

## **Environmental Permitting Regulations (England and Wales) 2007**

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**Regulatory Guidance Series, No EPR 5**

# Operator competence

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.

**Published by:**

Environment Agency  
Rio House  
Waterside Drive, Aztec West  
Almondsbury, Bristol BS32 4UD  
Tel: 0870 8506506  
Email: [enquiries@environment-agency.gov.uk](mailto:enquiries@environment-agency.gov.uk)  
[www.environment-agency.gov.uk](http://www.environment-agency.gov.uk)

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# 1. Introduction

1.1 This guidance provides an explanation of:

- the basis for requiring an operator to demonstrate competence;
- those elements of an application for an environmental permit which when taken together demonstrate an operator's competence; and
- how information provided by operators is used to assess competence.

1.2 The guidance focuses on the assessment of competence when determining applications for the grant or transfer of a permit. However, the operator is required to maintain competence for the duration of the permit and we may reassess an operator's competence at any time, and particularly where the results of compliance assessment suggest competence may not have been maintained

## 2. Operator competence

- 2.1 Assessment of competence provides a means of ensuring that an environmental permit is only granted or transferred to an operator who is:
- able to carry out the relevant activities; and
  - fulfil the obligations of an operator.
- 2.2 Schedule 5 paragraph 13 of the Regulations provides that we must refuse an application to grant or transfer an environmental permit if we consider that the applicant or the proposed transferee will not operate the facility in accordance with the permit.
- 2.3 Operators must maintain competence. If an operator ceases at any time to be competent we may decide to take enforcement action, or to revoke the permit.
- 2.4 The Government Guidance on Environmental Permitting (“Core Guidance”) expands upon the meaning of operator competence. It specifically identifies four factors that are relevant when assessing competence. We might doubt whether the operator could or is likely to comply with the permit conditions if:
- the operator’s management system is inadequate;
  - the operator’s technical competence is inadequate;
  - the operator has a poor record of compliance with previous regulatory requirements; or
  - the operator’s financial competence is inadequate.

The following sections deal with each of these points in turn.

### **3. Management systems**

- 3.1 All operators are required to manage operations in accordance with a management system; a standard permit condition or rule is used to impose this requirement. An effective written management system is essential to ensure that permitted operations are carried out in a controlled manner and in such a way that the risk of pollution is minimised.
- 3.2 Applicants for standard permits are required to indicate the type of management system they intend to adopt by ticking the appropriate box on the application form, and providing a reference number. If this information is provided then for the purposes of operator competence the management system will be deemed adequate. We do not require a copy of the management system to be submitted.
- 3.3 Applicants for bespoke permits are in addition required to submit an outline summary of their management system. A copy of the full management system is not required. The outline management system should be assessed to ensure there are no serious deficiencies. If the document passes this assessment the management system element of operator competence is fulfilled.
- 3.4 It is important that operators have an effective management system in place to ensure a high level of environmental protection. Compliance assessment plans should recognise the importance of checking the adequacy and implementation of management systems at newly permitted operations.

## 4. Technical competence

- 4.1 All operators should be technically competent to operate their facility and be capable of demonstrating their competence on an ongoing basis. Technical competence will be largely demonstrated through the operator's knowledge of the law as it applies to his operations, appreciation of how to comply with the law, his understanding of environmental risk, and the appropriate control measures to minimise risk. Operators will also require a knowledge of how activities are carried out, safe handling of materials, and the operation of plant and machinery.
- 4.2 All operators must demonstrate adequate technical competence. This aspect of operator competence is addressed differently for waste and non-waste operations.

### Non-waste operations

- 4.3 An operator's management system must address staff training and development, and make provision to update staff competence in line with technical and legislative change. At the application stage no specific action is required to assess technical competence as this is an integral part of assessing the management system. Thereafter an operator's technical competence is reviewed by assessing the adequacy and delivery of staff competence in accordance with the management system.

### Relevant waste operations

- 4.4 Operators of relevant waste operations<sup>1</sup> will explain in their management system how they intend to demonstrate technical competence. They must also satisfy one of the following:
- Compliance with an approved industry scheme – details of compliant individuals / sites will be available on databases maintained by scheme providers
  - Holding an appropriate Certificate of Technical Competence (CoTC) – this can be checked on the WAMITAB CoTC database
  - Holding registered and validated deemed competence status – all deemed competent persons will be listed on an Environment Agency database
  - Has previously completed an Environment Agency assessment for non-CoTC activities – details of all persons and the sites / activities for which they were assessed will be listed on an Environment Agency database. No new Agency assessments will be carried out after the first industry scheme is approved but previous assessments will remain valid.

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<sup>1</sup> Relevant waste operation is defined in Schedule 9 paragraph 2(2)(b) of the Regulations

Applicants are required to specify on the application form which option they will rely on. The operator's management system will include reference to the relevant scheme with details of any technically competent persons. All applications for the grant or transfer of a permit must be checked against the relevant database to verify that the operator's technical competence is valid.

## **Industry schemes**

4.5 Technical competence schemes will be developed and run by industry in accordance with principles laid down in the Core Guidance. The number of schemes available is likely to vary, but each scheme must be approved by Government. Scheme providers will maintain databases of individuals and/or organisations qualifying as technically competent under their scheme. To establish whether an applicant has the appropriate level of technical competence it will be necessary to:

- check that the technically competent person/organisation appears on the chosen scheme's database; and
- check that the type and level of competence attained is appropriate to the operations being permitted

The databases will also be used by staff to carry out compliance assessment checks.

4.6 Where industry schemes refer out to Environment Agency guidance on minimum attendance criteria operators must comply with the requirements contained in that guidance.

## **Certificates of Technical Competence (CoTCs)**

4.7 Existing holders of CoTC issued by the Waste Management Industry Training and Advisory Board (WAMITAB) will continue to be recognised as competent to manage operations for which their certificate is valid. A database of CoTC holders will be maintained by WAMITAB and will be the definitive central record.

## **Deemed competence**

4.8 Persons operating under a waste disposal licence before May 1994 have been deemed technically competent for that operation, and have never been required to demonstrate their technical competence. These individuals will retain deemed competent status if they register their claim and the registration is accepted as valid. After this date the register will be closed to any future claim of deemed competence. The registration process is likely to be conducted during summer 2008.

A database will provide a definitive list of deemed competent individuals for specified operations and locations. Where an operator claims deemed

competent status, either at application or during compliance assessment, this should be checked against the deemed competence database.

### **Environment Agency assessment**

- 4.8 It is anticipated that industry schemes will provide full coverage across the waste industry. No further Agency assessments will be carried out after the first industry scheme is approved.
- 4.9 Where an applicant claims their waste operation is not covered by any approved industry scheme we will identify the most appropriate scheme for the activity. If this is not possible we are required to assess the operator's technical competence. In exceptional circumstances we may carry out a 'bespoke', activity specific competence assessment.
- 4.10 For transfers; an individual who has previously passed an Agency assessment for a non-CoTC activity will remain competent if their responsibilities within the management structure do not substantially change as a result of the transfer. This also applies during the transitional period when a licence holder may be required to transfer a permit because it is not the operator.

### **Grace periods**

- 4.11 A period of grace is provided for operators who are unable at the time of application to demonstrate technical competence. Operators in this position are allowed a maximum of four weeks from the time at which permitted operations begin to obtain an Environmental Permit Operator Certificate (EPOC) awarded by the Chartered Institution of Wastes Management. For low risk operations this is a sufficient level of competence. Operators of medium or high risk operations will additionally be required to attain the appropriate level of competence within 12 months.

The provision of grace periods may be scheme specific, e.g. under the scheme proposed by Environmental Services Association and EU Skills no grace period is available to an operator intending to demonstrate technical competence through a competence management system.

- 4.12 If an applicant relies on a period of grace this should be recorded in the decision document and will be adequate for the purpose of the operator competence assessment.

### **Continuing competence**

- 4.13 Technical competence must be maintained. Operators are required to update their skills and knowledge, and are required to pass a periodic assessment to demonstrate an understanding of changes affecting the waste industry (individuals are tested every 2 years, competence management systems are audited every year). Failure to do so causes

technical competent status to lapse. Results of continuing competence assessments are recorded on scheme providers' databases. Previous written evidence of competence, such as letters or certificates, may not demonstrate current status so the validity of any claim must be checked against the appropriate database. This applies equally to permitting and compliance assessment checks.

### **Specific permit requirements**

- 4.14 Permit conditions may specify that an activity can only take place in the presence of a person with a specific level of qualification e.g. HND or higher in Chemistry for hazardous waste treatment. Such requirements are not included in the operator competence assessment during application. It may however be a priority when undertaking compliance assessment.

## 5. Relevant convictions (compliance record)

- 5.1 We will assess the compliance record of an operator in the following circumstances:
- application for a new permit;
  - application to transfer a permit; and
  - conviction of an existing operator;
- 5.2 Only convictions for an offence relating to the environment or environmental regulation will be considered relevant. A definitive list of relevant offences appears in the relevant convictions operational instruction and is reproduced in guidance to applicants. The list will be amended as necessary to reflect changes in legislation.
- 5.3 In assessing an operator's competence we take into account relevant convictions held by both the operator and by relevant persons. Relevant persons are defined in the Core Guidance as being:
- the operator (i.e. the 'legal person' holding or applying for the permit – a person, persons in a partnership, or a corporate body); and
  - a director, manager, secretary or other similar officer of an operator (when it is a corporate body) and a partner in a limited liability partnership (LLP), who has either been convicted of a relevant offence themselves, or who held a position in another corporate body or LLP when it was convicted of a relevant offence.
- 5.4 Applicants are required to disclose in their application any relevant convictions against themselves or other relevant persons. The provisions of the Rehabilitation of Offenders Act 1974 apply, allowing convictions held by individuals to be treated as 'spent' after a prescribed period. Spent convictions are not disclosable. Although the 1974 Act does not apply to corporate bodies we will treat corporate bodies in the same way as individuals. Corporate bodies will not be required to declare any conviction that would be spent if it were held by an individual. Details of relevant rehabilitation periods are given in the relevant convictions operational instruction.
- 5.5 The name of the operator and each relevant person must be checked against the national enforcement database (NED) to ensure the accuracy of any declared convictions, and for evidence of undeclared convictions. NED only contains details of convictions for which we were the prosecuting authority.
- 5.6 Where there is no evidence of convictions the operator satisfies the competence assessment for relevant convictions.

- 5.7 If relevant convictions are declared, or are otherwise revealed, their significance are assessed by reference to the criteria given in the relevant convictions operational instruction. If previous offences are considered of “concern” the applicant is invited to submit a post conviction plan to demonstrate their competence. If the post conviction plan does not sufficiently address our concerns of the case is one of “serious concern”, the case will be referred to a central assessment panel. The panel will determine whether the operator may be considered competent to hold a permit, and will recommend the appropriate course of action in accordance with principles laid out in the relevant convictions operational instruction.
- 5.8 Following a successful prosecution, or where we otherwise become aware that an existing permit holder has acquired a relevant conviction then, as part of the compliance assessment process, they will be required to submit a post conviction plan. This provides the operator with an opportunity to explain how a repetition of the offence will be avoided, and why we should continue to consider them to be competent.
- 5.9 If the continued competence of an operator needs further consideration the case will be referred to the central assessment panel. The panel will consider the facts in accordance with principles laid out in the relevant convictions operational instruction and recommend a course of action which may include, where appropriate revocation or partial revocation of a permit. The ultimate decision on whether to implement the panel's recommendation lies with the Area.

## 6. Financial competence

- 6.1 We may only issue a permit if we have reason to believe that the operator will be capable of meeting the financial obligations of the permit. It is necessary to identify those operators who pose the highest financial risk and confirm their financial stability prior to issue. In order to establish this we require an applicant to declare any current or past insolvency and bankruptcy proceedings against it or any relevant person, and to give consent for us to carry out a credit check.
- 6.2 Where a declaration is made and consent for a credit check is not forthcoming the operator should be advised that the application may be refused.
- 6.3 Where an operator declares bankruptcy / insolvency proceedings against itself or a relevant person it will be necessary to refer the application to the National Permitting Service financial provision team. This team will conduct further checks to determine whether the operator can be considered financially competent and advise permitting staff accordingly.

### Landfill operations

- 6.4 The Landfill Directive requires an operator to make financial provision prior to the operation of the landfill, provision adequate to discharge the obligations of the permit (including closure and aftercare). Operators of landfill sites must demonstrate they have fulfilled this requirement in accordance with our policy requirements, i.e. sufficient, secure, and available to the operator.
- 6.5 Operators will specify the mechanism they have chosen to make financial provision and provide a plan of the estimated expenditure or each phase of the landfill. This information will be passed to the National Permitting Service financial provision team who will check whether appropriate provision is in place and advise permitting staff accordingly.