therefore a regulated facility governed by a separate permit. This is explained in para. 5.3 of Defra and Welsh Assembly Government's *Environmental Permitting Core Guidance* ('the Core Guidance'). The number of permits covering such an installation will fluctuate according to the number of operators, but this does not affect the boundary of the installation.
- 2.3 The Regulations state 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, a regulated facility need not be in operation for legal obligations to be imposed on an operator before and after the operation phase.
- 2.4 The operator of a regulated facility must be correctly identified, so that a permit can require that each part of the activities on a site are properly managed, and so that we can take appropriate enforcement action against the correct legal person (see section 5).
- 2.5 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 4.7, 'regulated facility' includes 'regulated facilities'.

How do we regulate operators?

- 2.6 The Regulations require us to identify the operator and make sure he continues to be in control of the operations.
- 2.7 We must not grant or transfer 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; or if we consider they will not operate it in accordance with the permit (see Schedule 5, paragraph 13 of the Regulations).
- 2.8 We can only serve enforcement and suspension notices on an operator (see regulations 36 and 37).
- 2.9 We may revoke a permit where the holder of the permit has ceased to be the operator of the regulated facility (see regulation 22).
- 2.10 Regulation 21 allows the transfer in whole or part of a permit from one operator to another.

3 What does control mean?

- 3.1 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" (para. 5.1, box 1).
- 3.2 We can assess whether an operator (or proposed operator) has the authority and ability by considering the following and other factors.

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
- decide who holds key staff positions and have incompetent staff removed
- make investment and/or other financial decisions affecting performance of the facility
- ensure that regulated activities are suitably controlled in an emergency.

A site owner can continue to be the operator and hold the permit where it lets a contract for activities at a site provided they continue to take responsibility and exert sufficient supervision, otherwise the permit must be transferred to the contractor.

An operator should understand that it is responsible should a notice need to be served or enforcement action – including criminal prosecution - become necessary.

Control should be at the correct level

- 4.3 A typical holding company will sit above several operating companies. The holding company may suggest it can demonstrate control over operations because it owns the majority of the shares in the company which actually operates the regulated facility. That is not sufficient. It would need contractual arrangements in place to deliver the factors above before we could regard it as the operator. (See transitional arrangements for some waste operators in Annex 1).
- 4.4 It is also commonplace to use contractors to undertake activities on behalf of an operating company. That is acceptable provided adequate contractual controls are in place which means that the applicant retains control (and responsibility) over the operations. 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.
- 4.5 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 an operating company holding the permit .
- 4.6 We will consider each case on its merits and will always need to be sure that the permit holder is actually in control of the operation.

Multiple operators

- 4.7 Where more than one operator will run different parts of what would otherwise be one regulated facility, applications for each part of the regulated facility or facilities must demonstrate that the appropriate person has been identified as the operator. The applications must identify any inter-relationships between the different operators and their facilities. There should be no ambiguity over which operator has responsibility for which part of the regulated facility.
- 4.8 There can be multiple operators for a facility, each individually and collectively responsible for it. For example, a sewage treatment plant comprising a water discharge and/or groundwater activity and serving several properties. There only needs to be a single application for the facility, made jointly by all the householders.

5 An operator must be a legal person

5.1 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, NHS Trusts and the Food Standards Agency);
- individual persons; and
- Limited Liability Partnerships (recognisable by the acronym LLP).

5.2 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;
- unless a partnership is a Limited Liability Partnership, the partnership itself cannot hold the permit as it is not a legal person. The individual partners in a partnership (who may be people or companies) are legal persons and can therefore hold permits in their own right;
- a club or charity might be a limited company, or they might be individuals (humans) who are the trustees or members who take legal responsibility. The limited company or the individual persons would be the legal person who holds the permit.

Our officers should get legal advice before accepting (or rejecting) an application to grant or transfer a permit if there are any doubts about whether the applicant is a legal person.

5.3 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. Legal advice should be taken if the joint arrangements are unclear.

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 each specific case.

An installation with a chemical plant and a boiler plant

6.2 In this example, a chemical plant is controlled by one company and its boiler plant by an energy company. The chemical company will be the operator and require a permit to operate the chemical plant. Whether it is the chemical company or the energy company 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.

6.3 Where the energy company 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 the chemical company merely pays the energy company to produce energy, then only the energy company could be the operator of the boiler plant. There would be one installation but two regulated facilities, each with its own operator.

Local authority civic amenity waste sites

6.4 Where a local authority provides a facility for householders for the receipt of their waste, the running of the facility is often contracted out. The local authority will be the operator if the nature of the contract gives it sufficient control of the operations. (See Annex 1 for transitional arrangements where this is not the case).

Water and sewerage undertakers

6.5 Water and sewerage undertakers may contract out the routine operation and maintenance of a group of sewage works to a contractor. The undertaker could be the operator provided they retain control of the operation and can demonstrate this to us (see criteria in section 4). If responsibility for the water or sewage works passes to the contractor without the owner retaining sufficient supervision and control, then the contractor will be the operator and should hold the permit.

Discharge of effluent containing hazardous substances or non-hazardous pollutants to surface waters or groundwater from industrial and commercial activities

- 6.6 Typically the company owning the site would tend to have the necessary level of control to be the operator, but it could be a holding company or contractor under some circumstances (see section 4).

Discharge of used or waste sheep dip, used biocides or used dilute pesticides to ground

- 6.7 Typically the person in charge and hence the operator could be a farmer, land manager or an agricultural contractor according to who truly has control.

Nuclear licensed sites

- 6.8 The site licensee company (SLC) is the operator.
- 6.9 Where a tenant on a nuclear licensed site carries on a radioactive substances activity but is not the SLC, and the activity is not under the day-to-day control of the SLC, then that tenant requires a permit.
- 6.10 Where the Ministry of Defence (MoD) owns facilities that are operated on its behalf by a contractor, that contractor is the operator and will require a permit. The MoD itself does not require a permit where it operates a facility as the Regulations don't apply to it.

Shared non-nuclear facilities

- 6.11 Where more than one operator uses a common facility, such as a laboratory, we will normally require the regulated facility to be split (see 2.2 above) with each operator holding a permit for the radioactive substances activities it performs. However, under certain exceptional circumstances we may only require one of the operators to hold a permit. See '*Regulating radioactive substances activities at non-nuclear sites*', Regulatory Guidance Series No. RSR3.

Annex 1: Holders of Waste Management Licences who were deemed as operators coming into Environmental Permitting

- 1 At the time the Regulations took effect in April 2008, there were holders of waste management licences¹ (WML) who occupied the premises but were not in day to day control of the activity, eg at some municipal waste facilities. In order to avoid the administrative burden of immediately having to apply for new permits, the Regulations deemed all holders to be operators, even if they did not satisfy the control requirements set out in this guidance.
2. Although the 2010 Regulations no longer contain this provision, we have decided to maintain it.
3. For 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. Thus 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.
4. In the event that the management of one of these sites is inadequate, we will normally take action against the deemed operator.
5. 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.
6. We will work with deemed operators to ensure they have sufficient control or transfer it to a person who does. For example, we are talking to local authorities and their representative organisations. We want to approach this in the most efficient way possible both for us and for the businesses we regulate. We will not be actively seeking transfer applications for individual permits while we develop the arrangements except where there are particular problems on a site². We will tell our officers and industry before implementing them.

¹ This position did not apply to waste operations that were granted a pollution prevention and control (PPC) permit. The PPC permit had to be issued to the operator. ² [Charging arrangements for this transfer].