Guidance on financial provision for environmental liabilities

Additional guidance on environmental impairment liability insurance

2017
Introduction

The EPA published *Guidance on Financial Provision for Environmental Liabilities* in 2015 ([https://www.epa.ie/pubs/advice/licensee/financiaprovisionsreport.pdf](https://www.epa.ie/pubs/advice/licensee/financiaprovisionsreport.pdf)). The overarching principles are that financial provisions 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).

A number of common issues have arisen in the context of ensuring EIL Insurances meet the overarching principles and cover the full costs of responding and remedial measures if an incident occurs at a licenced facility.

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

1. **Ring-fencing:**

There are two issues that need to be addressed relating to ring-fencing the cover for environmental response and remedial measures associated with an incident at a licenced facility from other liabilities to ensure the financial provision is not diluted.

a) **Ring-fencing the licenced facility/activity**

The guidance already states that EIL Insurance must “ring-fence the policy limits to the licensee’s operation of the licensed facility having regard to the risk values identified in the licensee’s ELRA report” (Section 4.6ix - emphasis added). This note provides further guidance.

A licenced facility/activity may be a sub-set of a broader business that has other elements including other sites and off-site transport activities that are not subject to the licence. EIL Insurance may cover such a 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 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 4.6i 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 is at risk of dilution by cover for these other liabilities.
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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 of these 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. 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.

3. 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