



Guidance on financial provision for environmental liabilities

Additional guidance on environmental impairment liability insurance

2019

Revision 2

ENVIRONMENTAL PROTECTION AGENCY

An Ghníomhaireacht um Chaomhnú Comhshaoil

PO Box 3000, Johnstown Castle, Co. Wexford, Ireland

T +353 53 916 0600

F +353 53 916 0699

E info@epa.ie

W www.epa.ie

LoCall 1890 33 55 99

© Environmental Protection Agency 2019

Introduction

The EPA published *Guidance on Financial Provision for Environmental Liabilities* in 2015. The overarching principles of financial provisions are that they are secure, sufficient and available when required.

Environmental Impairment Liability (EIL) Insurance is, in principle, an acceptable financial instrument for potential liabilities from incidents. EIL Insurance must cover *“the full costs of responding and remedial measures if an incident occurs at a licenced facility”* (Section 1 of the Guidance).

Issues have arisen in ensuring EIL Insurances meet the overarching principles and that they cover the costs of an incident at a licenced facility. Eight of these issues are described in this document. This document is an update on Revision 1 of the addendum published in 2019.

Due to the nature of insurance policies all EIL Insurances, proposed as a financial provision for environmental liabilities, will be approved by the EPA on a case by case basis.

1. Ring-fencing

Two issues relating to ring-fencing are the dilution of cover from other liabilities and for environmental response and remedial measures.

a) Ring-fencing the licenced facility/activity

The Guidance states that EIL Insurance must *“ring-fence the policy limits to the licensee’s operation of the licenced facility having regard to the risk values identified in the licensee’s ELRA report”* (Section 4.6ix - emphasis added).

A licenced facility/activity may be a sub-set of a broader business with other elements not subject to the licence, including other sites and off-site transport activities. EIL Insurance may cover the broader business in its entirety. However, the cover for the licenced facility/activity is at risk of dilution by cover for the other elements of the business.

Requirement: The Environmental Impairment Liability cover for the licenced facility/activity (to the amount determined by ELRA) must be ring-fenced from the cover for the other elements of the business (e.g. other sites or off-site transport activities).

b) Ring-fencing environmental response and remedial measures

In addition to the above, EIL Insurance must *“respond to environmental and pollution loss and damage in accordance with the Environmental Liability Directive”* (Section 4.6 (i) of the guidance). The Environmental Liability Directive *“does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages”*.

EIL Insurance may cover liabilities other than environmental response and remedial measures, e.g. personal injury, damage to private property, economic liabilities such as business interruption and legal fees/penalties. However, the cover for environmental response and remedial measures maybe at risk of dilution by cover for these other liabilities.

Requirement: The cover for environmental response and remedial measures (to the amount determined by ELRA) must be ring-fenced from the cover for other liabilities (while still extending to clean-up of the Licensee's property and third-party property).

Both issues can be addressed using a stand-alone EIL Insurance, limited to the environmental response and remedial measures associated with an incident at a licenced facility only.

2. Payment of Premia

As stated in the Guidance, the EPA requires evidence that all premia for the relevant insurance policy and period has been paid. This is to ensure the policy meets the core principle that the financial provision is "Secure" for the policy period.

Depending on whether a broker or insurer is procuring the insurance the requirements will differ:

Insurer

The insurer must confirm directly to the EPA that:

- 1) The premium under the relevant policy has been paid in full; and
- 2) The policy is effective for the policy period.

The insurer should attach the policy, as approved by the EPA, to the confirmation.

Broker

Pursuant to SI 229/2018 European Union (Insurance Distribution) Regulations 2018, premiums paid by a customer to the intermediary or broker are deemed to be paid to the relevant insurer.

If a broker is procuring the insurance, they will need to confirm/provide the following directly to the EPA:

- 1) It has received the premium in full from the licensee;
- 2) It is authorised to accept premia on behalf of the insurer it is procuring the EIL policy from;
and
- 3) Confirmation from the insurer that the policy is effective for the policy period.

The broker should also attach the approved form of policy to the confirmation.

One further issue that all licensees, brokers and insurers should note is the EPA does not accept policies paid by instalments.

Where there is conflict between this note and requirement (vii) under section 4.6 of the Guidance, this note shall take precedence.

3. Deductible / Excess

Section 4.6 of the Guidance states “*where any policy is proposed which includes a deductible/excess the licensee may be required to provide financial provision to the value of the deductible/excess*”.

EIL policies may provide for deductibles depending on the relevant claim. Additional financial provision may be required to cover the excess if, for example, the EPA is liable for the excess in the event they become the insured. For this reason, the EPA reserves the right to require additional financial provision to cover the cumulative value of the potential excess of any claim under an EIL policy.

The requirement to provide additional financial provision in respect of any excess or deductible may be satisfied if the EIL policy provides that, in respect of the EPA’s cover and/or where the EPA makes a claim under the EIL policy pursuant to its terms, no excess/deductible will be applied to the EPA.

4. Disclosed Documents

The insurance policies proposed by licensees for the purposes of covering ELRA liability at licensed sites include a “disclosed documents” schedule. This schedule identifies the documents disclosed to the insurer. Section 4.6 (vi) of the EPA Guidance requires that the EPA approved ELRA report be disclosed to the insurer.

The EPA approved ELRA report is the only document the EPA is satisfied to include in the “disclosed documents” schedule. The inclusion of additional documents may limit the cover under the policy thereby making it unacceptable to the EPA.

5. Known Conditions

Insurance cannot be used to cover pre-existing contamination, ongoing pollution or known liabilities on site. A “known conditions” schedule is included in each insurance policy. Any “condition” included in this schedule excludes the insured from a claim caused by that condition. The EPA considers known conditions on a case by case basis.

The inclusion of a licensee’s non-compliance or an existing ongoing pollution event, in the known conditions schedule, excludes the insured from any resultant claims. The inclusion of these conditions makes an EIL insurance an unacceptable financial provision as it does not respond to the release of pollutants howsoever occurring as per point (ii) in Section 4.6 of the *EPA Guidance on Financial Provision for Environmental Liabilities 2015*.

6. Asbestos and Lead Exclusion

Some insurance policies proposed by licensees for the purposes of covering ELRA liability at licensed sites include an exclusion related to Asbestos and Lead. The EPA will examine each such proposed exclusion on a case-by-case basis to determine whether it is appropriate or not.

7. Extended Reporting Period

In the event that a policy is cancelled or not renewed, for whatever reason, and no other insurance has been arranged to replace all or part of the EIL Insurance, the EPA require an extended reporting period of a minimum of 120 days from the date of non-renewal or cancellation. During this period, the insured and/or the EPA shall be entitled to notify the insured of a claim under the EIL Insurance policy.

8. Anti-Vitiation

Misrepresentation, non-disclosure, want of due diligence or breach of any declaration, terms, condition or warranty of, or by, the Licensee in relation to the EIL Insurance policy should not affect the EPA's coverage under the EIL Insurance policy.

END