Permitting decisions- Refusal

We have decided to refuse an application by Veolia ES (UK) Limited to vary permit reference EPF/AP3238GH for Winsford Rock Salt Mine Waste Facility operated by Veolia ES (UK) Limited ("the Operator").

Winsford Rock Salt Mine Waste Facility is located on Jack Lane, Bostock, Middlewich, Cheshire, CW10 9JQ.

Veolia ES (UK) Ltd applied to vary the underground storage of hazardous waste activity in their permit from disposal to recovery. The Operator failed to demonstrate that the proposed variation was justified and so the application is refused.

In reaching that decision we have taken into account all relevant considerations and legal requirements.

Purpose of this document

This decision document provides a record of the decision-making process. It:

- highlights key issues in the determination
- gives reasons for refusal
- summarises the decision making process in the decision considerations section to show how the main relevant factors have been taken into account.

Unless the decision document specifies otherwise, we have accepted the Operator's proposals.

Read the permitting decisions in conjunction with the refusal notice.

Key issues of the decision

Summary of our decision

Description of the facility

Winsford Rock Salt Mine Facility is located approximately 3 kilometres to the northeast of Winsford, Cheshire.

The activities on site comprise of permanent storage of packaged hazardous waste and repackaging of hazardous waste.

The storage activity falls under Environmental Permitting (England and Wales) Regulations 2016 ('EPR 2016')

'Schedule 1, Chapter 5, Section 5.6

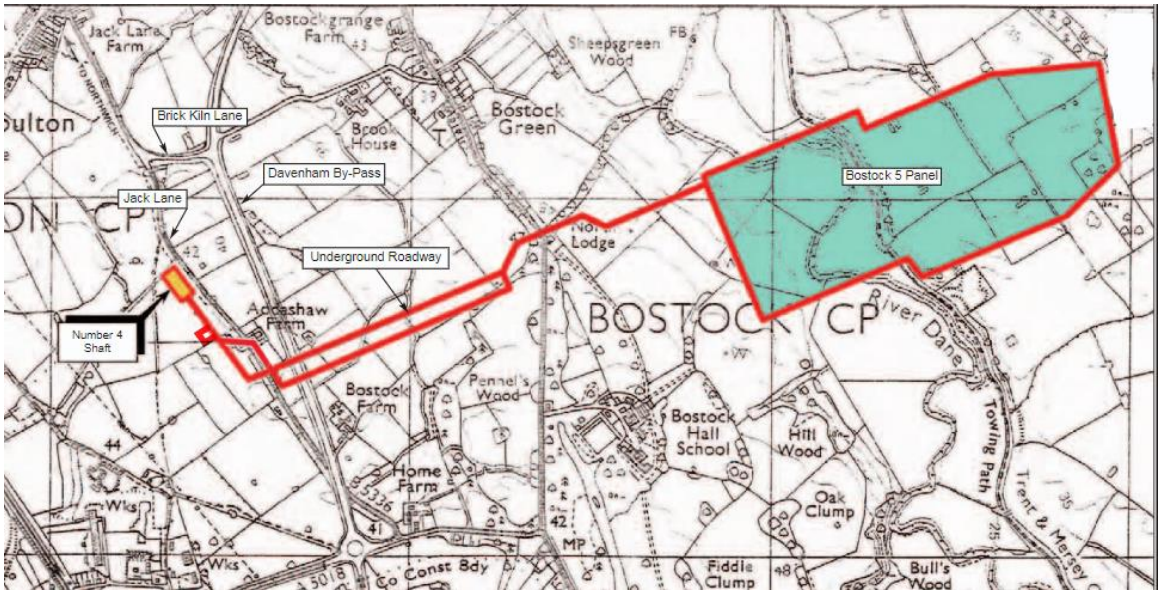
Part A(1)

(b) Underground storage of hazardous waste with a total capacity exceeding 50 tonnes.'

When waste arrives in bulk at the site, the Operator is permitted to repackage it into Flexible Intermediate Bulk Containers so that it can then be transported to and deposited in the underground storage.

The underground storage activity takes place in a mine or void created by the excavation of rock salt several hundred metres beneath the Cheshire countryside. The repackaging activity takes place on the surface at a point close to the access point to the mine, a vertical shaft.

The permit site boundary plan is below.



The legal framework

In any permit granted under EPR 2016 it is necessary to describe which activities are authorised and any limitations there are on them. This is so that the activities can be regulated effectively and enforcement action taken if an operator is carrying out activities outside the scope of those authorised. Where, as here, the activities are within an activity described in Part 2 of Schedule 1 to EPR 2016 we describe the activities by reference to the relevant description in Part 2 as this provides maximum certainty and clarity. Where an activity can fall within more than one description we use the description that we consider fits it most aptly.

In addition, where an activity is also a waste operation then Schedule 9 paragraph 3(c) EPR 2016 requires us to ensure the requirements of the second paragraph of Article 23 (1) the Waste Framework Directive 2008/98/EC ("the WFD") are met. These include specifying each type of operation permitted. We do this by reference to the disposal and recovery operations in Annexes I and II to the WFD.

So in this case the permit specifies both the activity described in Schedule 1 EPR 2016 and the relevant operation from Annex I and II to the WFD.

Whilst we have described the activity as a section 5.6 activity from Schedule1. It is also within Section 5.2 disposal of waste in a landfill but as section 5.6 is specific to the underground storage of hazardous waste that description was considered most apt.

Regulation 35(2) EPR 2016 requires that where relevant we apply the requirements of schedules 7 to 25B in any permit. This meant that whilst we described the activity by reference to section 5.6 we also had to ensure it met the relevant requirements of Schedule 7 Part A Installations: Industrial Emission Directive and Schedule 10 in relation to landfills.

In assessing the proposed variation we need to consider whether schedule 10 should still be applied to the activities.

In accordance with EPR 2016, Schedule 10 paragraph 2(1)(d). The definition of landfill is that given in Article 2(g) of the Directive 1999/31/EC on the Landfill of Waste ("the Landfill Directive"), that is:

> "a waste disposal site for the deposit of waste onto or into land (i.e. underground), including:
>
> -- internal waste disposal sites (i.e. landfill where a producer of waste is carrying out its own waste disposal at the place of production), and

-- a permanent site (i.e. more than one year) which is used for the temporary storage of waste,

but excluding:

-- facilities where waste is unloaded in order to permit its preparation for further transport for recovery, treatment or disposal elsewhere, and

-- storage of waste prior to recovery or treatment for a period less than three years as a general rule, or

-- storage of waste prior to disposal for a period less than one year;"

Recovery is defined in paragraph 2 of Schedule 9 EPR 2016 by reference to the definition in the WFD as:

-- "any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations;"

Environmental issues: likelihood of pollution

This application does not seek to add new waste types to the permit or change any of the physical processes or controls carried out as part of the permitted activity. As such, the risks the permitted facilities present to the environment do not change. The likelihood of pollution is therefore not changed from risks presented by the existing activities that were assessed in the original permit application and subsequent variations. This application does not raise any new site-specific environmental issues, merely seeks change to the way the activity is classified in terms of whether it is a disposal or a storage prior to recovery activity. The Agency can confirm that there is no increased likelihood of pollution, however, if the Environment Agency were minded to grant the variation, then the site would be subject to:

- The Chemical Waste Appropriate Measures Guidance and the operator would have to comply with the Guidance, or provide alternative measures. The operator failed to provide satisfactory alternatives measures referred to below

  And,

- The operator has confirmed to the Agency that there is currently no recovery outlet for this waste.

How we took our decision and Grounds for refusal

On 27 August 2020, the Operator applied for the deposit of the waste to be a recovery activity. Prior to duly making the application we undertook a preliminary assessment of their evidence and were not satisfied this was recovery activity. The waste being deposited was not serving a useful purpose and was not replacing other materials i.e., non-waste they would otherwise have used to fulfil a particular function. Based on this preliminary view the Operator amended their application to a storage prior to recovery activity. A storage prior to recovery activity requires a different assessment process. Instead of assessing whether the deposit (in this case underground) is itself a recovery activity we have to assess whether it is instead being stored pending being subject to a subsequent recovery operation. On 30 September 2021, the application was duly made and we began to determine the application.

We carried out a technical and regulatory assessment of the duly made application. Following the assessment, on 7 December 2021, we issued a Request for Further Information Notice issued under Schedule 5(4) of EPR 2016 ("the Notice"). This Notice sought clarification of:

- The length of time the Operator wished to store waste prior to recovery.
- Potential and realistic options for the recovery of the stored waste.
- Operational matters around the way the waste was stacked & identified for recovery, procedures for the removal of the waste at the relevant time, and the general operational techniques they were using to demonstrate that the recently updated: 'Chemical Waste: Appropriate Measures Guidance' were being delivered.

The initial response date for that notice was 11 January 2022. On 7 January 2022 we agreed an extension to the deadline date to 31 January 2022. On 27 January 2022 we received the Operator's response. We have carried out a technical and regulatory assessment of this response and concluded that we should refuse the application for the following reasons:

The variation application was principally to change the description of the storage facility from a disposal activity to a storage prior to recovery activity in terms of the Annexes I and II WFD codes.

We consider the definition of a landfill remains relevant to this facility.

Landfill sites are disposal facilities. Annex I to WFD provides a "non-exhaustive" list of activities it considers to be disposal activities. This list includes:

'Deposit into or on to land (e.g. landfill, etc.)' as a D1 activity

'Specially engineered landfill (e.g. placement into lined discrete cells which are capped and isolated from one another and the environment etc)' as a D5 activity and

> ‘Permanent storage (e.g. emplacement of containers in a mine, etc.)’ as a D12 activity.

This description, D12 is used in Table S1.1 of the current permit as best describing what is being done in practice.

Annex II to WFD provides a list of recovery activities. The list is non-exhaustive. The Operator applied to change the D 12 reference for:

> ‘R 13 Storage of waste pending any of the operations numbered R 1 to R 12’.

R1 to R12 are for processes, the principal result of which is waste serving a useful purpose or is otherwise recovered or reclaimed so that it is no longer waste. For us to accept R13 we need to be satisfied the waste is being stored prior to being submitted to a recovery operation. This requires us to be satisfied that the waste is suitable for such an operation and that it will actually be subjected to it within a reasonable time scale. This in turn will demonstrate the Article 2(g) exemption from the requirements of the Landfill Directive has been satisfied.

Article 2(g) of the retained Landfill Directive provides an exclusion from its requirements where the:

> “storage of waste prior to recovery or treatment {is} for a period less than three years as a general rule”.

Whilst 3 years is a general rule the presumption is that anything stored for longer than this is unlikely to be recovered even if this were potentially possible. In particular it prevents long term speculative storage of waste without a clear likelihood of recovery avoiding the requirements of the Landfill Directive and ensures any long-term storage is undertaken in a manner that protects the environment.

The Operator failed to provide sufficient evidence in their application of the timescales for the storage of waste or the availability of processes to recover the waste. Questions in the Request for Further Information Notice issued under Schedule 5 EPR 2016, sought clarification on the length of time the Operator wished to store waste prior to recovery and the potential and realistic options for the recovery of the stored waste.

In the response to the schedule 5 Notice the Operator stated that the storage time would be an indefinite time reviewed no earlier than 5 years. The Operator confirmed that there was no recovery outlet available for the waste and they were not proposing one in the immediate future. The Operator has therefore failed to demonstrate or provide evidence that they can justify the use of an R13 description or meet the exclusion from the need for the Landfill Directive to apply.

The Operator failed to satisfy us that there is a recovery option available for the waste or will be within the foreseeable future. It follows that we cannot be satisfied that the waste would be subject to a recovery operation and that any storage would

be pending that consequently, the activity must remain classified as a disposal activity.

Should a viable recovery option be determined in future then the current D 12 classification would not prevent the material being excavated and submitted to a recovery operation.

Whilst not strictly applicable to the determination it is also considered that paragraph 13 of Part 1 of Schedule 5 EPR 2016 is relevant to the determination. That requires an application for a permit to be refused where it is not considered that an applicant would operate in accordance with any permit issued. Similarly it would be illogical to vary a permit where it was not considered that the permit as varied would be complied with. This means that we cannot authorise an operator to undertake a recovery activity (in this case an R13 operation) unless we were actually satisfied the activity met that description. Otherwise, we would be allowing activities that were not authorised by or be in compliance with the permit. So by analogy a variation application should be refused where it is not considered that the operator would comply with the varied condition because it no longer authorised the activity being undertaken.

The Operator applied to keep their activity as a Section 5.6 Part A(1)(b), but to vary the permit as an R13 Recovery Activity - Underground storage of hazardous waste activity. The Operator could have applied to store waste as a temporary storage activity under:

Section 5.6 , Chapter 5, Section 5.6
Part A(1)
(a) Temporary storage of hazardous waste with a total capacity exceeding 50 tonnes pending any of the activities listed in Sections 5.1, 5.2 or 5.3.

The Environment Agency has published guidance setting out the relevant technical standards that we would expect an operator to comply with when temporarily storing hazardous waste, “Chemical Waste: Appropriate Measures for Permitted Facilities”.

Questions 1, 2, 3, 4, 6 and 7 of the Schedule 5 notice dated 7 December 2021 sought evidence that all the relevant technical standards would have been met had we been satisfied the activity could have been considered temporary storage pending a recovery operation.

The Operator has the option, to propose alternative measures that achieve the same level of environmental protection or provide an explanation of why the specific measure is not relevant. The operator also has the option of complying with the Guidance. In their response, however the Operator failed to satisfy us that the proposals put forward either met all the relevant standards set out in the guidance or would achieve the same level of environmental protection. The

Operator did not fully explain why certain specific measures are not relevant or how the existing operating techniques they proposed to retain delivered an equivalent level of environmental protection to those in the guidance.

Given the fact that the temporary storage and the handling procedures are different to those from permanent storage, the Operator needs to demonstrate to us that either that the current measures also address the risks from temporary as well as permanent storage or propose measures address those risks. The Operator has currently failed to do either of these options despite being given the opportunity to do so.

The Operator therefore failed to satisfy us that the Operating Techniques they proposed to use would manage and operate the activities in accordance with a written management system that identifies and minimises risks of pollution, including those arising from operations, maintenance, accidents, incidents, non-conformances, closure and those drawn to the attention of the operator as a result of complaints as required by condition 1.1.1 (a) of their permit.

Decision considerations

Section 108 Deregulation Act 2015 - Growth Duty

We have considered our duty to have regard to the desirability of promoting economic growth set out in section 108(1) of the Deregulation Act 2015 and the guidance issued under section 100 of that Act in deciding whether to grant this permit variation.

Paragraph 1.3 of the guidance says:

“The primary role of regulators, in delivering regulation, is to achieve the regulatory outcomes for which they are responsible. For a number of regulators, these regulatory outcomes include an explicit reference to development or growth. The growth duty establishes economic growth as a factor that all specified regulators should have regard to, alongside the delivery of the protections set out in the relevant legislation.”

We have addressed the legislative requirements and environmental standards to be set for this operation in the body of the decision document above. The guidance is clear at paragraph 1.5 that the growth duty does not legitimise non-compliance and its purpose is not to achieve or pursue economic growth at the expense of necessary protections. This also promotes growth amongst legitimate Operators because the standards applied to the Operator are consistent across businesses in this sector and have been set to achieve the required legislative standards.