

EPA Financial Provision: December 2020 Circular on Environmental Impairment Liability Insurance

Section 1. Introduction

This circular applies generally to EPA licensees whose licences require financial provision to be put in place. It is particularly relevant to those licensees who currently have Environmental Impairment Liability Insurance (“EILI”) policies in place or those considering these policies as a prospective financial instrument. This note is also relevant to brokers and insurers providing EILI policies, in so far as ensuring that such policies submitted to the EPA for consideration, comply with EPA requirements.

This note builds on *Guidance on Financial Provision for Environmental Liabilities* (EPA, 2015), *Additional Guidance on Environmental Impairment Liability Insurance* (EPA, 2019, Rev 2) and affirms that any EILI policies submitted to the EPA for consideration must comply with these requirements.

This circular addresses:

- The core EPA requirements governing EILI;
- The limited amount of time being provided to the EPA to review and approve EILI policies;
- Certain procedural improvements which would assist the EPA throughout the policy review and approval process; and
- Asbestos/lead exclusion wording in EILI policies.

Due to the nature of insurance policies, all EILI policies proposed as a financial provision for environmental liabilities are assessed and, where acceptable, approved by the EPA on a case by case basis.

Section 2. Financial instruments for EPA licensed sites

As of August 2020, some €792M in Financial Instruments were in place, 23% of which were in the form of EILI policies (Diagram 1 & 2).

Diagram 1: Agreed ELRA & CRAMP Costings and Financial Provision Secured for EPA Licensed Sites (August 2014 – August 2020)

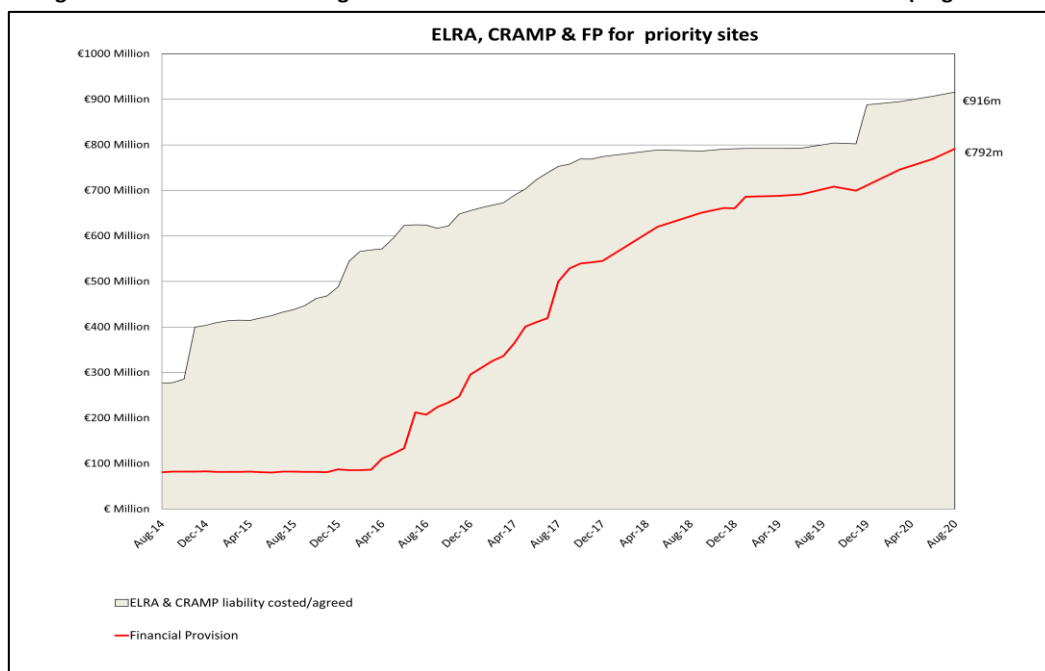
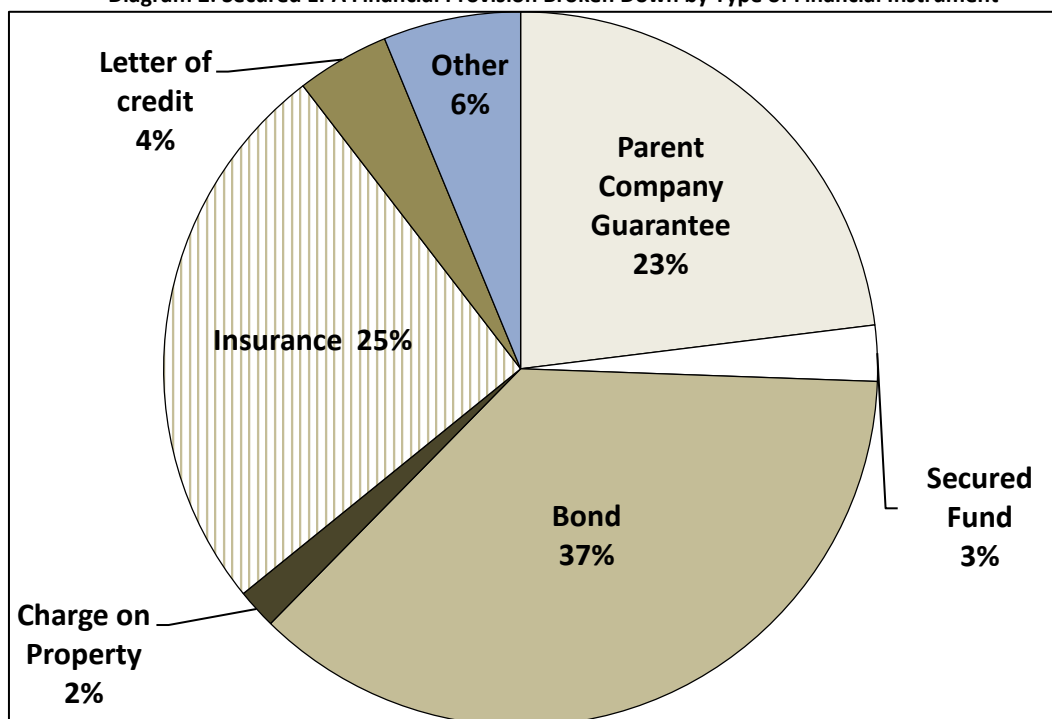


Diagram 2: Secured EPA Financial Provision Broken Down by Type of Financial Instrument



Section 3. Environmental Impairment Liability Insurance

In practice, EILI policies take different forms and are provided by a variety of insurance providers in Ireland.

As set out in EPA Guidance, the EPA has determined that if an EILI policy is to be accepted, it must include certain core requirements, to the satisfaction of the EPA.

These requirements are outlined in detail in:

- [2015, Guidance on Financial Provision for Environmental Liabilities](#); and
- [2019, Additional Guidance on Environmental Impairment Liability Insurance, Rev 2](#)

(together the “EPA Guidance”) (also see Appendices 1 and 2 below).

EILI is not a suitable financial provision for known liabilities, such as those associated with closure or previously identified pollution/contamination known to the licensee prior to policy inception.

The EPA has previously stated, that in respect of unknown liabilities, EILI policies are potentially an acceptable form of financial provision. As for any type of financial provision, EILI must cover “the full costs of responding and remedial measures if an incident occurs at a licenced facility”¹.

All EILI policies submitted to the EPA for consideration *must* cover all of the overarching principles outlined in the EPA Guidance. In particular, an EILI policy must “respond to the release of pollutants, howsoever occurring”².

¹ 2019, Additional Guidance on Environmental Impairment Liability Insurance, Revision 2, Page 1

² 2015, EPA Guidance on Financial Provision for Environmental Liabilities, Section 4.6 (ii), page 18

Licensees are reminded that they are obliged to comply with the full suite of licence conditions, including a requirement to put in place satisfactory financial provision which is secure, sufficient and available when required³.

If an EILI policy is put in place which does not meet the requirements outlined in the EPA Guidance, the EPA will view this as a non-compliance. The EPA may take formal intervention in the matter and formally record the non-compliance by way of a notice. This is the first step in the escalation of enforcement action and may result in the opening of a Compliance Investigation, or ultimately lead to prosecution.

Section 4. Insufficient time being provided to the EPA to review EILI policies

The EPA is increasingly in receipt of draft policies very close to the policy expiry date.

This results in limited time for the EPA to engage with the respective policy holder, broker and/or insurer to consider, review and ensure the EILI policy is compliant with the EPA Guidance prior to the policy renewal date.

As part of the policy renewal process, the EPA sends licensees a number of renewal notices. This is to facilitate the renewal process in sufficient time prior to the renewal date. The licensee must ensure appropriate actions are taken immediately upon receipt of such notices.

Accordingly, the EPA's expectation is that a licensee will commence engagement with its broker and/or insurer in plenty of time before the policy expiry date, and at a minimum upon receipt of the first renewal notice.

Where policies are being approved by the EPA for the first time, licensees, insurers and brokers are reminded to allow adequate time for the EPA to consider the policy terms provided.

A licensee changing insurance provider is advised to inform the EPA of this change up to 90 days before policy expiry. A draft EILI policy should also be provided to the EPA in sufficient time for review.

Separately, if an alternative financial provision instrument is being proposed by a licensee that previously had an EILI policy, notification should be provided to the EPA up to 90 days before the existing policy expires.

Section 5. Review and approval of EILI policies

As part of the policy renewal process, the EPA commonly reviews EILI policy wording and engages with the respective licensee, broker and/or insurer. The purpose of this engagement is to ensure that the EILI policies comply with the EPA Guidance.

Two issues relating to this process are unilateral changes made to a policy without the EPA's approval and proposed policy changes not being emphasised by a broker/insurer in relevant communications.

Section 5.1: Unilateral changes to policies

³ 2015, EPA Guidance on Financial Provision for Environmental Liabilities, Section 2 Page 3

The EPA undertakes a process to ensure the approved EILI wording for each licensed site correlates with the EPA Guidance. This can entail engagement with licensees, brokers and/or insurers on certain policy terms.

The EPA has found that once policy terms are, in essence, agreed with a broker/insurer, an updated policy draft can, on occasion, include unilateral policy changes of which the EPA is not aware.

To ensure that such issues do not arise, the EPA requires that all proposed changes to an EILI policy during the engagement phase are highlighted to the EPA. Upon a policy being agreed with the EPA, any subsequent changes made to the policy, may result in it being non-compliant with the EPA's requirements. The EPA reserves the right to take enforcement action in such an instance.

Section 5.2: Proposed changes to policies

The EPA on occasion receives updated policy drafts for its review without changes being clearly highlighted by the respective broker/insurer. This often arises during a review where several drafts of the same policy may be considered. Where changes are not highlighted to the EPA, this impacts the process to consider the amended policy wording, as it necessitates a full policy review each time a revised policy draft is received by the EPA.

To expedite the review and approval process, when sending an updated draft policy to the EPA, a broker/insurer should either:

- Send a comparison document to the EPA, clearly showing the proposed (tracked) changes made to the policy for consideration by the EPA; or
- Confirm to the EPA directly in correspondence the changes which have been made to the EILI policy. The relevant policy clauses should also be cited for ease of reference.

If policy provisions are introduced, which have not been approved by the EPA, this may result in the EILI policy being formally rejected.

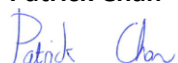
Section 6. Asbestos and/or Lead Exclusion

The insurance policies proposed by licensees for the purposes of covering ELRA liability at licensed sites may include an exclusion related to Asbestos and/or Lead. The exclusion will typically seek to exclude asbestos/or asbestos-containing materials, together with lead and/or lead- containing materials, on site (materials commonly found in structures, on site).

These exclusions commonly have insurance cover written back in to the policy to provide cover for associated costs arising from any follow-on environmental impact from asbestos and/or asbestos-containing structure(s) on site.

The EPA's preference is that the cover written back into policies for asbestos-related contamination should cover all reasonable and necessary costs incurred for environmental remediation required to *"land, surface, water or groundwater"*.

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Appendix 1

2015, EPA Guidance on Financial Provision for Environmental Liabilities, Section 4.6: Environmental Impairment Liability Insurance:

The EPA has determined that any such environmental impairment liability policy must, to the satisfaction of the EPA, adequately operate to achieve the following requirements:

- i) responds to environmental and pollution loss and damage in accordance with the Environmental Liability Directive;
- ii) responds to the release of pollutants, howsoever occurring;
- iii) expressly provides for retroactive cover in respect of the operation of the licensed facility (effective from the original licence grant date of the licensed facility);
- iv) extends coverage to the EPA as a named insured and loss payee under the policy, in the event that:
 - a. the licensee policyholder becomes insolvent or bankrupt during the policy period; or
 - b. the licensee policyholder is deceased; or
 - c. the circumstances identified in part (v)(b) below arise;
- v) in the event of a pollution event or in circumstances where the EPA has exercised its right to incur clean-up costs:
 - a. does not prevent or restrict the EPA from notifying the insurer of a claim that the EPA has against the licensee policyholder at the same time as the EPA gives notice of that claim to the licensee policyholder; and
 - b. requires the insurer, where pursuant to paragraph (a) the EPA has notified the insurer of a claim but the licensee policyholder has failed to notify the insurer of that claim, to accept receipt of and respond to the EPA's notice of claim as though it was a notice of claim given by and received from the licensee policyholder or the EPA itself was a named insured under the policy;
- vi) requires, as a condition of making a policy application, that the licensee has disclosed to the insurer a copy of the approved ELRA report submitted in respect of the licensed facility. This is to be included as part of a schedule of disclosed information also to be required by the insurer;
- vii) requires, as a pre-condition to the policy taking effect, that the insurer has received payment of all *premia* for the policy, evidence of which must be provided by the insurer to the EPA as a pre-condition to the licence taking effect, and to the licensee's operation of the licensed facility commencing;
- viii) requires that the licensee policyholder and the insurer give the EPA not less than sixty (60) days' notice in writing of any policy cancellation; and
- ix) ring-fences 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.

Appendix 2

Guidance on Financial Provision for Environmental Liabilities, Additional Guidance on Environmental Impairment Liability Insurance, 2019, Revision 2:

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 licensed 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 may be 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.