

1. Background

Operators of permitted waste sites need to be competent to run their site successfully and in a manner which protects the environment and human health. 'Competence' in this context means the ability to comply with the conditions of their permit and run a waste site effectively without negatively impacting the environment or local communities.

There is evidence from the waste industry and regulators that a lack of competence is causing poor performance across the sector. The reasons why operators do not hold the appropriate levels of competence are varied. Whilst certain operators deliberately choose not to achieve the levels of competence needed to run their waste site in line with their permit, other operators are ignorant about what levels of competence they need.

The regulators are required to assess that an operator has the appropriate level of competence needed to fulfil the obligations of their waste permit and operate their facility safely. When the previous waste management licensing system was replaced in 2007 by the Environmental Permitting Regulations (EPRs), all existing waste management licences automatically became environmental permits without any amendment, and without any reassessment of the operator's competence. Changes were made to the way that a waste operator's competence was assessed. The previous 'fit and proper person' test, as set out in past legislation, was replaced with a more light touch approach. Paragraph 13 of Schedule 5 to the EPRs sets out that a regulator must refuse an application for the grant of an environmental permit if the applicant cannot satisfy the regulator that they will:

- be the operator of the regulated facility; and
- operate the regulated facility in accordance with the environmental permit.

The Environmental Permitting Core Guidance¹ explains how the EPRs should be applied in practice and Chapter 9 of the guidance sets out the scope and application of operator competence. Using their powers under the EPRs, the regulator may refuse an application, set permit conditions or take enforcement action. When exercising their powers, the regulators must have regard to the Core guidance. The Core Guidance advises that operator competence can be considered by the regulator at any time, whether as part of the determination of an application or during the life of a permit, and the appropriate action to take where the regulator finds inadequate operator competence.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211852/pb13897-ep-core-guidance-130220.pdf

The four elements of operator competence are outlined in the Core Guidance: 1) past operator performance, 2) management systems, 3) technical competence, and 4) financial competence/provision.

Since 2008 the regulators have strengthened the enforcement of certain elements of operator competence by including permit conditions when issuing or transferring a waste permit. There are currently about 11,800 environmental permits relating to operations at waste sites or installations. An estimated 9,200 permits now have a technical competence and a management system condition. However, around 2,600 permits that were issued before 2008 and not varied since do not contain such conditions. This has inadvertently created an imbalance in the waste permitting stock resulting in an un-level playing field.

All permits that were issued before 2008 would eventually be varied to include technical competence and management system conditions, but it is estimated that on the current rate of variation this would take around 20 years and so will not deliver the increase in competence standards across the sector needed now. Nor do we believe it is appropriate to vary all 2,000 permits in one go as the cost of the variations would necessarily be borne by operators, and scarce permitting expertise would need to be diverted from dealing with other permit applications.

2. The case for action

The most effective way to tackle poor performance is for the regulators to intervene at the permit application stage to ensure that operators have the appropriate level of competence in the first place or not issuing a permit if an operator cannot demonstrate the appropriate level of competence.

The regulators use Operator Risk Appraisal (OPRA) to determine the level of risk from an activity. An operator's compliance record forms a significant part of their overall risk. Operators with a good record of permit compliance can expect to fall into band A or B whereas operators with serious or multiple permit breaches will fall into bands D, E and F.

Evidence from the Environment Agency (EA)² shows that, in England in 2015/16 465 (4%) permits in the waste industry had poor compliance with permit conditions and were rated band D, E or F. Of these, 203 are persistent poor performers who have been rated DEF for two years or more. In 2015, 69 (73%) of the serious pollution incidents caused by permitted waste sites were rated DEF. Of the 14 waste sites that were designated as sites of high public interest in 2015 by the regulators, 9 (64%) had a DEF rating. Evidence from Natural Resources Wales (NRW) shows that, in

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553539/Regulating_the_waste_industry_2015_evidence_summary.pdf

Wales 6.5% of the 603 permitted operational waste facilities in Wales were poor performing and rated bands D, E or F. Dealing with poor performing sites also costs the regulators substantially more than they receive in permit fees due to the need to respond to complaints and intervene more frequently to drive up standards.

Poor competence can also lead to a site operator failing to comply with the regulators' enforcement requirements and ultimately abandoning their site, leaving the government to clear the remaining waste. There are approximately 40 abandoned sites in England and Wales. The waste at abandoned sites is not stored or managed in accordance with the conditions of the permit, increasing the risk of fires which can involve large amounts of waste and burn for prolonged periods. The costs to the regulators and local services to deal with these fires are significant. For example, costs incurred by the London Fire Brigade in attending one site in London over the course of 2013 to 2015 were nearly £1m.

Changes to the Core Guidance in 2013 further clarified the ability of the regulators to refuse and revoke permits on operator competence grounds. This resulted in a reduction of 6% (217 to 203) of persistent poor performers from 2014 to 2015. Whilst this was clearly beneficial, it did not go far enough to strengthen the ability of the regulators to assess and enforce all four areas of competence to significantly raise the standard of operator competence and reduce the number of poor performing sites.

3. Our approach

The vast majority of respondents to the 2015 Call for Evidence³ supported proposals to increase the standard of operator competence across the waste sector. To fulfil the commitment made in the 2015 government response we are proposing to raise the bar to hold and obtain a waste permit by strengthening the regulators' assessment and enforcement of the competence of waste operators. For each element of the four elements of operator competence we are proposing to:

- 1. Past Performance** – widen the scope of offences, behaviour and relevant persons that the regulators can take account of when assessing competence.
- 2. Management Systems** – require all permitted waste operators to manage and operate in accordance with a written management system.
- 3. Technical Competence** – require all permitted waste operators to demonstrate appropriate technical knowledge of their waste site and provide details of the Technically Competent Manager.

³ https://consult.defra.gov.uk/waste/enhanced_powers_to_tackle_waste_crime/

4. Financial Competence/Provision – require the operator of any permitted site to be financially capable of running their waste business and provide financial security.

The 2015 government response⁴ concluded that operator competence should be better enshrined in legislation. We have since discussed with the regulators which sections of the EPRs need to be amended to implement the proposals and which parts of the Core Guidance need to be clarified to better reflect the scope of the powers. This will tighten the regulatory regime whilst still enabling the waste industry the flexibility to operate. We will take forward the proposals through a combination of:

- enshrining certain elements in the EPRs
- amending the EPRs to create a level playing field for all waste permits
- amending guidance.

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/466879/waste-crime-consult-sum-resp.pdf