

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

enhancing... improving... cleaning... restoring...
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Regulatory Guidance Series, No EPR 10

**Dealing with the death, financial
difficulties or striking off of an
operator**

Version 1.0 June 2009

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 (EP Regulations). 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 (available at www.defra.gov.uk) 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	June 2009	Initial version, for installations and waste operations

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This document is out of date and was withdrawn (01/02/2016)

1. Introduction

1.1 This guidance note is to assist you when the operator of a regulated facility is affected by one of the following events:

- death
- bankruptcy
- striking off/dissolution
- insolvency
- the entering into of a voluntary arrangement

1.2 If an event occurs there will no longer be an operator or the operator's ability to operate the regulated facility will have been significantly affected. The concept of an operator which exercises control over the regulated facility is key to the environmental permitting regime. Generally, only an operator may obtain, hold, transfer or surrender an environmental permit. The operator is responsible for operating the regulated facility in accordance with the environmental permit; if there is a breach, enforcement action will generally be taken against the operator.

1.3 When an event occurs our main aims are to ensure that the environment is protected and to assist the operator and its representatives to manage the situation with a view to achieving the best possible environmental outcome.

1.4 In order to apply a reasonable and consistent approach to regulated facilities affected by these events, we have developed a procedure that should be followed in all cases.

1.5 This guidance note:

- establishes our policy aims,
- describes the events that can occur and defines key terms,
- explains the effect of each event on the environmental permit; and
- outlines the approach we should take, the basic information we should gather and the steps we need to take to achieve our aims.

2. Our policy aims

We aim to:

- (a) ensure that the environment is protected,
- (b) work with the operator/its representative(s) to manage the situation,
- (c) if appropriate/possible, achieve the whole or partial transfer or surrender of the environmental permit¹,
- (d) where this is not possible, try to ensure the site is left in a 'satisfactory state'² and is not at risk of becoming 'contaminated land' under the Environmental Protection Act 1990.

This document is out of date and was withdrawn (01/02/2016)

¹ In particular, to avoid the environmental permit being disclaimed as onerous property if the operator is declared bankrupt or a liquidator has been appointed.

² See regulatory guidance note EPR 9 on surrender of permits.

3. Events affecting natural persons

- 3.1 The events that affect operators who are living or 'natural' persons, e.g. sole traders and members of a partnership, differ from those that affect purely legal entities such as companies. This section looks only at those events which affect natural persons.

Death

- 3.2 If the environmental permit has been issued in the name of only one operator, it will cease to exist if he dies. Where the permit is in the name of more than one individual (e.g. where the regulated facility is operated by a partnership) and one of them dies, the environmental permit will continue to exist in the name of the remaining individual(s).

- 3.3 Where the environmental permit ceases to exist, any outstanding applications (e.g. for transfer or variation) will fall aside and operating the regulated facility will be an offence under the Environmental Permitting (England and Wales) Regulations 2007 (the regulations).

- 3.4 When an operator dies we should seek to establish:

- whether the facility is still operating and, if so, who is operating it;
- whether the deceased owned the site;
- if the deceased owned the site or owed us any money, the identity of his personal representatives;
- if the deceased did not own the site, who does and on what basis the deceased occupied it e.g. lease, licence etc.;
- whether anybody is interested in purchasing/operating the regulated facility;
- what steps, if any, need to be taken in relation to the site in order to avoid harm to the environment or human health.

- 3.5 Given that the operator has died, the information gathering process should be conducted as sensitively as possible. An employee of the deceased, such as a site manager, may be able to provide some information, but contact with the family of the deceased may be necessary.

Bankruptcy

- 3.6 Bankruptcy is the process by which a debtor's property is brought under court control and distributed to the bankrupt's creditors. An individual operator or a member of a partnership may be declared

bankrupt. Bankruptcy orders are made after the presentation of a petition, usually by the debtor or one of his creditors. The bankruptcy will be administered by the official receiver or an insolvency practitioner acting as a trustee in bankruptcy (the trustee).

- 3.7 When the bankruptcy order is made the bankrupt's estate, including the environmental permit, immediately vests in the trustee, who becomes the operator³ for the purposes of the regulations. Where the permit is in the name of more than one individual (e.g. where the regulated facility is operated by a partnership) and one of them is declared bankrupt, the environmental permit will continue to exist in the name of the remaining individual(s). We are able to exercise all our powers under the regulations against the trustee, though it should be borne in mind that, like a liquidator (see section 4.21 below), the trustee may disclaim the environmental permit as 'onerous property' at any stage.
- 3.8 The trustee collects in the bankrupt's assets. He may sell the business and apply to transfer the environmental permit. In the absence of a transfer or a disclaimer the environmental permit remains vested in the trustee, though it may revert to the bankrupt if the bankruptcy is brought to an end by the court.⁴ Having paid the costs of the bankruptcy, the trustee distributes any available funds firstly to any preferential creditors and then to any other creditors, including us.
- 3.9 The bankruptcy comes to an end if it is discharged (usually within 12 months unless there is an application to extend) or annulled by the court.
- 3.10 A bankrupt should not make any direct payments to us. If we feel it is appropriate to seek to recover any unpaid fees etc, we should contact the trustee. Similarly, any correspondence or notices relating to the environmental permit should be sent to the trustee.
- 3.11 When an operator is declared bankrupt we should seek to establish:
- the identity of the trustee in bankruptcy and the terms of any court order;
 - whether the regulated facility is still operating and, if so, who is operating it;
 - the intentions of the trustee in bankruptcy;
 - whether anybody is interested in purchasing/operating the regulated facility;
 - what steps, if any, need to be taken in relation to the site in order to avoid harm to the environment or human health.

³ note that this is not a transfer of the environmental permit

⁴ reference should be made to the terms of the relevant court order.

Individual Voluntary Arrangements

- 3.12 In an effort to avoid bankruptcy, an operator may enter into an individual voluntary arrangement (IVA) with his creditors to repay some or all of his debts. An IVA may be proposed on behalf of an individual, a member of a partnership or a partnership. The proposal has to be put together with the assistance of an insolvency practitioner and agreed by 75% (in value) of the creditors. The IVA specifies how the debtor is going to repay the creditors and the period for repayment (usually five years). The IVA is overseen by an insolvency practitioner, who monitors the debtor's income and expenditure, supervises the arrangement and pays the creditors. If the IVA fails then the creditors may seek a bankruptcy order.
- 3.13 An IVA does not affect the environmental permit, but while the IVA is extant all creditors are prevented from pursuing debts or progressing any legal action relating to debts, such as outstanding subsistence fees.
- 3.14 If an operator is proposing to enter into an IVA we should:
- seek to establish as soon as possible the identity of the insolvency practitioner and the terms of the IVA proposal;
 - establish whether any operational changes are being made that may have an effect on environmental protection; and
 - if we are a creditor:
 - i. inform the insolvency practitioner of our interest; and
 - ii. decide whether, taking our policy aims into account, we should vote for or against the proposed IVA.

4. Events affecting legal entities other than natural persons

- 4.1 These events only affect legal entities such as companies and partnerships; they do not apply to natural persons.

Administration⁵

- 4.2 Administration is an insolvency procedure which applies to companies and partnerships. Its primary aim is to rescue a company or a partnership as a going concern. If this is not achievable, the administrator will seek to recover more for creditors than would be possible if the company were wound up. Only if these options fail will the administrator seek to sell the assets of the business.

The administrator may be appointed in one of three ways:

- (i) by administration order where the court is satisfied that the company/partnership is or is likely to become unable to pay its debts and that it is reasonably likely that the purpose of the administration can be achieved;
 - (ii) by the holder of a qualifying floating charge⁶; or
 - (iii) by the company or its directors filing a declaration at court stating that the company is or is likely to become unable to pay its debts, is not in liquidation and is not subject to any other restriction preventing the appointment.
- 4.3 Once appointed the administrator must act in order to:
- a) secure the survival of the company as a going concern;
 - b) achieve a more advantageous realization of the assets of the company for the creditors than would be available on winding up; or
 - c) realize the assets in order to make a distribution to one or more secured or preferential creditors.

⁵ The current procedure was introduced by the Enterprise Act 2002. It should be noted that the former procedure, where only the court may appoint an administrator, remains in force for some types of company, including the water industry under the Water Industry Act 1991.

⁶ A floating charge is an equitable charge which 'floats' over the constantly changing assets of a business rather than attaching to a particular item of property. Therefore, the business can continue to deal with its assets without the prior consent of the holder of the floating charge, and the holder has no right to possession of the assets covered by the charge until one of the events specified in the charge instrument causes it to crystallize.

In addition, the administrator must ensure that he performs his duties in the interests of the creditors as a whole and as quickly and efficiently as reasonably practicable.

- 4.4 One of the main features of administration is that it creates a moratorium which restricts most actions against the business. The moratorium effectively commences when an application to court is made, or a notice or declaration is filed. During the moratorium permission to take action may be sought from the administrator or, if this is not forthcoming, from the court. Any third party rights may still be pursued once the moratorium is lifted.
- 4.5 The appointment of an administrator has no effect on the existence of the operator as a legal entity or on any environmental permit it holds. Depending on the terms of his appointment, an administrator may be able to apply to transfer or surrender the whole or part of an environmental permit.
- 4.6 The operator must still comply with the terms of its environmental permit and will be guilty of an offence if it fails to do so. The administrator will also be bound by the permit conditions and may be liable for breaches in certain circumstances. Leave of the administrator or the court is required to commence or continue civil proceedings, and may be subject to conditions.
- 4.7 If an operator goes into administration we should seek to establish:
- the identity of the administrator and the terms of his appointment,
 - whether the facility is still operating,
 - the intentions of the administrator,
 - whether anybody is interested in purchasing/operating the regulated facility,
 - whether any operational changes are being made that may have an effect on environmental protection,
 - what steps, if any, need to be taken in relation to the site in order to avoid harm to the environment or human health.
- 4.8 We should notify the administrator of our interest (including details of any outstanding compliance and improvement issues, and whether we are a creditor) as soon as possible.

Receivership

- 4.9 A 'receiver' is appointed for the collection or protection of property. Receivers normally have the power to sell assets and distribute the proceeds, and also have a number of implied powers. However, the

precise extent of any powers will depend on the method of appointment, and reference should always be made to the relevant loan agreement (usually known as a debenture) or court order.

- 4.10 The estates of individuals and the property of partnerships may be subject to receivership, but this section focuses on corporate receivership, which normally takes place where a company is insolvent or nearly insolvent and where assets are realized in order to pay particular debts. Although a company may return to normal trading after a period of receivership, frequently it will end up in liquidation. A company may be in receivership and liquidation at the same time.
- 4.11 Most receiverships are initiated by a secured creditor after a company breaches the terms of a debenture. A receiver (also known as an administrative receiver) may be appointed by the court or by individuals or corporations. Court appointments are rare; most receivers are privately appointed under powers set out in the loan agreement that has been breached. In the case of a fixed charge over land, there is also an implied statutory power to appoint a receiver. The purpose of the appointment is to sell the land or property over which the charge has been taken to repay a loan.
- 4.12 The appointment of a receiver has no effect on the existence of the operator or on any environmental permit it holds. However, the directors' powers over the assets affected by the debenture will be suspended and the receiver will act on the company's behalf. The operator must still comply with the terms of the environmental permit and will be guilty of an offence if it fails to do so. The receiver will also be bound by the permit conditions and may be liable for breaches in certain circumstances.
- 4.13 Depending on the terms of his appointment, a receiver may be able to apply to transfer or surrender the whole or part of an environmental permit.
- 4.14 If an operator goes into receivership we should seek to establish:
- the identity of the receiver and the terms of his appointment,
 - whether the facility is still operating,
 - the intentions of the receiver,
 - whether anybody is interested in purchasing/operating the regulated facility,
 - whether any operational changes are being made that may have an effect on environmental protection; and
 - what steps, if any, need to be taken in relation to the site in order to avoid harm to the environment or human health.

- 4.15 We should notify the receiver of our interest (including details of any outstanding compliance and improvement issues, and whether we are a creditor) as soon as possible.

Winding up/liquidation of the operator

- 4.16 If a company is insolvent⁷ it may be wound up in one of two ways:
- (i) compulsory winding up: this is where a person (usually a creditor) presents a petition to the court to wind up a company; and
 - (ii) creditors' voluntary winding up: this is where the members of a company (also referred to as its shareholders) pass a resolution to wind it up.
- 4.17 In both cases the winding up will be administered by a 'liquidator' who will become the agent of the company. The management of the company's affairs will be taken out of the hands of the directors and the assets will be realized in order to meet (as far as possible) the company's liabilities. The company will then be dissolved, i.e. it will be removed from the register of companies and will cease to exist as a legal entity. Any environmental permit will cease to exist when the company is dissolved.
- 4.18 On the making of a winding up order by the court, the official receiver will automatically be appointed as the liquidator. However, the official receiver may be replaced by a private insolvency practitioner appointed by a 'creditors and contributors' meeting. The court may confer functions on the liquidator and limit his powers as it sees fit. Conversely, the official receiver and the court generally have no part to play in a creditor's voluntary winding up (though applications to the court are possible), and a liquidator does not have to be appointed in the initial stages of the process. The creditors share control of the process with the company; if there is a conflict between the wishes of the creditors and the members, the creditors' wishes will prevail.
- 4.19 The appointment of a liquidator has no effect on the existence of the operator or on any environmental permit it holds. The operator must still comply with the terms of the environmental permit and will be guilty of an offence if it fails to do so. The liquidator is agent for and an officer of the company. As such he is also bound by the conditions of the environmental permit and may be liable for breaches in certain circumstances. However, the liquidator's primary role is to wind up the company, and the operator is likely to cease trading regardless of the requirements of the environmental permit. Furthermore, leave of the court (which may be subject to conditions) must be obtained in order to

⁷ There is another form of winding up known as members' voluntary winding up which can only take place if the company is solvent.

commence or continue civil proceedings, and may be required in respect of criminal proceedings.

4.20 A liquidator may apply to transfer or surrender the whole or part of an environmental permit.

4.21 A liquidator has the power to disclaim onerous property; an environmental permit is regarded as property for this purpose. A disclaimer is effected by a notice signed by the liquidator which is filed at and sealed by the court. Usually, the disclaimer will be effective from the date on which it is sealed by the court. Any person with an interest in the property must be notified that it has been disclaimed but there is no right to object to the disclaimer. As the effect of a disclaimer is to extinguish all rights and obligations of the company in relation to the property disclaimed, the environmental permit will cease to exist when the notice takes effect.

4.22 If an operator is subject to winding up we should seek to establish:

- the identity of any liquidator and the terms of his appointment;
- whether the facility is still operating;
- the intentions of the operator/any liquidator;
- whether anybody is interested in purchasing/operating the regulated facility;
- what steps need to be taken in relation to the site bearing in mind our policy aims and the desire to avoid harm to the environment or human health.

4.23 We should notify the liquidator of our interest (including whether we are a creditor) as soon as possible.

Company Voluntary Arrangements

4.24 A company voluntary arrangement (CVA) is used to rescue companies which are insolvent but which have an underlying business that has a prospect of being profitable in the future. A proposal is drawn up by the directors, the liquidator (if the company is being wound up) or the administrator (if the company is in administration). The proposal must name an insolvency practitioner who will call meetings of the members and creditors. If the proposal is accepted by 75% (in value) of the creditors it will be binding on all creditors who had notice of and were entitled to vote at the meeting. As long as the company adheres to the terms of the CVA, the directors will retain day to day control of the business.

4.25 A CVA does not affect the efficacy of an environmental permit, but while it is extant all creditors are prevented from pursuing debts or

progressing any legal action relating to debts, such as outstanding subsistence fees.

4.26 If an operator is proposing to enter into a CVA we should:

- seek to establish as soon as possible the identity of the insolvency practitioner and the terms of the CVA proposal;
- establish whether any operational changes are being made that may have an effect on environmental protection; and
- if we are a creditor:
 - i. inform the insolvency practitioner of our interest; and
 - ii. decide whether, taking our policy aims into account, we should vote for or against the proposed CVA.

Striking off

4.27 A company may be struck off the Register of Companies for a number of different reasons including the failure to comply with the requirements of the Companies Acts. Notice of an intended striking off must be given in the London Gazette. Interested parties may object to the striking off. Once a company has been struck off the Register of Companies the environmental permit will cease to exist.

5. Key aspects of our approach

- 5.1 We should get involved as soon as one of these events is identified and assess the situation. Operations staff should contact Legal and Finance functions as soon as possible and use land quality experts for support, as appropriate.
- 5.2 In most circumstances the best environmental outcome will be achieved by a transfer or surrender of the environmental permit, and we should support any efforts to attain this result.⁸ For example, we should provide advice to the transferor or any potential transferee, and should deal with any applications promptly, bearing in mind that the transferor may be under considerable time pressure.
- 5.3 Even if a transfer or surrender is not attainable, we should as far as possible encourage and assist the operator/his representative to take a responsible and systematic approach to the closure of the facility.
- 5.4 In exceptional circumstances, where to do so would achieve a more favourable environmental outcome, we may wish to use our powers to revoke or vary an environmental permit. We do not revoke simply to help an operator reduce his liabilities.
- 5.5 It is essential to recognize the commercial realities of the situation faced by the operator/his representatives. As a general rule the earlier we are able to become involved the better. If we are aware that an operator is in financial difficulty we may in some cases be able to provide advice on the safe cessation of activities in advance of the event occurring. We should be alert to the sensitivities of those affected by the event, including the operator's employees, and appreciate that it may be difficult to obtain cooperation or information when the operator and its employees may be facing the prospect of business closure or redundancy.
- 5.6 We should contact any personal representative, trustee, administrator, receiver, liquidator or other insolvency practitioner as soon as possible to inform them of our interest. Given that their role is primarily financial, these representatives may have little understanding of the regulations, the obligations imposed by the environmental permit, the activities carried out at the regulated facility and the environmental implications of ceasing to operate. Therefore, it may be appropriate for us to provide advice and assistance in relation to these issues.
- 5.7 Although in many cases there will be no assets to distribute we should preserve our position at the outset. In particular, we should inform any representative if we are a creditor of the operator and Finance has advised that the sum is significant.

⁸ This does not of course apply where the operator is simply subject to an IVA or CVA

- 5.8 When an event occurs, our ability to commence or continue civil and criminal proceedings may be affected by legal and/or practical considerations. The steps that should be taken and the options available to us will vary considerably depending on the nature of the Event and the surrounding circumstances. Therefore, if civil or criminal proceedings are ongoing or contemplated, legal advice should always be obtained as soon as possible. In the case of criminal proceedings, decisions should always be taken on the basis of legal advice in accordance with our Enforcement and Prosecution Policy.
- 5.9 Our general approach to communications is that, in the absence of a good reason to the contrary, all interested parties should be kept informed of our actions and copied in on any correspondence or e-mails.
- 5.10 Staff should follow our operational instructions to ensure that we take a considered and consistent approach to these events.

This document is out of date and was withdrawn (01/02/2016)

6. Other issues

Financial provision

- 6.1 The Landfill Directive requires an operator to make financial provision prior to the operation of a landfill that will be adequate to discharge the obligations of the landfill permit. Accordingly, our financial provision system aims to ensure that operators of landfills have funds to meet the closure and aftercare of those landfills, thereby meeting the obligations of the environmental permit and protecting the environment.⁹
- 6.2 Where a landfill operator is affected by an event, the lead on financial provision issues will be taken by the Financial Provision team at the National Permitting Service.

Orphan sites

- 6.3 Where a regulated facility has been abandoned and we have not been able to trace or establish what has happened to an operator for over a year, it may then be appropriate to revoke the environmental permit.

⁹ See Policy on Financial Provision for Landfills, Policy No 20_06.

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