guarantee, performance and payment agreement

[insert name of surety]

[insert name of licensee]

The Environmental Protection Agency

DATED [⦁]

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This **DEED** is dated [●] and is **BETWEEN**

1. **[Insert Name Of Surety]** a company registered in [⦁] with company number [⦁] and having its registered office at [⦁][[1]](#footnote-1) (the “**Surety**”)[[2]](#footnote-2);
2. **[Insert Name Of Licensee]** a company registered in [⦁] with company number [⦁] and having its registered office at [⦁] (the “**Licensee**”); and
3. **The Environmental Protection Agency** of PO Box 3000, Johnstown Castle Estate, Wexford, County Wexford (the “**EPA**”),

each a “**Party**” and, together, the “**Parties**”.

**BACKGROUND**

1. The Licensee operates the Licensed Site.
2. Pursuant to the Licence, the Licensee is permitted to carry out the activities set out in the Licence at the Licensed Site. The Licence is administered by the EPA.
3. Pursuant to the Licence, the Licensee is required to put in place certain financial provisions as security for the cost of the Licensee’s Obligations.
4. The Surety has agreed to execute this Deed, including the guarantee undertakings, covenants, agreements, warranties and acknowledgements contained in this Deed, for the purposes of providing financial security in favour of the EPA for the Licensee’s Obligations.

**THIS DEED WITNESSES:**

# Definitions and Interpretation

## Definitions

In this Deed (including the Background) the following terms shall, unless the context otherwise requires, have the following meanings:

“**Accounting Principles**” means generally accepted accounting principles [in Ireland][[3]](#footnote-3).

“**Agreed Rate**” means with respect to any amount which is not paid when demanded under this Deed, the rate per annum equal to 1% over three month EURIBOR (as certified by EPA), calculated and applied on a daily basis.

“**Business Day**” means any day of the week except a Saturday, Sunday or a bank or public holiday in Ireland.

 “**CiCC**”means a change in compliance costs as a result of change in site conditions, law, regulations, regulatory authority charges or other significant changes.

[“**CRAMP/ELRA Costing**” the costing and quantification of the Known Liabilities and the Unknown Liabilities as approved by the EPA.]

[“**ELRA Assessment**” means the document detailing and quantifying the Unknown Liabilities in the manner envisaged and prescribed by the Licence which is currently approved by the EPA and which may be revised/amended/extended from time to time in accordance with the approval of the EPA.]

“**Environment**” means the environment generally including all of its physical and ecological aspects including:

land including the sea bed and any natural or man-made structures;

water including rivers, lakes (man-made or natural), canals, the ocean (whether within or without territorial waters), ground waters and waters in drains and sewers; and

air including air within buildings and other natural and man-made structures above or below ground,

and “**Environmental**” is construed accordingly.

“**Environmental Law**” means all and any applicable law, including common law, statute, bye-law and subordinate legislation, regulations and directives and judgments and decisions, including notices, orders or circulars, of any court or authority competent to make such judgment or decision compliance with which is applicable in Ireland and which is mandatory for the Licensee with regard to Environmental matters and the protection of the Environment.

“**Financial Year**” means the annual accounting period of the Surety ending on [31 December].[[4]](#footnote-4)

“**Financial Statements**” means the financial statements delivered pursuant to Clause 3 below.

“**Insolvency**” in relation to a person means that it:

#### is dissolved (other than pursuant to a consolidation, amalgamation or merger);

becomes unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

makes a general assignment, arrangement or composition with or for the benefit of its creditors;

institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organization, or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official;

has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition is instituted or presented by a person or entity not described in paragraph (D) above and:

results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation; or

is not dismissed, discharged, stayed or restrained in each case within 14 days of the institution or presentation thereof;

has a resolution passed for its winding-up or liquidation (other than pursuant to a consolidation, amalgamation or merger);

seeks or becomes subject to the appointment of an administrator, examiner, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;

has a creditor take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 14 days thereafter;

causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in paragraphs (A) to (H) above; or

takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts,

and “**Insolvent**” is construed accordingly.

“**Known Liabilities**” means all present and future Environmental obligations and/or liabilities in connection with (a) the closure, decommissioning and/or residuals management of the Licensed Site (or any part of it); and/or (b) the rehabilitation, remediation, restoration, on-going emissions control, monitoring and/or aftercare of the Licensed Site (or any part of it) following closure.

“**Licence**” means the [**insert**] issued by the EPA on [**insert**] with Licence register number [**insert**] as [**revised, amended or extended**] by [**insert details of any amendments to the applicable Licence**], as may be revised, amended or extended from time to time.

“**Licensee’s Obligations**” means all present and future obligations and/or liabilities of: (a) the Licensee in respect of the [Known Liabilities and/or the Unknown Liabilities], whether under Environmental Law and/or the Licence [and/or the Plan]; and/or (b) the Licensee and Surety under this Deed. Any reference to the “**Licensee’s Obligations**” includes a reference to any of them.

“**Licensed Site**” means the land and property which is the subject of the Licence, being the [property known as [insert location of licensed site] / the Licensee’s [insert nature of the licensed operations] facility at [insert location of licensed site]] and everything on, in, attached to or forming part of that property, facility, installation, site and those lands.

“**Material Adverse Effect**” means any event or circumstance which, in the opinion of the EPA by reference to the assessment criteria set out in the *EPA Financial Strength Assessment for Company Guarantees 2019* guidelines (<https://www.epa.ie/publications/licensing--permitting/industrial/Financial_Strength_Assessment.pdf>), has a material adverse effect on:

#### the business, operations, property, condition (financial or otherwise) or prospects of the Surety; or

the ability of the Surety to perform its obligations under this Deed; or

the validity or enforceability of, or the effectiveness or ranking of the Surety’s obligations under this Deed or the rights or remedies of the Surety under this Deed.

“**Party**” means a party to this Deed.

[“**Plan**” means the document detailing the plans and costings for orderly dealing with the Known Liabilities in the manner envisaged and prescribed by the Licence which is currently approved by the EPA and which may be revised/amended/extended from time to time in accordance with the approval of the EPA.]

“**Unknown Liabilities**” means all present and future Environmental liabilities and obligations (whether under the Licence or Environmental Law) arising out of or in connection with incidents, accidents and/or other changes of circumstances from the norm with actual or potential negative consequences in relation to the Licensed Site and/or any other part of the Environment affected by any such incident, accident or other change of circumstance.

“**Works**” means the works carried out, or to be carried out, in order to effect, implement and complete the Plan and ensure compliance with the Licensee’s Obligations (including any unanticipated works which the EPA reasonably concludes are required in order to effect, implement and complete the Plan and/or ensure compliance with the Licensee’s Obligations).

“**WPI**”means the appropriate wholesale price index (being the Capital Goods, Building & Construction (i.e. Materials & Wages) Index), as published by the Central Statistics Office of Ireland, for the year since last calculation/revision of the CRAMP/ELRA Costing.

## Interpretation

 In this Deed:

any reference to a person, if the context so requires or admits, include a company, partnership or unincorporated association;

words importing the singular, where the context so requires or admits, include the plural and vice versa and reference to the masculine, feminine or neuter genders include references to the other genders;

any reference to a Clause or Schedule is a reference to a Clause or Schedule (as the case may be) of this Deed and any reference in a Clause to a sub-clause, paragraph or sub-paragraph is a reference to a sub-clause, paragraph or sub-paragraph of the Clause in which the reference is contained;

the contents of the Schedules form an integral part of this Deed and have as full effect as if they were incorporated in the body of this Deed and the expressions **this Deed** and **the Deed** as used in the Schedules mean this Guarantee, Performance and Payment Agreement and any reference to this Deed is deemed to include the Schedules;

the headings and captions to the Clauses and Schedules in this Deed are inserted for convenience of reference only and shall not be considered a part of or affect the construction or interpretation of this Deed;

any reference to any legislation, order or regulation in this Deed includes reference to any extension, modification, replacement or re-enactment of it from time to time in force and all regulations and orders from time to time made under it and any analogous provision or rule under any applicable law for the time being in force;

a reference to any document includes that document as it has been or may be, subject to and in accordance with its terms or by operation of law, amended, restated, supplemented, varied, assigned, novated, or otherwise from time to time;

terms such as **including, in particular**, **such as**, and **for example** are not to be read as exhaustive, or to limit, but may extend the generality of the provisions to which they relate;

this Deed shall not be interpreted contra proferentum;

any reference to the Licensee or the EPA shall, where the context so admits, include each of their successors and permitted assigns as the case may be and, in respect of the EPA’s successors and permitted assigns, each such person is entitled to enforce and rely upon this Deed as if named in this Deed;

section 75 of the Land and Conveyancing Law Reform Act 2009 does not apply to this Deed; and

the Insolvency of the Licensee or disclaimer of the Licence does not limit or affect the Licensee’s Obligations for the purposes of this Deed and in such a case the Licensee’s Obligations (including all obligations, responsibilities, liabilities and duties under them) are deemed to be the exact same as they would have been but for the Insolvency of the Licensee or disclaimer of the Licence.

# UNDERTAKINGS

Subject always to Clause 2.6, the Surety hereby:

[on demand by the EPA,] guarantees the Licensee’s Obligations and as separate, several and independent obligations, undertakes, covenants and agrees, to observe, perform, fulfill, carry out and/or discharge the Licensee's Obligations, or procure the observance, performance, fulfilment, carrying out and discharge of same on demand by the EPA; and

undertakes, covenants and agrees, on demand by the EPA, to pay the cost of any Works to the EPA.

The EPA may issue a demand on the Surety pursuant to Clause 2.1.1 in accordance with Clause 4.1. The EPA may issue a demand on the Surety pursuant to Clause 2.1.2 in accordance with Clause 4.2.

In the case of Insolvency of the Licensee, the Licensee’s Obligations include all liabilities and obligations which would at any time have been owed by the Licensee in respect of the Licensee’s Obligations if such Insolvency had commenced at the time when the EPA received actual notice thereof and notwithstanding such Insolvency.

The liability of the Surety under this Deed shall be as sole and primary obligor and not merely as surety. The Surety hereby waives all and any of its rights as surety which may at any time be inconsistent with any of the provisions of this Deed and irrevocably and unconditionally indemnifies and agrees to keep the EPA indemnified immediately on demand by the EPA against all actions and proceedings, costs, damages, expenses, claims and losses whatsoever of the EPA, arising as a result of any one or more of the following:

failure by the Licensee to observe, perform, fulfill, carry out and/or discharge the Licensee's Obligations;

the undertakings, covenants and agreements in Clause 2.1 (or any part of it) being or becoming unenforceable, irrecoverable, void or capable of being avoided for any reason whatsoever; and

all or any part of the Licensee's Obligations becoming illegal or unenforceable, irrecoverable, void or capable of being avoided for any reason whatsoever, irrespective of whether such reason was or ought to have been known to the EPA, its officers, employees, agents or professional advisers.

The Surety confirms to the EPA that the EPA need not advise the Surety of its dealings with the Licensee or of any default by the Licensee of the Licensee’s Obligations which the EPA may have notice.

Notwithstanding anything to the contrary contained in this Deed, the maximum aggregate payment obligations and liability of the Surety under or in connection with this Deed shall be limited to:

€[⦁] (EUR [⦁]) (or its equivalent at the date of payment) adjusted to take account of any decrease or increase required due to a change in WPI or CiCC[[5]](#footnote-5); and

any interest thereon at the Agreed Rate from the date of demand by payment by the EPA until the date of payment by the Surety; and

all legal and other costs, charges and expenses payable by the Surety under Clause 22 (*Costs and Expenses*) of this Deed; and

any amounts that may be required to be paid by the Surety in accordance with clause 10.4 and/or clause 10.5,

PROVIDED that the limitation on recourse in this Clause 2.6 shall not apply if:

the Surety contests the validity or enforceability of the Licensee’s Obligations and/or this Deed on a frivolous or vexatious basis; or

the Surety commits fraud or engages in any wilful misconduct in connection with the Licensee’s Obligations and/or this Deed.

# INFORMATION UNDERTAKINGS

The Surety shall supply to the EPA as soon as they same become available, but in any event within 270 days after the end of each of its Financial Years its audited consolidated financial statements for that Financial Year, where same are not publically available at no cost to the EPA.

Each set of Financial Statements shall include a balance sheet, profit and loss account and cash flow statement and shall be certified by a director of the Surety or auditor as giving a true and fair view of its financial condition as at the date on which the Financial Statements were drawn up.

The Surety shall procure that Financial Statements delivered pursuant to this Clause 3 are:

prepared using the Accounting Principles; and

audited by the Surety’s auditors.

The Surety shall supply to the EPA, promptly:

### upon becoming aware of them, the details of any litigation, arbitration or administrative proceedings which are current, threatened or pending against the Surety, and which, if adversely determined are reasonably likely to have a Material Adverse Effect;

any change to the Surety’s financial accounts which is reasonably likely to have a Material Adverse Effect;[[6]](#footnote-6) and

such further information regarding the financial condition, assets and operations of the Surety as the EPA may request from time to time,

save, in each case, where the Surety is prohibited from doing so pursuant to applicable law.

If, in the view of the EPA, the Surety is no longer in a sufficiently strong financial position to meet its obligations under this Deed, the Surety acknowledges that the EPA shall immediately begin discussions with the Licensee in relation to putting a replacement financial provision in place for purposes of Condition [12] of the Licence.

# DEMANDS

The EPA may issue a demand on the Surety for the purposes of Clause 2.1.1 if:

the Licensee has failed to observe, perform, fulfill, carry out and/or discharge the Licensee's Obligations and the EPA has attempted to notify the Licensee of same; or

an Insolvency has occurred in relation to the Licensee.

The EPA may issue a demand on the Surety for the purposes of Clause 2.1.2 if:

the EPA has issued a written request to the Licensee to carry out Works and the Licensee has failed to commence and proceed with such Works within:

15 days; or

five (5) days, if it is necessary to urgently carry out the Works in order to prevent or remediate Environmental pollution resulting from a breach of the Licensee's Obligations and this is specified in the written notice; or

an Insolvency has occurred in relation to the Licensee.

The cost of the Works shall be calculated in accordance with Clause 5.

The Surety waives any right it may have of first requiring the EPA to make a demand upon, proceed against or enforce any other rights or security, or claim payment from, or make or file any proof or claim in any proceedings resulting from an Insolvency in relation to the Licensee or any other person prior to the issuance of a demand pursuant to Clause 4.1 and/or Clause 4.2 (as the case may be) or otherwise claiming from the Surety under this Deed. This waiver applies irrespective of any law or any provision of any document to the contrary.

Without prejudice to the generality of Clause 4.4, but subject to Clause 4.1 and Clause 4.2, the EPA shall not be bound, prior to the issuance of a demand pursuant to Clause 4.1 and/or Clause 4.2 (as the case may be) or otherwise claiming from the Surety under this Deed:

to have called or demanded upon the Licensee to comply with the Licensee’s Obligations, or otherwise sought to enforce the Licensee’s Obligations;

to demand any sum from the Licensee;

for any Works to have commenced or completed;

for the costs of any Works (which have commenced or completed) to have been wholly or partially discharged;

to institute any proceedings against the Licensee for the purposes of establishing any breach of the Licensee’s Obligations;

to institute any proceedings against the Licensee for the purposes of establishing that any money or obligation is due and owing from the Licensee, or recoverable from the Licensee;

to carry out any measures for the purposes of preventing or remediating Environmental liabilities; or

to provide any prior notice or communication to the Surety, save for a demand pursuant to this Clause 4.[[7]](#footnote-7)

Nothing in Clause 4.5 shall enable the EPA to recover an amount due from the Licensee and the Surety in respect of the same obligation or liability, where such recovery would amount to “double recovery”.

# CALCULATION AND PAYMENT

The EPA shall calculate the estimated cost of any Works and shall send a written itemised estimate of the cost of the Works to the Surety together with the demand for payment, issued in accordance with Clause 4.2. The EPA shall stipulate the date by which such amount shall be paid to the EPA. The Surety shall pay the amount to the EPA by the date stipulated by the EPA.

In the event that it is apparent to the EPA that the costs of the Works will exceed the estimated cost notified to the Surety in accordance with Clause 5.1, the EPA shall re-calculate the estimated cost of any Works and send an updated written itemised estimate of the cost of the Works to the Surety, together with an additional demand for payment of the additional amount, subject to Clause 2.6. The EPA shall stipulate the date by which such additional amount shall be paid to the EPA.

Once the Works have been completed, the EPA shall produce a written itemised final account of the cost of the Works and inform the Surety whether (i) a further payment is due by the Surety to the EPA or (ii) if a refund is due from the EPA to the Surety. In the case of a further payment, the Surety shall pay the additional amount to the EPA by the date stipulated by the EPA. In the case of a refund, the EPA shall pay the refund within 30 days of receipt of the EPA’s determination (or such other date as agreed by the EPA in writing).

The Surety may raise a query in respect of the itemised final account within two weeks of receipt of the final itemised account. The EPA shall consider any query and either amend the itemised final account or decide that no amendment is required, as the EPA considers appropriate. The EPA shall inform the Surety of its decision in relation to the itemized final account. The Surety, or the EPA, shall make any payment or refund in accordance with that itemized final account within 30 days of receipt of the EPA’s determination (or such other date as agreed by the EPA in writing).

If the Surety, having queried the itemised final account in accordance with Clause 5.4, disagrees with the EPA’s determination, the matter shall be referred for determination by an expert. The Expert is deemed to act as an expert and not an arbitrator. The expert shall be appointed by agreement of the Surety and the EPA or, in default of agreement, nominated by the president for the time being of The Institute of Engineers of Ireland. In addition to determining matter relation to the itemised final account, the expert shall also be entitled to make a determination in relation to the costs and expenses of the determination process. The determination of the expert shall be binding on the EPA and on the Surety and the Parties shall comply with the expert’s decision unless and until it is overturned in accordance with Clause 23. The Expert’s decision shall be final unless a Party issues a notice of dissatisfaction to the other Party within 15 Business Days of the expert’s decision in which case the determination of the costs and expenses may only be finally settled by amicable agreement or by a Court, having competent jurisdiction, in accordance with Clause 23. If the expert’s decision is challenged in accordance with Clause 23 the expert’s decision may be admissible as evidence. The Surety or the EPA shall make any payments required in accordance with the expert's determination within 30 days of the expert’s determination.

## The cost of the Works shall include a charge for the amount of time spent by EPA staff on monitoring and enforcement of the Licence in order to determine that the Works were needed and were carried out. The rate for this charge shall be consistent with the rate charged by the EPA from time to time in relation to monitoring, detection and enforcement.

Where the Surety has paid any monies to the EPA in accordance with this Clause 5, the EPA shall place those monies in an interest bearing account until disbursed, and shall on request account to the Surety for any interest earned. In the alternative, the Parties may agree that the Surety shall hold any sum due until such time as it becomes payable.

# INTEREST

With respect to any amount which is demanded from the Surety by the EPA in accordance with this Deed, the Surety shall pay interest at the Agreed Rate (as well after as before judgment) from the date of the demand for payment under this Deed until payment in full. Interest payable under this Clause shall be compounded with rests on such days as the EPA shall from time to time decide but without prejudice to the right of the EPA to require payment of such interest when due.

# CONTINUING SECURITY

The Surety acknowledges that this Deed is a continuing security for all of the Licensee’s Obligations and shall not be discharged by any intermediate or partial observance, performance, fulfilment, carrying out and/or discharge of the Licensee's Obligations. Subject to Clause 2.6, no demand made by the EPA under this Deed shall prejudice or restrict the right of the EPA to make furtherdemands.

Where the Surety has paid any monies to the EPA at any time pursuant to this Deed, in respect of or arising from the Licensee’s failure to observe, perform, fulfill, carry out and/or discharge the Licensee’s Obligations, such payment shall not discharge the Surety from liability under this Deed in respect of, nor shall it prejudice the right of the EPA to claim in respect of, further failures to observe, perform, fulfill, carry out and/or discharge the Licensee’s Obligations.

If this Deed ceases for any reason to be a continuing security, this Deed shall relate to all the Licensee’s Obligations as at the date of such cessation.

The Surety acknowledges and agrees that:

this Deed is irrevocable;

it will not serve notice or take any other action to determine or revoke its obligations under this Deed as a continuing security; and

service of notice by it to determine or revoke its obligations under this Deed (save as expressly provided for in this Deed) or any other action taken to determine or revoke those obligations shall constitute a breach of the undertakings in this Deed for the purposes of Clause 2.1.1.

This Deed is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any other guarantee or security for the Licensee’s Obligations which are now or hereafter held by the EPA whether from the Surety or otherwise.

# PRESERVATION OF RIGHTS

The obligations of the Surety under this Deed will not be affected by any act, omission, matter or thing which, but for this Clause 8, would reduce, release, prejudice or diminish any of its obligations under this Deed or prejudice or diminish those obligations in whole or in part (whether or not known to it or the EPA) including:

any time (including any extension of any deadline), forbearance (including any forbearance to take any action on foot of non-compliance with any deadline), waiver, consent, indulgence or concession granted to the Licensee, the Surety or any other person;

the release of the Licensee, the Surety or any other person under the terms of any composition or arrangement with any creditor of the Licensee, the Surety or other person;

the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, the Licensee, the Surety or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

the issuing, confirming, renewing, determining, varying or increasing any negotiable instrument in any manner whatsoever;

any incapacity or lack of power, authority or legal personality of, or dissolution or change in the members or status or constitution of, the Licensee, the Surety or any other person;

any amendment, extension, restatement or variation (in each case, however fundamental and of whatsoever nature and whether or not more onerous) or replacement of the Licence or the Licensee’s Obligations or any other document relating to or connected with the Licence or the Licensee’s Obligations;

any unenforceability, illegality, invalidity or non-provability of the Licensee’s Obligations or any liabilities or obligation of the Licensee or any person under any document relating to or connected with the Licence or the Licensee’s Obligations;

an Insolvency in relation to the Surety or the Licensee;

any merger or amalgamation (however effected) relating to the Licensee, the Surety or other person;

any judgment obtained against the Licensee, the Surety or other person;

any purported or attempted surrender of the Licence;

any agreement between the Licensee and the Surety;

any agreement between the Licensee and the EPA, except where stated otherwise in such agreement;

any agreement between the EPA and the Surety, except where stated otherwise in such agreement; or

any other act, event or omission which but for this provision would or might operate to impair, discharge or otherwise affect the liabilities and obligations of the Surety under this Deed.

# REINSTATEMENT

If any payment by the Licensee or the Surety or any discharge, release or settlement given by the EPA (whether in respect of the obligations of the Licensee or the Surety or any security for those obligations or otherwise) is avoided, adjusted or reduced as a result of an Insolvency:

the liability of the Surety shall continue as if the payment, discharge, release, settlement, avoidance, adjustment or reduction had not occurred;

the EPA shall be entitled to recover the value or amount of that security or payment from the Surety, as if the payment, discharge, release, settlement, avoidance, adjustment or reduction had not occurred; and

the EPA shall be entitled to enforce this Deed subsequently as if such payment, discharge, release, settlement, avoidance, adjustment or reduction had not occurred and any such payment had not been made.

# PAYMENT

All payments by the Surety under this Deed shall be made to the EPA to an account at such office or such bank as the EPA may notify to the Surety for this purpose.

Payments under this Deed to the Surety shall be made for value on the due date at such times and in such funds specified by the EPA.

If a payment under this Deed is due on a day which is not a Business Day, the due date for that payment shall instead be the next Business Day.

Save as may be required by law, the Surety will pay all monies due under this Deed free and clear of and without deduction for or on account of any set-off or counterclaim or any and all present or future taxes, levies, imposts, charges, fees, deductions or withholdings. If any sums payable under this Deed shall be or become subject to any such deduction or withholding, the amount of such payments shall be increased so that the net amount received by the EPA shall equal the amount which, but for such deduction or withholding, would have been received by the EPA under this Deed.

In circumstances where a payment to be made by the Surety under this Deed would attract a liability to tax in the hands of the EPA but would, if such payment were instead made by the Licensee, be either be tax free or attract a lesser liability to tax, then the Surety will concurrently pay to the EPA such additional amount as will compensate the EPA for such tax or increased tax.

If the Surety is required to make any payment to the EPA pursuant to either Clause 10.4 and/or Clause 10.5 and the EPA subsequently receives or utilises a refund or tax credit equal to the amount of the increased payment made by the surety then the EPA shall pay or repay an amount to the Surety which will leave the Surety (after that payment or repayment) in the same position as it would have been in had the increased payment not have been required to be made to the Surety.

Any certification or determination by the EPA of a rate, time period or amount under this Deed is, in the absence of manifest error, evidence of the matters to which it relates.

# POWERS OF THE EPA

In the event of any proceedings in or analogous to any Insolvency in relation to the Licensee, the EPA may notwithstanding any payment made under this Deed approve and agree to accept any dividend or composition in respect of the whole or any part of the Licensee’s Obligations in the same manner as if this Deed had not been given.

The EPA shall be entitled to retain this Deed and any security held for the liability of the Surety under this Deed after, as well as before, the observance, performance, fulfilment, carrying out and/or discharge of the Licensee's Obligations under this Deed for such period as the EPA may determine.

# DEFERRAL OF SURETY’S RIGHTS

Until the Licensee’s Obligations have been irrevocably observed, performed, fulfilled, carried out and/or discharged in full, the Surety may not exercise any rights which it may have to:

save in the normal course of business accept from the Licensee, either directly or indirectly, any undertaking, obligation or security whereby the Surety or any person claiming through the Surety, by endorsement, assignment or otherwise, intends in an Insolvency in relation to the Licensee to prejudice the EPA or increase the proofs in such Insolvency or diminish the assets distributable amongst the creditors of the Licensee;

make or enforce any claim (whether by way of set-off, counterclaim or otherwise) or right against the Licensee or prove in competition with the EPA in respect of any payment under this Deed made by the Surety;

claim or be entitled to claim, or have the benefit of, any set-off, counterclaim or proof against, or dividend, composition or payment by, the Licensee or any co-surety in respect of any payment under this Deed made by the Surety;

claim or prove in competition with the EPA in an Insolvency in relation to the Licensee or any co-surety or have the benefit of or share in any payment or composition from the same but, if so directed by the EPA, it shall prove for the whole or any part of its claim in such Insolvency on terms that the benefit of such proof and all money received by it in respect thereof shall be held on trust for the EPA and applied in or towards the observance, performance, fulfilment, carrying out and/or discharge of the Licensee’s Obligations in such manner as the EPA shall deem appropriate;

be indemnified or reimbursed by the Licensee;

claim or enforce any contribution from any other surety of all or part of the Licensee’s Obligations; and/or

take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the EPA under any document guarantee or security taken pursuant to, or in connection with, the Licensee’s Obligations by the EPA.

Where the Surety receives any benefit, payment or distribution in relation to the rights specified in Clause 12.1, it shall hold on trust for the EPA that benefit, payment or distribution to the extent necessary to enable all amounts which may be or become payable to the EPA by the Licensee under or in connection with the Licensee’s Obligations to be observed, performed, fulfilled, carried out and/or discharged in full and shall immediately pay or transfer the same to the EPA or as the EPA may direct.

The Surety waives all or any of its rights as surety which may be inconsistent with any provisions of this Deed.

The provisions of Clause 12.2 stating that a trust is created shall have effect only to the extent that such provisions do not constitute or create any charge and if they are so deemed to create a charge then the Surety agrees that a debt instead shall be due from the Surety to the EPA in an amount equivalent to the benefit, payment or distribution received by it as referred to in Clause 12.2.

# BREACH OF THIS DEED AND INVALIDITY

If, at any time, any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

If, at any time, any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, and if, as a result, the EPA is unable to recover the cost of carrying out any Works, the Surety agrees to pay to the EPA by way of liquidated damages a sum equal to that cost.

# REPRESENTATIONS AND WARRANTIES

The Surety hereby represents and warrants that[[8]](#footnote-8):

It is [duly incorporated and validly existing under the law of its jurisdiction of incorporation].

It has, and covenants that it will at all times have, the necessary legal capacity and power to execute this Deed and perform its obligations under this Deed.

It has obtained all necessary authorisations, consents, registrations, notarisations, legalisations and notifications required in connection with the entry into, performance, validity and enforceability of, and the transactions contemplated by, this Deed have been obtained or effected (as appropriate) and are in full force and effect.

This Deed constitutes its legal, valid and binding obligations.

The execution of this Deed and the performance of its obligations under this Deed will not:

conflict with its constitutional documentation;

conflict with any laws binding on it; or

conflict with or result in default under any document agreement or instrument which is binding upon it or any of its assets nor result in the creation of any security over any of its assets.

Under the laws of its place of incorporation and (if different) Ireland in force at the date of this Deed, the claims of the EPA against the Surety under this Deed will rank at least *pari passu* with the claims of all the Surety’s other unsecured creditors save those whose claims are preferred solely on an Insolvency or by operation of law.

It has not taken any corporate action nor have any other steps been taken or legal proceedings been commenced or threatened against it in relation to its Insolvency or re-organisation or for the appointment of a receiver, administrative receiver, trustee or similar officer of it or of any or all of its assets or revenues to be made in respect of its assets.

It will not be required to make any deduction or withholding from any payment it may make under or in connection with this Deed.

[No filing or registration is required in the jurisdiction of incorporation of the Surety to make this Deed.]

The Surety makes the representations and warranties set out in this Clause 14 on the date of this Deed.

The representations and warranties in this this Clause 14 shall continue and are deemed to be made by the Surety on each day until this Deed is released by the EPA.

Each representation and warranty deemed to be made after the date of this Deed shall be deemed to be made by reference to the facts and circumstances existing at the date the representation and warranty is deemed to be made.

The Surety acknowledges that it has not relied on any warranty or representation made by or on behalf of the EPA to induce it to enter into this Deed and that it has made and will continue to make, without reliance on the EPA, its own independent investigation in relation to the affairs of the Licensee, its conduct of the Licensee’s Obligations and otherwise. The Surety further acknowledges that the EPA has no duty or responsibility either now or in the future to provide the Surety with any information relating to the affairs of the Licensee, its conduct of the Licensee’s Obligations and otherwise.

# REMEDIES AND WAIVERS

No delay or omission on the part of the EPA, whether deliberate or inadvertent, in exercising any right or remedy under this Deed shall impair that right or remedy or operate as, or be taken to be, a waiver by the EPA of the right or remedy and it shall not prevent any other or further exercise under this Deed of that other right or remedy.

A waiver by the EPA of any breach of any term of this Deed shall not prevent the subsequent enforcement of that term if not remedied on demand, or if subsequently breached again and shall not be deemed a waiver of any subsequent breach. The EPA’s rights under this Deed are cumulative and not exclusive of any rights provided by law and may be exercised from time to time and as often as the EPA deems expedient.

# TERMINATION

## This Deed shall continue to have full force and effect notwithstanding the suspension or revocation of the Licence.

## Without prejudice to Clause 16.1, after:

the Licensee’s Obligations have been irrevocably observed, performed, fulfiled, carried out and discharged in full to the satisfaction of the EPA; or

the lawful transfer of the Licence with the consent and agreement of the EPA; or

if the EPA otherwise agrees in writing,

## the EPA shall at the request and cost of the Surety execute and do all such acts, deeds and things as may be necessary to release the Surety from its obligations under this Deed and any such release shall be in writing.

# MISCELLANEOUS

The Surety may not assign or transfer or enter into any trust arrangement with any third party in respect of any of its rights, benefits and/or obligations under this Deed.

If pursuant to any arrangement, compromise, merger, amalgamation or analogous proceeding in any jurisdiction all or any of the Licensee’s Obligations are transferred to or assumed by any other person or persons, this Deed shall continue to have effect as if all references to the Licensee included such other person or persons.

The obligations of the Surety under this Deed shall be enforceable notwithstanding:

any reconstruction, reorganisation or change in the constitution of the Licensee or the EPA;

the acquisition of all or any part of the undertaking of the Licensee or the EPA by any other person; or

any merger or amalgamation (however effected) relating to the Licensee or the EPA,

 and references to the Licensee and the EPA shall be deemed to include any person who, under the laws of its jurisdiction of incorporation, domicile or other relevant applicable law has assumed the rights and obligations of the Licensee or the EPA, as the case may be, under this Deed or to which under such laws the same have been transferred.

Where the Surety is acquired by any other company, or ceases to be listed on any stock exchange on which it is currently listed as a public company (or its equivalent in the jurisdiction where it is incorporated), the Surety shall notify the EPA unless such information is publicly available.

In any litigation relating to this Deed or any security given by the Surety, the Surety irrevocably waives the right to interpose any defence based upon any statute of limitations or any claim of laches or set-off or frivolous or vexatious counter-claim of any nature or description.

This Deed may not be amended or waived except by an instrument in writing signed by a duly authorised officer or representative of the EPA and the Surety.

Each of the parties to this Deed confirms, acknowledges and agrees that there are no oral understandings between the EPA and the Surety in any way varying, contradicting or amplifying the terms of this Deed. This Deed supersedes all prior representations, arrangements, understandings and agreements and save in respect of any written agreement which expressly refers to this Deed in its terms sets forth the entire, complete and exclusive agreement and understanding between the parties as to the matters provided for in this Deed.

The Licensee and the Surety agree to immediately notify the EPA if the Surety is acquired, merged, restructured or if an Insolvency occurs in relation to the Surety.

The Surety and Licensee acknowledge that this Deed does not give rise to any legitimate expectation on its part that the EPA will determine any future Licence review in a particular manner.

No amendment to this Deed will be valid or binding unless set forth in writing and duly executed by all of the Parties hereto. No waiver of any breach of any provision of this Deed will be effective or binding upon the EPA unless made in writing and signed by the EPA purporting to give the same and, unless otherwise provided, will be limited to the specific breach waived. A waiver of any breach of any provision of this Deed is not a waiver of a breach of any other agreement, licence, lease, permission or any other document or law.

No delay, omission or forbearance by the EPA in exercising any right, power, privilege or remedy under this Deed shall operate to impair, or be construed as a waiver of, such right, power, privilege or remedy. Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any further exercise thereof or other right, power, privilege or remedy.

Neither the Surety nor Licensee, is entitled to novate, assign, transfer or otherwise dispose of this Deed, or any of its rights or obligations under it (including by way of merger) to any extent without the prior written consent of the EPA.

# Notices

A demand, notice and other communications to any Party to this Deed required or permitted under Deed, or any proceedings relating to this Deed, shall be in writing and will be sufficiently served:

if delivered by hand, or

if sent by prepaid registered post; and

if sent by email, and

in addition to any method of service listed at Clause 18.1.1 - 18.1.3 above, shall in each case also be sent electronically to the address specified below in this Clause 18.1 or to any other address as is from time to time notified to the other party in accordance with the provisions of this Clause 18:

To the Surety:

Address: [⦁]

Attention: [⦁]

Email: [⦁]

To the Licensee:

Address: [⦁]

Attention: [⦁]

Email: [⦁]

Electronically: [Via the EPA portal (EDEN)]

To the EPA:

Address: The Environmental Protection Agency

 PO Box 3000

Johnstown Castle Estate

County Wexford

Attention: The Financial Provision Team

Electronically: Via the EPA portal (EDEN)

Any notice or communication shall be deemed to have been served:

if delivered by hand, on delivery;

if sent by pre-paid registered post, on the second Business Day after the date of posting;

if sent by email, on receipt by the sender of proof of delivery, as well as,

through the EPA portal, on receipt by the Surety or Licensee of confirmation from the EPA’s portal of proof of delivery,

provided that, if in accordance with the above provisions, any notice or communication is delivered by hand or received by email outside working hours on any Business Day, that notice or communication shall be deemed to have been served at the start of working hours on the next Business Day.

Each person giving a notice or making a communication under this Deed by email may promptly confirm the notice or communication by post to the person to whom the notice or communication was addressed but the absence of any confirmation shall not affect the validity of the notice or communication or the time upon which it is deemed to have been served.

# COUNTERPARTS

This Deed may be executed in any number of counter parts and by the different Parties to it on separate counterparts, each of which, when executed and delivered, shall constitute an original, but all the counterparts shall together constitute but one and the same instrument.

# TRUST

The EPA declares that it shall hold the benefit of this Deed for itself and for all local or public authorities which are now, or may in future be, vested with any power to take action to prevent, remediate or alleviate environmental pollution pursuant to Environmental Law.

The Surety and the Licensee agree to this declaration and agree that the EPA may apply any sum paid under this Deed to remedy any breach of the Licensee’s Obligations, and may disburse any such sum to any local or public authority to do likewise.

# COSTS AND EXPENSES

The Surety shall, within three Business Days of demand, pay to the EPA the amount of all costs and expenses (including legal fees) ordinary and properly incurred by the EPA in connection with the enforcement of, or the preservation of any rights under this Deed in an enforcement scenario and any proceedings instituted to preserve the rights of the EPA as a consequence of taking or holding this Deed or enforcing these rights.

# LAW AND JURISDICTION

This Deed, and all disputes (including non-contractual disputes) and matters arising out of or in connection with it (including as to its formation, existence, interpretation and validity), shall be governed by and construed in accordance with the laws of Ireland.

For the benefit of the EPA, the Surety and Licensee submit to the exclusive jurisdiction of the Courts of Ireland in relation to any suit, action, claim or proceedings to be brought by the Surety or Licensee arising out of or in connection with this Deed (including as to its formation, existence, interpretation and validity and any non-contractual disputes).

Nothing in this Clause 22 limits the right of the EPA to take any suit, action, claim or proceeding arising out of or in connection with this Deed (the “**Proceedings**”) against the Surety or Licensee in any other court of competent jurisdiction and the Surety and Licensee irrevocably submits to any other jurisdiction in which it has assets and hereby waives any objection to any claim that any Proceedings have been brought in any inconvenient forum. The taking of any Proceedings in one or more jurisdictions does not preclude the EPA from taking Proceedings in any other jurisdiction, whether concurrently or not.

Without prejudice to any other mode of service allowed under any relevant law, the Surety:[[9]](#footnote-9)

irrevocably appoints [the Licensee] as its agent for service of process in relation to any proceedings before the courts of Ireland in connection with this Deed; and

agrees that failure by a process agent to notify the Surety of the process will not invalidate the proceedings concerned.

If any person appointed as an agent for service of process is unable for any reason to act as agent for service of process, the Surety must immediately (and in any event within seven days of such event taking place) appoint another agent on terms acceptable to the EPA. Failing this, the EPA may appoint another agent for this purpose.

**IN WITNESS** whereof the parties have executed this document as a Deed on the date first written above.

# EXECUTION PAGES[[10]](#footnote-10)

**THE SURETY**[[11]](#footnote-11)

GIVEN under the common seal of

**[insert]**

and delivered as a deed

|  |  |  |
| --- | --- | --- |
| Seal | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Director**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Director / Secretary** |  |

EXECUTEDas a deed by

**[insert]**

on being signed by two directors

or a director and secretary

............................................(Director)

............................................(Director/Secretary)

**EXECUTED** as a deed by

**[insert]**

**THE LICENSEE**

GIVEN under the common seal of

**[insert]** and delivered as a deed

|  |  |  |
| --- | --- | --- |
|  |  |  |
|  |  |  |
| Witness signature |  | Signature of **director** |
|  |  |  |
| Print name |  | Print name |
|  |  |  |
| Print address |  |  |
|  |  |  |
| Witness occupation |  |  |
|  |  | Signature of **director/secretary** |
|  |  |  |
|  |  | Print name |

**THE EPA**

GIVEN underthe common seal of the

**ENVIRONMENTAL**

**PROTECTION AGENCY**

and delivered as a deed

|  |  |  |
| --- | --- | --- |
|  |  |  |
|  |  |  |
| Witness signature |  | Signature of **authorised signatory** |
|  |  |  |
| Print name |  | Print name |
|  |  |  |
| Print address |  |  |
|  |  |  |
| Witness occupation |  |  |
|  |  |  |

1. Where the Surety is an entity incorporated in a jurisdiction outside of Ireland a legal opinion, from a law firm approved by the EPA, will be required. Proof of suitable professional indemnity cover may be required. In house counsel opinions are not suitable. [↑](#footnote-ref-1)
2. The Surety does not need to be the ultimate parent or holding company. It may be any member of the Licensee’s “group of companies” as that term is defined in the Irish Companies Act 2014. This includes any holding company or subsidiary of the Licensee, or any subsidiary of a holding company of the Licensee. Again, the terms “holding company” and “subsidiary” shall be taken to have the same meanings here as they do in the Companies Act 2014. Regardless of where in the “group of companies” the proposed surety sits, and its relationship to the Licensee, the proposed surety must have the requisite financial strength to act as Surety, in accordance with the EPA’s Guidance on Financial Provision for Environmental Liabilities. [↑](#footnote-ref-2)
3. Where the Surety is an entity incorporated in a jurisdiction outside of Ireland the EPA may accept other common international financial reporting frameworks such as US GAAP and UK GAAP. [↑](#footnote-ref-3)
4. Surety to confirm. [↑](#footnote-ref-4)
5. Please see paragraph 2.7.4 of the document entitled “Guidance on assessing and costing environmental liabilities” 2014 (available at [www.epa.ie](http://www.epa.ie)) [↑](#footnote-ref-5)
6. The Surety should notify the EPA of any changes which may impact on its financial strength. Such changes will vary depending on the Surety. These may include but are not limited to, changes in the level or number of guarantees and/or undertakings given by the Surety, movement to a net liability position, a reduction in net current assets or a material change in cash balance, debtors/creditors days or stock inventory. [↑](#footnote-ref-6)
7. It is the Surety’s responsibility to make itself aware of the operations of the Licensee to the extent it requires in order for it to enter into this Deed. The EPA is not responsible for keeping the Surety informed of the Licensee’s operations. [↑](#footnote-ref-7)
8. Where the Surety is incorporated in a jurisdiction other than Ireland, a legal opinion will be required in addition to the representations and warranties set out in this Deed. [↑](#footnote-ref-8)
9. See template process agent letter. [↑](#footnote-ref-9)
10. Subject to review of constitutional documentation. [↑](#footnote-ref-10)
11. Local law advice with respect to the Execution Block for the Surety required where the Surety is not incorporated in Ireland. [↑](#footnote-ref-11)