



Annex I

United Kingdom

Improving financial security in the context of the
Environmental Liability Directive

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1. INTRODUCTION

Financial security for the prevention and remediation of environmental damage under the ELD in the form of stand-alone environmental insurance policies is widely available in the United Kingdom. The London insurance market issues stand-alone environmental insurance policies, not only for risks in the United Kingdom, but also across the EU by passporting via affiliates in Member States.

Financial security for the remediation of off-site pollution from an operator's activities at its own site in the form of an extension to a general (public) liability policy is also widely available.

Environmental extensions to property policies are not generally available.

The ELD is implemented in the United Kingdom by different regulations for England, Scotland, Wales and Northern Ireland as follows:

- Environmental (Prevention and Remediation) (England) Regulations 2015/810, as amended;¹
- Environmental Liability (Scotland) Regulations 2009/226, as amended;²
- Environmental (Prevention and Remediation) (Wales) Regulations 2009/995, as amended;³ and
- Environmental (Prevention and Remediation) (Northern Ireland) Regulations 2009/252, as amended.⁴

None of the jurisdictions in the United Kingdom has introduced mandatory financial security for ELD liabilities.

None of the jurisdictions in the United Kingdom impose mandatory financial security for other environmental responsibilities and/or liabilities other than those mandated by EU legislation.

2. ENVIRONMENTAL INSURANCE MARKET

The environmental insurance market in the United Kingdom is mature. Stand-alone environmental insurance policies for businesses with sites and/or operations only in the United Kingdom are widely available. Demand is good and continues to increase.

Environmental extensions to general liability policies range from extensions for small to medium sized businesses to standardised 'add ins' for general liability policies issued to large businesses. Due to the 'add ins', a much larger volume of environmental extensions to general liability policies exists compared to stand-alone environmental insurance policies.

The extensions do not necessarily provide cover for ELD liabilities; many provide only limited cover for remediating pollution under environmental legislation other than the ELD. The vast majority do not provide any cover for any ELD liabilities. Some require a claim for bodily injury or property damage under the general liability policy before the extension is triggered. Most

¹ Environmental (Prevention and Remediation) (England) Regulations 2015/810;
<http://www.legislation.gov.uk/uksi/2015/810/contents>

² Environmental Liability (Scotland) Regulations 2009/226;
<http://www.legislation.gov.uk/ssi/2009/266/contents>

³ Environmental (Prevention and Remediation) (Wales) Regulations 2009/995;
<http://www.legislation.gov.uk/wsi/2009/995/contents>

⁴ Environmental (Prevention and Remediation) (Northern Ireland) Regulations 2009/252;
<http://www.legislation.gov.uk/nisr/2009/252/contents/made>

limit cover to remediating off-site pollution from a sudden and accidental incident on an insured's site. Some limit cover for remediating pollution to an incident on an insured's site that begins and ends in a specified period of time and that is reported to the insurer within a specified time period. Cover is available in some extensions for third-party claims for bodily injury and property damage from pollutants that migrate gradually from an insured's site – but not for the costs of remediating such pollution. The majority do not provide cover for preventive measures under the ELD or other environmental legislation but, instead, provide cover only for remedial measures.

The environmental extensions are generally known as *Bartoline* endorsements after a case in which an English court concluded that cover was not provided by a general liability policy for remediating pollution caused by a fire at the insured's premises.⁵

Demand for environmental extensions to general liability policies is good and increasing.

In addition to the above extensions, a very small number of insurers offer 'lite' environmental extensions to general liability policies. These extensions provide varying degrees of cover including, in some cases, cover for primary remediation under the ELD. Demand for such extensions is low to very low.

Due to the large size of the London insurance market, multinational insurers tend to issue stand-alone environmental insurance policies by passporting via their offices in Member States to businesses in other States rather than businesses in the United Kingdom purchasing policies issued in other States. Demand for policies issued by passporting via affiliates is good and continues to increase as more insurers continue to enter the market.

2.1. Commercial insurers

2.1.1. Number of insurers

Approximately 20 insurers in the United Kingdom offer stand-alone environmental insurance policies, most of which have dedicated environmental insurance underwriters or teams of underwriters.

2.1.2. New insurers entering the market since 2009

Approximately five insurers offered stand-alone environmental insurance policies in 2009. That number steadily grew to the 20 or so insurers that offered such policies when this report was published. Most of the insurers also offer other types of policies.

2.1.3. Existing insurers that introduced environmental insurance policies since 2009

Most of the 20 or so insurers that offered stand-alone environmental insurance policies when this report was published carried out insurance business in the United Kingdom before 2009.

2.2. Re/insurance pools

There are no re/insurance pools for ELD or other environmental liabilities in the United Kingdom.

2.2.1. Date of establishment

Not applicable

⁵ *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2006] EWHC 3598 (QB), (2007) 1 All ER (Comm) 1043

2.2.2. Descriptions of policies issued

Not applicable

2.3. Mutuels

The National Farmers Union Mutual Insurance Society Limited (NFU Mutual) offers stand-alone environmental insurance policies to its members.

2.3.1. Date of establishment

NFU Mutual was founded on 30 September 1910.

2.3.2. Descriptions of policies issued

Policies issued by NFU Mutual tend to be for farmers and, to a lesser extent, owners of country estates. The policies tend to be combined policies, with one section providing cover for environmental liabilities and other sections providing cover for public liability, property, employers' liability insurance, etc.

2.4. Other

There are no captives or other types of providers of environmental insurance policies in the United Kingdom with the exception of captives in the Channel Islands and the Isle of Man. Some of these captives provide cover for ELD and other environmental liabilities.

3. VOLUNTARY INSURANCE POLICIES FOR ELD AND OTHER ENVIRONMENTAL LIABILITIES

3.1. Environmental insurance policies

A wide range of stand-alone environmental insurance policies are widely available in the United Kingdom for preventing and remediating environmental damage, including pollution, under the ELD and other environmental legislation.

3.2. Cover for ELD preventive costs

Stand-alone environmental insurance policies provide cover for: (1) the costs of emergency measures to prevent environmental damage from occurring in the first place; and (2) where environmental damage has occurred, to prevent and further environmental damage. Conditions and/or restrictions on such cover generally require an insured to report the emergency measures to insurers within a specified time period. Other restrictions, depending on the policy, limit the type of measures within the definition or scope of emergency costs.

Some stand-alone environmental insurance policies specifically provide cover for the cost of measures to prevent environmental damage under the ELD. The policies do not provide cover for the cost of measures to repair or upgrade equipment to prevent the occurrence of environmental damage or similar costs. Insurance is available only for fortuitous losses, that is, the risk of a possible loss; it is not available for certainties.

Some other stand-alone environmental insurance policies do not provide cover for preventive measures under the ELD due to the possibility that this could potentially include cover for improvement or similar costs.

3.3. Cover for ELD primary, complementary and compensatory costs

Virtually all stand-alone environmental insurance policies offered in the United Kingdom provide cover for primary, complementary and compensatory remediation costs under the ELD.

3.4. Cover for non-ELD liabilities

All stand-alone environmental insurance policies offered for risks in the United Kingdom provide cover for costs arising from pollution under other environmental legislation as well as environmental damage under the ELD.

3.5. Nature of policies (liability only or liability and on-site remediation)

The vast majority of stand-alone environmental insurance policies offered for risks in the United Kingdom provide cover for claims for the remediation of on-site, as well as off-site, environmental damage including pollution of soil and water. They do not provide cover for damage to on-site property in the form of buildings, other structures and equipment, with the caveat that some provide cover for the repair or replacement of some on-site property that is damaged during works to remediate environmental damage.

3.6. Description of policies

3.6.1. Format

Stand-alone environmental insurance policies offered for risks in the United Kingdom generally have a menu format so that an insured may select the coverage it requires. The policies tend to have separate insuring agreements for the costs of preventing and remediating environmental damage under the ELD and the costs of remediating it under other environmental legislation. The reason for this split is not because operators select only coverage under the ELD; they do not do so. Rather, the split demonstrates to brokers and insureds that the policy provides cover for both types of costs.

3.6.2. Claims made or occurrence based

With the exception of some policies for contractors, stand-alone environmental insurance policies are underwritten on a claims made and reported basis. That is, a claim must be made against an insured and the insured must report the claim to insurers during the policy period. Some policies have automatic and optional extended reporting periods. These extend the period during which the insured may report a claim for environmental damage that occurred during the policy period to insurers. Automatic extended reporting periods vary from 30 to 90 days depending on the insurer. Optional extended reporting periods may be purchased from some insurers for an additional premium for periods generally between one and three years.

3.6.3. Policies for operators

Insuring agreements in many stand-alone environmental insurance policies provide cover for the following:

- the remediation of on-site and off-site environmental damage under the ELD caused by operations, including transportation, carried out by the insured operator during the policy period;
- the remediation of pollution under other environmental legislation caused by operations, including transportation, carried out by the insured operator during the policy period;

- emergency measures to prevent or remediate environmental damage under the ELD that occurs during the policy period;
- emergency measures to prevent or remediate pollution under other environmental legislation that occurs during the policy period;
- the remediation of pre-existing environmental damage including pollution at or emanating from sites owned or occupied by the insured provided that the damage is disclosed by the insured to insurers, or is unknown to the insured, before the inception of the policy;
- third-party claims for bodily injury and property damage from environmental damage including pollution;
- first party business interruption costs and extra expense caused by environmental damage including pollution;
- third party business interruption costs and extra expense caused by environmental damage including pollution;
- crisis response costs arising from an incident that has caused environmental damage including pollution;
- the remediation of environmental damage arising from the insured's waste at an authorised non-owned disposal site; and
- related legal costs.

Only the first and third items are liabilities under the ELD. The policies are thus designed to include, not only protection under the ELD but also protection under other public law as well as civil law and non-liability requirements.

Depending on the policy, cover tends to be site specific, especially for pre-existing environmental damage, in that sites owned or occupied by an insured are typically listed on an endorsement to the policy. Policies may be flexible in that cover may be provided automatically, or subject to satisfactory scrutiny by insurers, for sites (and sometimes companies) that are acquired by the insured during the policy period.

Some stand-alone environmental insurance policies provide cover on a 'business' basis. That is, they provide cover for environmental liabilities arising out of the insured's business (as described in the policy) without basing it on specific sites owned or occupied by the insured. Cover for risks arising from historic pollution, however, is provided only on a site-specific basis. As a practical matter, both site-specific and non-site-specific policies tend to provide the same broad scope of cover.

Some stand-alone environmental insurance policies issued by branches of insurers that also conduct insurance business in the US are designed specifically to provide cover for risks in the United Kingdom; others tend to have terms and conditions that apply to the US but not necessarily to the legal and licensing systems in the United Kingdom.

3.6.4. Policies for contractors and others

Stand-alone environmental insurance policies that provide cover for ELD and other environmental liabilities are also available for contractors on a claims made and reported basis as well as an occurrence basis (cover is provided for environmental damage that occurs during a policy period; the claim may be made after that period). The policies tend to provide similar types of cover as the above policies for operators including liability for remediating environmental damage including pollution at sites at which the contractor is carrying out operations in addition to the insured contractor's own site.

Stand-alone environmental insurance policies that provide cover for ELD and other environmental liabilities are also available for real estate portfolios.

Another type of environmental insurance policy provides cover for risks arising from agriculture carried out on an insured's property and agricultural contracting carried out by the insured on third-party land. This type of cover may be offered in a stand-alone environmental insurance policy or as a specific section in a combined policy, that is, a policy with separate sections that provide cover for different types of risks including, for example, property, public/general liability, employers' liability, etc. Both types of policies tend to provide cover for ELD and other environmental liabilities.

A further type of environmental insurance policy that was formerly offered but no longer appeared to be offered when this report was published, is a remediation/clean-up cost cap policy. This policy provides cover for losses arising from costs that exceed a buffer above an amount agreed between the operator and insurers following detailed negotiations between them. The agreed amount is the projected cost of the remediation/clean up. The policy thus provides cover if the clean-up costs exceed the agreed amount plus the buffer amount.

3.7. Model terms and conditions

There are no model terms and conditions for environmental insurance policies or any other financial security instruments issued for risks in the United Kingdom.

3.7.1. Organisation issuing model terms and conditions

Not applicable

3.7.2. Description of model terms and conditions

Not applicable

3.7.3. Relationship between policies with model terms and conditions and environmental insurance policies

Not applicable

3.8. Date of general availability of environmental insurance policies

Stand-alone environmental insurance policies were first issued in the United Kingdom in the early 1990s. The early policies provided cover for risks from pollution that was caused by the insured during the policy period. Their primary aim, however, was to provide cover for risks arising from historic contamination, that is, pollution that existed at an insured site prior to being owned or leased by an insured that was not aware, and did not have reason to be aware, of the existence of the pollution when the site was acquired.

The scope of the policies increased to provide cover for insureds that knew that their site(s) was polluted but declared this pollution to insurers. Insurers would then either carve out cover for the disclosed pollution in the policies or would provide cover for liabilities arising from it, depending on the degree of risk posed by the pollution. The focus of these policies was transactional rather than operational. That is, the parties to a share or asset transaction focused on transferring the risk of liabilities from historic pollution at sites involved in the transaction from the seller to the buyer or vice versa, with a secondary focus on operational risks.

The number and range of stand-alone environmental insurance policies for businesses with sites and/or operations in the United Kingdom (and policies to businesses outside the United Kingdom from the London insurance market) began to increase substantially after transposition of the ELD in the United Kingdom in 2009. As the market expanded, the focus on cover for historic pollution has changed to reflect increasing demand for cover for

operational risks, that is, risks from operations carried out by an insured during the policy period.

3.9. Environmental assessments and audits

A business that applies for a stand-alone environmental insurance policy is not required to carry out an environmental assessment or audit of sites to be covered by it before it is placed. If the prospective insured already has information on the environmental condition of the site(s) to be insured, this information is provided to the insurer. Under the law in the United Kingdom, an insurer may deny cover if the insured fails to disclose material information before the policy incept.

One large insurer based in the United Kingdom stated that it requests insureds to have International Organisation for Standardisation (ISO) 14001 (UNE-EN ISO 14001:1996) certification before agreeing to provide a stand-alone environmental insurance policy to them.

3.10. Average premium

There is no average premium for a stand-alone environmental insurance policy due to the range of policies that provide cover for single or multiple sites, type of sites, environmental management, loss history, etc.

Several ELD stakeholders, all in the insurance market, provided what they viewed as average premiums as follows. The wide range of premiums appears to reflect the many types of policies issued to businesses from small to medium sized businesses to large businesses.

The following are the average premiums that were provided:

- £35,000 (EUR 40,796) is an average premium;
- premiums start at £500 (EUR 583) but there is no average. For large property portfolio policies, an average premium for each site in the portfolio could be £100 (EUR 117) or less;
- the average premium is £2,000 to £10,000 for small to medium sized businesses; £25,000 (EUR 29,140) to £50,000 (EUR 58,280) for middle market businesses; and £100,000 (EUR 116,560) to £200,000 (EUR 233,120) for large and heavy industry businesses; and
- the average premium is EUR 26,919 but that they range from EUR 897 to over EUR 897,300.

3.11. Average policy limit

There is no average policy limit for a stand-alone environmental insurance policy due to the range of policies that provide cover for single or multiple sites, type of sites, environmental management, loss history, etc. The policy limit is also, of course, influenced by the length of the policy period.

Several ELD stakeholders, all in the insurance market, provided what they viewed as average policy limits as follows. The wide range of policy limits appears to reflect the many types of policies issued to businesses from small to medium sized businesses to large businesses.

The following are the average policy limits that were provided:

- the average policy limit for a single site tends to be between EUR 2,000,000 and EUR 5,000,000;
- an average policy limit is £10,000,000 (EUR 11,656,000);

- the average policy limit is in the £5,000,000 (EUR 5,828,000) to £20,000,000 (EUR 23,312,000) range although limits up to £250,000,000 are readily available (with the caveat that multiple carriers would have to provide excess layers of cover to achieve this limit);
- policy limits are usually in the range of £5,000,000 (EUR 5,828,000) to £10,000,000 (EUR 11,656,000);
- the average policy limit for a single site operation with an annual policy period is EUR 5,000,000 but, depending on the site, it could be between EUR 10,000,000 and EUR 20,000,000 per site;
- an average policy limit for a single site with an annual policy period is EUR 5,000,000;
- an average policy limit is £15,000,000 (EUR 17,484,000); and
- an average policy limit is EUR 4,468,500 to EUR 8,973,000 but limits range from EUR 897,300 to EUR 44,865,000.

3.12. Average deductible or self-insured retention

There is no average deductible/self-insured retention for a stand-alone environmental insurance policy due to the range of policies that provide cover for single or multiple sites, type of sites, environmental management, loss history, etc. The deductible/self-insured retention is also, of course, influenced by the limit of liability of the policy.

Several ELD stakeholders, all in the insurance market, provided what they viewed as average deductibles/self-insured retentions. The wide range of deductibles/self-insured retentions appears to reflect the many types of policies issued to businesses from small to medium sized businesses to large businesses.

The following are the average deductibles/self-insured retentions that were provided:

- the average deductible or self-insured retention is £15,000 (EUR 17,484);
- deductibles/self-insured retentions start at £5,000 (EUR 5,828); there is no average;
- the deductible/self-insured retention is £5,000 (EUR 5,828) to £25,000 (EUR 29,140) and upwards depending on the business;
- the average deductible/self-insured retention is £10,000 (EUR 11,656) to £25,000 (EUR 29,140);
- the average deductible/self-insured retention for a single site with an annual policy period is EUR 5,000,000 to EUR 25,000,000;
- the average deductible/self-insured retention is EUR 44,865 to EUR 89,730 with the caveat that they range from EUR 4,487 to over EUR 897,300;
- the average deductible/self-insured retention is £50,000 (EUR 58,280); and
- the average deductible or self-insured retention for a single site tends to be between EUR 10,000 and EUR 50,000 with the caveat that this limit can vary substantially depending on the type and size of the site and cover required for it.

3.13. Average policy period

The average policy period for a stand-alone environmental policy that provides cover for operational risks is one to three years with the potential for five years in some policies depending on the insurer.

The average policy period for a stand-alone environmental policy that provides cover for risks from historic pollution is up to 10 years.

Both types of cover may be (and usually are) included in a single policy.

Policies can, of course, be renewed subject to agreement of the insurer.

The average policy period for a policy for a contractor is either annually or the length of specified contracts which may be up to six years and longer.

3.14. Sizes of typical insured businesses

Stand-alone environmental insurance policies are available to all sizes of businesses from small to medium, and also large businesses. Demand is good from all sizes of businesses, with more demand from large businesses.

3.15. Industrial and commercial sectors that typically purchase policies

All types of industrial and commercial sectors typically purchase stand-alone environmental insurance policies.

3.16. Industrial and commercial sectors with limited or no accessibility to policies

Most industrial and commercial sectors of businesses can access stand-alone environmental insurance policies. The following are industrial and commercial sectors that ELD stakeholders, all in the insurance industry, stated that they may not issue policies to, or that they may restrict cover in policies issued to them:

- coal and metal mining;
- coal power;
- medicinal cannabis production;
- facilities with tailing dams;
- hydraulic fracturing (fracking);
- agro-chemicals/spraying;
- life sciences;
- onshore and offshore oil and gas production;
- nuclear;
- genetically modified organisms; and
- oil pipelines.

3.17. Number and amount of claims

ELD stakeholders, all in the insurance industry, reported that the number of claims was continuing to rise as more environmental insurance policies were issued. They also stated that very few claims appear to involve liabilities under the ELD (due no doubt to the small number of ELD claims in the United Kingdom), and that most claims tend to involve on-site or off-site remediation either entirely or partially.

The following is information that was provided about the amounts of claims against environmental insurance policies:

- there is one claim of about £1,000,000 (EUR 1,165,600), with others below £500,000 (EUR 582,800);
- most claims are below £1,000,000 (EUR 1,165,000);
- the average amount of a claim is between £100,000 (EUR 11,560) and £1,000,000 (EUR 1,165,000);
- the average amount of a claim is usually between EUR 250,000 and EUR 2,000,000;
- the approximate amount of a claim is EUR 448,650 but some claims are in the millions of euros; and
- the typical amount of a claim appears to be less than EUR 1,000,000 but some claims greatly exceed this amount.

One ELD stakeholder reported claims involving spills of pollutants from tanks, fires causing biodiversity damage, other spills into rivers, contractors causing environmental damage or exacerbating existing pollution at a building site. In addition, they reported claims against environmental consultants for remediating pollution inadequately.

One ELD stakeholder reported one ELD claim that involved damage caused by a waste pipe under an un-made road. Lorries driving over the road repeatedly wore down the road surface causing the pipe to crack and pollutants to leak from it into a site of special scientific interest (a protected area under English law).

3.18. Coverage litigation

There was no reported coverage litigation in the United Kingdom that involves stand-alone environmental insurance policies or environmental extensions to general liability policies when this report was published.

Some ELD stakeholders reported disputes between insurers that provided cover for gradual, as well as sudden and accidental, pollution under stand-alone environmental insurance policies with insurers that provided cover only for sudden and accidental pollution under general liability policies. That is, there was an overlap between cover provided for sudden and accidental pollution in the stand-alone environmental insurance policies and the extensions, leading to issues as to which policy should respond to a claim.

3.19. Cover for ELD liabilities in general liability policies

Extensions to general liability policies that provide cover for remediating off-site pollution from a sudden and accidental incident on an insured's site are widely available, with such an extension being standard in some general liability policies for large businesses.

As a general rule, the extensions tend to provide only limited cover, in some cases negligible cover.

There are a substantial number of differences in environmental extensions to general liability

Cover for remediating off-site pollution from an incident on the insured's site are available in some combined policies as an extension to the general liability section of the policy, virtually always subject to a sub-limit of liability. Cover for off-site environmental liabilities, including ELD liabilities, in combined policies may also be included as a separate section of the policy.

3.20. Cover for ELD liabilities in property policies

Property policies do not provide cover for environmental damage, including pollution, under the ELD or other legislation. The policies provide cover for damage to 'insured property'; land is not classified as 'insured property' that is covered by the policy.

Endorsements to property policies to provide cover for remediating pollution or other environmental damage on sites owned or occupied by the insured are not generally available.

Cover for remediating pollution on an insured's site is sometimes available in combined policies as an extension to the property section of the policy subject to a sub-limit of liability. Cover may also be available as part of a separate environmental liability section to a combined policy.

4. OTHER VOLUNTARY FINANCIAL SECURITY INSTRUMENTS AND MECHANISMS

4.1. Type(s)

Voluntary financial security instruments such as bank guarantees are not generally available for liabilities under the ELD or other environmental legislation. There is no demand for them because they are geared towards mandatory financial security requirements for known responsibilities such as closure and post closure (aftercare) of a landfill, not voluntary financial security for accidental damage, such as may arise under the ELD.

4.2. Availability

Not applicable

5. MANDATORY FINANCIAL SECURITY FOR ELD LIABILITIES (ARTICLE 14(1))

None of the jurisdictions in the United Kingdom impose mandatory financial security for liabilities under the ELD.

5.1. Competent authority(ies)

Not applicable

5.2. Legislative provisions

Not applicable

5.2.1. Name(s) of legislation

5.2.2. Stand-alone requirement or hybrid

5.2.3. Consideration of mandatory financial security legislation (if not enacted)

5.2.4. Reasons for decision not to enact mandatory financial security legislation

5.2.5. Revisions to legislation

5.2.6. ELD liabilities covered by mandatory financial security

5.2.7. Description of mandatory financial security provisions

5.2.8. Exception for low risk sites

5.2.9. Exception for ISO 14001 certification or EMAS registration

5.2.10. Other exceptions

5.3. Environmental licence conditions

No environmental permits or licences impose mandatory financial security for liabilities under the ELD.

5.3.1. Stand-alone requirement or hybrid

Not applicable

5.3.2. *Revisions to licensing requirements*

Not applicable

5.3.3. *ELD liabilities covered by mandatory financial security*

Not applicable

5.3.4. *Description of mandatory financial security conditions*

Not applicable

5.4. Date of introduction

Not applicable

5.5. Effective date

Not applicable

5.6. Key reasons for introduction

Not applicable

5.7. Withdrawal of mandatory financial security

Not applicable

5.8. Guidance

Not applicable

5.9. Operators subject to mandatory financial security

Not applicable

5.10. Amounts and limits of mandatory financial security

Not applicable

5.11. Growth of mandatory financial security

Not applicable

6. REGULATORY OVERSIGHT OF FINANCIAL SECURITY INSTRUMENTS AND MECHANISMS

6.1. Review of financial security instruments or mechanisms

Not applicable

6.2. Financial security instruments and mechanisms accepted

Not applicable

6.2.1. *Templates*

6.2.2. *Requirements for environmental insurance policies*

6.2.3. *Form of mandatory environmental insurance policy*

6.3. Financial security instruments and mechanisms not acceptable

Not applicable

6.4. Time of review

Not applicable

6.5. Regulatory costs of review

Not applicable

6.6. Requirements for operator to review

Not applicable

7. ENFORCEMENT OF FINANCIAL SECURITY REQUIREMENTS

Not applicable

8. EX POST ENVIRONMENTAL DAMAGE MANDATORY FINANCIAL SECURITY (ARTICLE 8(2))

Regulation 27 of the Environmental (Prevention and Remediation) (England) Regulations 2015 states that:

- (1) Where any costs are recoverable under these Regulations by an enforcing authority from a person who is the owner of any premises and the enforcing authority serves a notice on that person under this regulation—
 - (a) the costs carry interest, at such reasonable rate as the authority may determine, from the date of service of the notice until the whole amount is paid; and
 - (b) subject to the provisions of this regulation, the costs and accrued interest are a charge on the premises.

Regulation 27 of the Environmental (Prevention and Remediation) (Wales) Regulations 2009 and Regulation 28 of the Environmental (Prevention and Remediation) (Northern Ireland) Regulations 2009 are identical to Regulation 27 of the English regulations.

The regulations do not require an operator that has caused an imminent threat of, or actual, environmental damage to provide mandatory financial security. The charge on the premises is required only if the competent authority has carried out measures to prevent or remediate environmental damage and seeks security for reimbursement of the costs incurred in doing so.

There is no equivalent provision in the Environmental Liability (Scotland) Regulations 2009.⁶

8.1. Date legislation or policy for mandatory financial security introduced

The requirements for *ex post* mandatory financial security were introduced on the following dates:

- England: 1 March 2009;

⁶ See generally Colin Mackie and Colin M. Combe, 'Charges on Land for Environmental Liabilities: A Matter of "Priority" for Scotland' (March 2019) 31(1) Journal of Environmental Law 83

- Wales: 6 May 2009; and
- Northern Ireland: 24 July 2009.

8.2. Effective date for *ex post* mandatory financial security

The effective date for *ex post* mandatory financial security is the same as the date on which the legislation was introduced.

8.3. Financial security instruments and mechanisms accepted

The only *ex post* financial security instrument that is acceptable is a charge on premises.

8.4. Financial security instruments and mechanisms not acceptable

There is no list of financial security instruments or mechanisms that are not acceptable but, as noted in section 8.3 above, the only acceptable instrument is a charge on premises.

9. PROVIDERS OF MANDATORY FINANCIAL SECURITY INSTRUMENTS

9.1. Insurers

Not applicable

9.2. Banks and other financial institutions

Not applicable

9.3. Sureties

Not applicable

9.4. Providers outside Member State

Not applicable

10. MEASURES TAKEN BY MEMBER STATE TO DEVELOP FINANCIAL SECURITY MARKETS

The Department for Environment, Food and Rural Affairs (Defra) held meetings between insurers and other persons involved in the environmental insurance industry in the early 2000s.

11. EU ENVIRONMENTAL LEGISLATION WITH MANDATORY FINANCIAL SECURITY PROVISIONS

11.1. Landfill Directive

11.1.1. Competent authority(ies)

The competent authorities for the Landfill Directive (1999/31/EC), which is implemented by the following legislation in the various jurisdictions in the United Kingdom, are as follows:

- England: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;⁷
 - Environment Agency;

⁷ Environmental Permitting (England and Wales) Regulations 2016/1154; <http://www.legislation.gov.uk/uksi/2016/1154/contents>

- Wales: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;
 - Natural Resources Wales (NRW);
- Scotland: Landfill (Scotland) Regulations 2003/235, as amended;⁸
 - Scottish Environment Protection Agency (SEPA); and
- Northern Ireland: Waste and Contaminated Land (Northern Ireland) Order 1997/2778, as amended;⁹ and Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013/160, as amended;¹⁰
 - Northern Ireland Environment Agency (NIEA).

11.1.2. Financial security provisions

The financial provisions in the legislation indicated in section 11.1.1 above are as follows.

England and Wales: paragraphs 5 and 6 of schedule 10 of the Environmental Permitting (England and Wales) Regulations states that the regulator ‘must exercise its relevant functions so as to ensure compliance with the following provisions of the Landfill Directive ... Article 8 ...’ with the exception of the last sentence of article 8(a)(iv).

The relevant language in article 8(a)(iv) of the Landfill Directive is as follows:

adequate provisions, by way of a financial security or any other equivalent ... has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures ... are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site

The Environment Agency issued revised guidance on financial security for landfills in 2020.¹¹ This guidance is used in England and Wales. The guidance explains the matters that must be covered by financial provision. Among other things, the guidance states that operators of landfills for non-hazardous and hazardous waste should estimate detailed costs for an aftercare period of 60 years. It also states that aftercare costs must include a contingency fund that will be available after this time period. The contingency sum, which is for any further continued management of the site, must be available until the permit for the landfill is surrendered, at which time the Environment Agency will return any residual funds to the operator.

The guidance further states that the Environment Agency will accept local authority deed agreements.

Scotland: Regulation 10 of the Landfill (Scotland) Regulations 2003 requires the operator of a landfill to ensure that it has ‘financial provision or its equivalent’ as required by regulation 18(4). Under Regulation 18(4), a person ‘is not a fit and proper person’, and thus not eligible for a permit for a landfill, if it appears, among other things, to SEPA that the person has not made adequate financial provision (by way of security or an equivalent arrangement) to

⁸ Landfill (Scotland) Regulations 2003/235; <http://www.legislation.gov.uk/ssi/2003/235/contents/made>

⁹ Waste and Contaminated Land (Northern Ireland) Order 1997/2778; <http://www.legislation.gov.uk/nisi/1997/2778/contents>

¹⁰ Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013/160; <http://www.legislation.gov.uk/nisr/2013/160/schedule/1/made>

¹¹ Environment Agency, ‘Calculate your Financial Provision’ (GOV.UK); <https://www.gov.uk/guidance/landfill-operators-environmental-permits/calculate-your-financial-provision>

ensure that (1) obligations (including aftercare provisions) that arise from the permit in relation to the activity are met, and (2) any closure procedures required under the permit in relation to that activity are followed.

SEPA has issued a Technical Guidance Note on estimating the amount of financial provision for landfills.¹² Section 2.0 of the guidance states that the aftercare period for a typical (biodegradable waste) non-hazardous landfill site is at least 60 years. The guidance note further states, among other things, that the amount of financial security should be specific to each site depending on its operational proposals and the scale of the landfill, but should follow the same form of financial profile set out in the guidance.

11.1.3. Financial security instruments and mechanisms accepted

The following financial security instruments and mechanisms are acceptable in the various jurisdictions of the United Kingdom as follows.

England and Wales: the following financial security instruments and mechanisms are acceptable:

- renewable bonds;
- escrow accounts;
- cash deposits with the Environment Agency or NRW;
- local authority deed agreements; and
- trust based investment portfolios.

The Environment Agency may accept other instruments and mechanisms as long as the funds are sufficient, secure and available.

Scotland: Section 4.0 of the Technical Guidance Note states that for any new landfills authorised under the Pollution Prevention and Control (Scotland) Regulations 2012/360,¹³ or where an application is made for the variation of a landfill authorisation where that variation increases the financial liability associated with the authorisation (for example, for the construction of a new landfill cell), funds will be required to be secured (ring fenced) using a financial provision mechanism which has been approved by SEPA. Trust funds and performance bonds are commonly used.

Northern Ireland: Under article 3(3) of the Waste and Contaminated Land (Northern Ireland) Order, a person is not a fit and proper person (and thus eligible to be granted a waste management licence) if, among other things, it appears to the Department that the person who holds or is to hold the licence has not made and either has no intention of making or is in no position to make financial provision adequate to discharge the obligations arising from the licence.

Article 4(3) of the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) states that a person is not a fit and proper person if it appears to the chief inspector, among other things, that:

¹² Scottish Environment Protection Agency, 'SEPA Technical Guidance Note; Estimate of Amount of Financial Provision for Landfill Sites' (WST-G-032, version 2, 16 June 2016); <https://www.sepa.org.uk/media/28996/technical-guidance-note-estimate-of-amount-of-financial-provision-for-landfill.pdf>

¹³ Pollution Prevention and Control (Scotland) Regulations 2012/360; <http://www.legislation.gov.uk/ssi/2012/360/contents>

- (b) that person has not made, or will not before commencement of the specified waste management activity make, adequate financial provision (either by way of financial security or its equivalent) to ensure that—
- (i) the obligations (including after-care provisions) arising from the permit in relation to that activity are discharged; and
 - (ii) any closure procedures required by the permit in relation to that activity are followed.

The NIEA published guidance on final provision for waste management activities on 1 April 2010.¹⁴ On 27 March 2015, the Department of the Environment issued a consultation on amendments to the guidance.¹⁵ The amendments had not been made when this report was published.

Section 2.20 of the consultation referred to the following mechanisms for financial security as some of the available mechanisms, in the guidance:

- escrows;
- bond and renewable bond;
- insurance policy;
- cash;
- parent company guarantee; and
- local authority or public body signed deed agreement.

Section 2.21 of the consultation stated that if an applicant for a waste management licence wished to submit one of the above instruments, it must ‘submit detailed information to satisfy NIEA and its legal and financial advisors’. Further, if NIEA was ‘required to commission external expert advice, it may seek to recover these additional costs from the applicant’.

Appendix 2 of the partial regulatory impact assessment issued with the consultation on financial provision¹⁶ describes the types of financial security instruments that are acceptable, indicating their requirements in order to be acceptable.

The consultation proposed that the costs of restoration/remedial measures for non-landfill facilities should be included in the amendments. It also proposed including a credit check on the assessment of a waste operator’s financial circumstances and ‘whether they have sufficient, secure and available financial resources ... in order to reduce[] potential negative impacts on the environment, human health and the economy’ (section 4.2).

¹⁴ Northern Ireland Environment Agency, ‘Financial Provision for Waste Management Activities in Northern Ireland’ (1 April 2010)

¹⁵ Department of the Environment, ‘Environmental Protection Waste and Contaminated Land (Northern Ireland) Order 1997; Financial Provision; Consultation on amending the NIEA’s Financial Provision Policy entitled Financial Provision for Waste Management Activities in Northern Ireland’ (27 March 2015); <https://www.daera-ni.gov.uk/sites/default/files/consultations/doe/waste-consultation-amending-NIEA-Financial-Provision-Policy-entitled-Financial-Provision-for-Waste-Management-Activities-in-Northern-Ireland-2015.pdf>

¹⁶ Department of the Environment, ‘Environmental Protection Waste and Contaminated Land (Northern Ireland) Order 1997; Financial Provision; Consultation on amending the NIEA’s Financial Provision Policy entitled Financial Provision for Waste Management Activities in Northern Ireland; Partial Regulatory Impact Assessment, Amending the NIEA’s Financial Provision Policy Entitled Financial Provision for Waste Management Activities in Northern Ireland, Annex 2’ (27 March 2015); <https://www.daera-ni.gov.uk/sites/default/files/consultations/doe/waste-consultation-amending-NIEA-Financial-Provision-Policy-entitled-Financial-Provision-for-Waste-Management-Activities-in-Northern-Ireland-2015.pdf>

11.1.4. *Templates*

None of the jurisdictions in the United Kingdom has issued a template for financial security instruments or mechanisms for landfills.

11.1.5. *Financial security instruments and mechanisms not acceptable*

The following financial security instruments and mechanisms are not acceptable.

England: Environment Agency Guidance on Financial Provision lists the following mechanisms as unacceptable because they do not offer adequate security that funds will be available when needed:

- provision in accounts;
- parent company guarantees for commercial landfills;
- overdrafts; and
- annually renewable insurance.

Scotland: SEPA does not accept insurance, self-insurance, or credits checks for financial security under the legislation that implements the Landfill Directive.

Northern Ireland: Appendix 2 of the partial regulatory impact assessment issued with the consultation on financial provision¹⁷ describes the types of financial security instruments that are acceptable, indicating their requirements in order to be acceptable. Section A2.4 states that environmental insurance for potential environment incidents at licensed/permited facilities may be acceptable but that general liability policies are not acceptable.

11.2. **Extractive Waste Directive**

11.2.1. *Competent authority(ies)*

The competent authorities for the Extractive Waste Directive (2006/21/EC), which is implemented by the following legislation in the various jurisdictions in the United Kingdom, are as follows:

- England: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;
 - Environment Agency and mineral planning authorities;
- Wales: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;
 - NRW and mineral planning authorities;
- Scotland: Management of Extractive Waste (Scotland) Regulations 2010/60, as amended;¹⁸
 - planning authorities in consultation with SEPA and the Health and Safety Executive;

¹⁷ Department of the Environment, 'Environmental Protection Waste and Contaminated Land (Northern Ireland) Order 1997; Financial Provision; Consultation on amending the NIEA's Financial Provision Policy entitled Financial Provision for Waste Management Activities in Northern Ireland; Partial Regulatory Impact Assessment, Amending the NIEA's Financial Provision Policy Entitled Financial Provision for Waste Management Activities in Northern Ireland, Annex 2' (27 March 2015); <https://www.daera-ni.gov.uk/sites/default/files/consultations/doe/waste-consultation-amending-NIEA-Financial-Provision-Policy-entitled-Financial-Provision-for-Waste-Management-Activities-in-Northern-Ireland-2015.pdf>

¹⁸ Management of Extractive Waste (Scotland) Regulations 2010/60; <http://www.legislation.gov.uk/ssi/2010/60/contents/made>

- Northern Ireland: Planning (Management of Waste from Extractive Industries) Regulations (Northern Ireland) 2015/85, as amended;¹⁹
 - district councils.

11.2.2. Financial security provisions

England and Wales: The Environment Agency/NRW may not grant a permit for an extractive waste facility unless the necessary planning permission is in force. Schedule 20 of the Environmental Permitting (England and Wales) Regulations states that financial guarantees are required for Category A extractive waste facilities and other hazardous waste facilities.

Section 4.68 of guidance on environmental permitting issued by Defra²⁰ states that the financial guarantee must:

be adequate to ensure that the permit conditions, including those that apply following closure, can be complied with;

provide funds at any time for the purpose of restoring the land to a satisfactory state as described in the waste management plan.

Section 4.70 of the guidance states that the system for financial guarantees set out by the Environment Agency:

will ensure that the operator has to review the value of the financial guarantee, in particular to take into account any changes in the waste management plan and the restoration requirements of the mining waste facility.

(Defra issued the guidance before the creation of NRW. The NRW has not updated it, nor has the Environment Agency.)

Section 4.71 of the guidance states that when the Environment Agency will issue a notice to release the operator from the financial guarantee when the Agency has approved the closure of the extractive waste facility. The financial guarantee for the aftercare of the facility remains in place until the environmental permit is surrendered.

The Environment Agency had not issued the guidance on financial guarantees when this report was published.

Paragraph 13 of Schedule 20 of the Environmental Permitting (England and Wales) Regulations states that if there is any inconsistency between the environmental permit and the planning permission, the conditions of the environmental permit prevail.

A mineral planning authority is prohibited from granting planning permission for an extractive waste facility unless it is satisfied that the operator meets applicable requirements under the Extractive Waste Directive.

Scotland: Every planning permission granted for an extractive waste facility must, prior to the beginning of operations, have a financial guarantee that ensures the following:

- all obligations required under the planning permission in respect of the waste facility, including aftercare provisions, will be discharged; and

¹⁹ <http://www.legislation.gov.uk/nisr/2015/85/contents>

²⁰ Department for Environment, Food and Rural Affairs, 'Environmental Permitting Guidance, The Mining Waste Directive for the Environmental Permitting (England and Wales) Regulations 2010' (updated May 2010, version 1.1); https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69323/pb13636-ep2010miningwaste.pdf

- funds will be readily available at any given time for the rehabilitation of the land affected by the waste facility, as described in the waste management plan.

Heads of Planning Scotland has issued a position statement that includes, among other things, model planning conditions, and risk assessment of different financial security instruments.²¹

The financial guarantee is to be calculated on the basis of the following, subject to the satisfaction of the planning authority:

- the likely environmental impact of the waste facility, taking into account in particular the category of the waste facility, the characteristics of the waste and the future use of the rehabilitated land; and
- the assumption that independent and suitably qualified third parties will assess and carry out any rehabilitation work that is needed.

Northern Ireland: Regulation 8 of the Planning (Management of Waste from Extractive Industries) Regulations (Northern Ireland) prohibits any operations that involve the management of extractive waste to begin until the operator provides a financial guarantee to the relevant district council.

Regulation 8(2) states that the purpose of the financial guarantee is:

to ensure that—

- (a) all conditions on the planning permission pertaining to the management of extractive waste, including after-closure conditions, are met; and
- (b) there are funds readily available at any given time for the rehabilitation of the land affected by the waste facility, as described in the waste management plan.

11.2.3. Financial security instruments and mechanisms accepted

England, Wales and Northern Ireland: no acceptable financial security instruments or mechanisms are specified.

Scotland: Regulation 15(4) of the Management of Extractive Waste (Scotland) Regulations states that the ‘planning authority shall determine the form of the guarantee, and may accept the provision of a guarantee from an industry-sponsored mutual guarantee fund’.

11.2.4. Templates

There are no templates for financial security instruments or mechanisms under legislation implementing the Extractive Waste Directive in any jurisdiction in the United Kingdom.

11.2.5. Financial security instruments not acceptable

There is no list of financial security instruments that are not acceptable under the legislation implementing the Extractive Waste Directive in any jurisdiction in the United Kingdom.

²¹ Heads of Planning Scotland, ‘Energy and Resources Sub-Committee, ‘Position Statement on the Operation of Financial Mechanisms to Secure Decommissioning, Restoration and Aftercare of Development Sites’ (October 2018); <https://hopscotland.files.wordpress.com/2018/11/position-statement-on-financial-guarantees-finalised-version-october-2018.pdf>

11.3. Carbon Capture and Storage Directive

11.3.1. Status of implementation

Storage facilities for carbon dioxide are permitted only in the offshore area of the United Kingdom. No storage facilities had been constructed when this report was published.

11.3.2. Competent authority(ies)

The competent authorities for licensing storage facilities for carbon dioxide under the Directive on the geological storage of carbon dioxide (2009/31/EC), which is implemented in the United Kingdom by the Energy Act 2008,²² are as follows:

- England, Wales and Northern Ireland: Oil and Gas Authority; and
- Scotland: Oil and Gas Authority with the exception of Scottish Ministers for any storage sites in the territorial sea adjacent to Scotland.

11.3.3. Financial security provisions

Section 19(2)(e) of the Energy Act 2008 states that regulations may, in particular:

require an applicant, before a licence is granted, to make arrangements (whether by way of trust or otherwise) to provide financial security in respect of the applicant's future obligations relating to the activities under the licence (whether those obligations will or may arise under the licence or otherwise).

Section 20(3)(a) of the Energy Act 2008 states that, in addition to the financial security that is required under section 19 in respect of obligations of the licence, the licence for a storage facility may include 'provision about the circumstances in which financial security (which may be provided by way of a trust or other arrangements) may be required'.

Section 20(3)(b) states that the licence may also include provision 'about the circumstances in which financial security may be released (in whole or in part)'.

11.3.4. Financial security instruments and mechanisms accepted

Acceptable financial security instruments are not specified. Instead, as noted in section 11.3.3 above, they may be 'by way of trust or otherwise'.

11.3.5. Templates

There are no templates for financial security instruments or mechanisms for licences for storage facilities for carbon dioxide.

11.3.6. Financial security instruments and mechanisms not acceptable

There is no list of financial security instruments or mechanisms that are not acceptable.

12. EU RECOMMENDATION ON HYDRAULIC FRACTURING

12.1. Status

All the jurisdictions in the United Kingdom have adopted moratoria on fracking.

²² Energy Act; <http://www.legislation.gov.uk/ukpga/2016/20/contents>

On 4 February 2015, the Welsh Government voted for a moratorium on fracking until further consideration of the issue had taken place. The moratorium was extended in July 2018.²³

On 28 September 2015, Mark Durkan, Environment Minister for Northern Ireland, announced a moratorium on fracking in Northern Ireland.²⁴

On 24 October 2017, an indefinite moratorium on fracking was decided by the Scottish Parliament. The moratorium was extended in October 2019.²⁵

On 2 November 2019, the UK Government announced that it had ended support for fracking and that no further hydraulic fracturing consents (which the UK Government can issue in England) would be granted unless compelling new evidence was provided.²⁶

12.2. Competent authority(ies)

The Oil and Gas Authority is the competent authority for unconventional (as well as conventional) oil and gas licensing. Other authorities, including the environmental, the health and safety authorities, and planning authorities also have roles.

12.3. Financial security provisions

There are no mandatory financial security provisions for environmental (or other) liabilities in the legislation governing fracking in the United Kingdom.

The Scottish Government commissioned a report on financial liabilities for decommissioning, restoration and aftercare obligations and treatment of financial liabilities for unconventional oil and gas development in Scotland, published in October 2016.²⁷

Before the ban on fracking in England, mineral planning authorities in England could request the operator of a fracking site to provide financial security; there was no requirement for them to do so however. For example, North Yorkshire County Council required Third Energy, a fracking company, to submit a bond to cover the costs of restoration and aftercare of the site. There was no consistency in requiring financial security among mineral planning authorities.²⁸

In May 2019, the Department for Business, Energy and Industrial Strategy stated, in a report by the National Audit Office in the context of abandoned fracking sites, that the Environment Agency could pursue insolvent operators for the costs of preventing and remediating environmental damage under the legislation implementing the ELD in England. In October 2019, however, the Environment Agency stated that it would be 'unable to pursue insolvent

²³ See Steffan Messenger, 'Fracking plans face cold shoulder under new Wales policy', BBC News (3 July 2018); <https://www.bbc.co.uk/news/uk-wales-44696285>

²⁴ See Claire Williamson, 'Fracking banned in Northern Ireland for the first time', Belfast Telegraph (28 September 2015); <https://www.belfasttelegraph.co.uk/news/northern-ireland/fracking-banned-in-northern-ireland-for-the-first-time-31564424.html>

²⁵ See 'Scottish government extends ban on fracking', The Guardian (3 October 2019); <https://www.theguardian.com/uk-news/2019/oct/03/scottish-government-extends-ban-on-fracking>

²⁶ UK Government, 'Government ends support for fracking' (press release, 2 November 2019); <https://www.gov.uk/government/news/government-ends-support-for-fracking>

²⁷ AECOM, 'Unconventional Oil and Gas Development in Scotland; Decommissioning, Site Restoration and Aftercare – Obligations and Treatment of Financial Liabilities' (October 2016); <https://www2.gov.scot/Resource/0050/00509373.pdf>

²⁸ See National Audit Office, Report by the Comptroller and Auditor General, Department for Business, Energy and Industrial Strategy, 'Fracking for shale gas in England' (23 October 2019), s 4.14, 38; <https://www.nao.org.uk/wp-content/uploads/2019/07/Fracking-for-shale-gas-in-England.pdf>

operators and landowners, contradicting the advice [of the Department]'. The Agency stated that other statutory powers may be available to it but they would have limitations.²⁹

The National Audit Office report noted that some landowners may purchase insurance as part of their lease negotiations with operators but that they may not understand the potential liabilities arising from the lease. The report further stated that the Department was considering options to mitigate risks to a landowner if the operator became insolvent but that UK Onshore Oil and Gas, the trade association, considered that 'these finance mechanisms are immature'. The report further stated that:

Other options would create a contingent liability for government, which the Department has so far resisted. These include government signing insurance policies as a counter-party or introducing a new statutory onshore decommissioning regime to mirror the offshore regime [for which operators have a statutory liability to decommission assets and government is the decommissioner of last resort].³⁰

12.4. Financial security instruments and mechanisms accepted

See section 12.3 above.

12.5. Templates

Not applicable

12.6. Financial security instruments and mechanisms not acceptable

Not applicable

13. EU ENVIRONMENTAL LEGISLATION WITH NO MANDATORY FINANCIAL SECURITY PROVISIONS

13.1. Industrial Emissions Directive

13.1.1. Competent authority(ies)

The competent authorities for the Industrial Emissions Directive (2010/75/EU), which is implemented by the following legislation in the various jurisdictions in the United Kingdom, are as follows:

- England: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;
 - Environment Agency;
- Wales: Environmental Permitting (England and Wales) Regulations 2016/1154, as amended;
 - NRW;
- Scotland: Pollution Prevention and Control (Scotland) Regulations 2012/360, as amended;
 - SEPA;
- Northern Ireland: Pollution Prevention and Control Regulations (Northern Ireland) 2013, as amended;
 - NIEA.

²⁹ See *ibid* s 4.15, 38

³⁰ See *ibid* ss 4.16-4.17, 39

Legislation in all the jurisdictions in the United Kingdom applies to more integrated pollution and control facilities than the Industrial Emissions Directive. The competent authorities for these facilities are local authorities.

13.1.2. Financial security provisions

None of the regulations that implement the Industrial Emissions Directive in the United Kingdom contain mandatory financial security requirements.

13.1.3. Financial security instruments and mechanisms accepted

Not applicable

13.1.4. Templates

Not applicable

13.1.5. Financial security instruments and mechanisms not acceptable

Not applicable

13.2. Seveso III Directive

13.2.1. Competent authority(ies)

The competent authorities for the Seveso III Directive (2012/18/EU), which is implemented by the following legislation in the various jurisdictions in the United Kingdom, are as follows:

- England: Control of Major Accident Hazards Regulations 2015/483, as amended;³¹
 - Health and Safety Executive and the Environment Agency acting jointly;
 - Office for Nuclear Regulation and Environment Agency acting jointly for nuclear establishments;
- Wales: Control of Major Accident Hazards Regulations 2015/483, as amended;
 - Welsh Executive and NRW, acting jointly
 - Office for Nuclear Regulation and NRW acting jointly for nuclear establishments;
- Scotland: Control of Major Accident Hazards Regulations 2015/483, as amended;
 - Health and Safety Executive and SEPA acting jointly;
 - Office for Nuclear Regulation and SEPA acting jointly for nuclear establishments;
- Northern Ireland: Control of Major Accident Hazards Regulations (Northern Ireland) 2015/325;³²
 - Northern Ireland Executive and Department of the Environment acting jointly.

13.2.2. Financial security provisions

None of the regulations that implement the Seveso III Directive in the United Kingdom contain mandatory financial security requirements.

³¹ Control of Major Accident Hazards Regulations 2015/483;
<http://www.legislation.gov.uk/uksi/2015/483/contents>

³² <http://www.legislation.gov.uk/nisr/2015/325/contents>

13.2.3. Financial security instruments and mechanisms accepted

Not applicable

13.2.4. Templates

Not applicable

13.2.5. Financial security instruments and mechanisms not acceptable

Not applicable

13.3. Other legislation

No other legislation in any of the jurisdictions in the United Kingdom has mandatory financial security requirements for environmental liabilities.

14. MANDATORY FINANCIAL SECURITY FOR OFFSHORE OIL AND GAS OPERATIONS

14.1. Competent authority(ies)

The Oil and Gas Authority is the competent authority for offshore oil and gas licensing in the United Kingdom.

14.2. Status of offshore oil and gas operations

The United Kingdom has a long history of offshore oil and gas exploration and production in the North Sea off the coast of Scotland.

On 11 July 2019, the 32nd UK Offshore Licensing Round was opened for a total of 768 blocks or part-blocks in the Central North Sea, Northern North Sea, Southern North Sea and the West of Shetlands.³³

14.3. Requirements for financial security

The Petroleum Act 1998³⁴ is the main legislation for offshore oil and gas licensing. The Act requires model clauses to be set out in secondary legislation. The clauses are then inserted into most new licences.

Section 4 of the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008/225, as amended,³⁵ requires the holder of a licence for offshore oil and gas operations to show that it is financially capable of carrying out obligations under the licence.

14.4. Requirement for financial security for ELD liabilities

Regulation 10(1) of the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015/385³⁶ provide, among other things, that:

³³ Oil & Gas Authority, '32nd Offshore Licensing Round'; <https://www.ogauthority.co.uk/licensing-consents/licensing-rounds/>

³⁴ Petroleum Act 1998; <http://www.legislation.gov.uk/ukpga/1998/17/contents>

³⁵ Petroleum Licensing (Production) (Seaward Areas) Regulations 2008/225; <http://www.legislation.gov.uk/uksi/2008/225/contents/made>

³⁶ Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015/385; <http://www.legislation.gov.uk/uksi/2015/385>

An offshore licensee is financially liable for the prevention and remediation of environmental damage which is or may be caused by offshore petroleum operations carried out by or on behalf of the offshore licensee or operator under an offshore licence.

The above language is materially the same as article 7 of the Directive on safety of offshore oil and gas (2013/30/EU).

Neither the Petroleum Licensing (Production) (Seaward Areas) Regulations nor the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations includes any provisions that specifically require mandatory financial security for ELD liabilities.

15. FAILURE OF FINANCIAL SECURITY

15.1. Inadequate level of financial security instrument or mechanism to pay claims

There are cases in the United Kingdom in which a financial security instrument or mechanism, usually in the form of a bond, were inadequate to pay to remediate pollution.

One example is as stated in section 2.18 of the Consultation held by NIEA on financial provision for waste management activities in Northern Ireland stated that:

NIEA proposes to amend the Financial Provision policy, to remove the option permitting an operator to supply a 'Letter of Comfort' for a licensed waste management facility. The Agency has experienced the situation that when required, [financial provision] has not been in place and, consequently, the mechanism was neither secure nor available. A waste operator must have financial provision in place which can be used to fully discharge the obligations of the licence/permit.³⁷

Another example is the Scottish Coal Company, as indicated in section 15.2 below.

15.2. Insolvency of operator leading to failure of financial security instrument or mechanism

In 2013, Scottish Coal Company Ltd went into liquidation. The bond provision has been reported to be insufficient to cover the costs of discharging the planning conditions.³⁸ The sites have been transferred to the Scottish Mines Restoration Trust, which facilitates the process of restoring open-cast coal sites across Scotland.

There have also been a growing number of cases in which the operators of waste facilities have become insolvent. In January 2018, this led Defra and the Welsh Government to publish a consultation on, among other things, proposals to tackle poor performance in the waste sector.³⁹ One of the proposals in the consultation was to require an applicant for an

³⁷ Department of the Environment, 'Environmental Protection Waste and Contaminated Land (Northern Ireland) Order 1997; Financial Provision; Consultation on amending the NIEA's Financial Provision Policy entitled Financial Provision for Waste Management Activities in Northern Ireland (27 March 2015); <https://www.daera-ni.gov.uk/sites/default/files/consultations/doe/waste-consultation-amending-NIEA-Financial-Provision-Policy-entitled-Financial-Provision-for-Waste-Management-Activities-in-Northern-Ireland-2015.pdf>

³⁸ *Joint Liquidators of the Scottish Coal Company Limited* [2013] CSOH 124 [7]; see Colin Mackie and Valerie Fogleman, 'Self-insuring environmental liabilities: a residual risk-bearer's perspective' (2016) 16 *Journal of Corporate Law Studies* 293, 308

³⁹ Department for Environment, Food and Rural Affairs and the Welsh Government, 'Proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty for the waste duty of care' (2

environmental permit for a waste facility to have financial security. On 6 February 2019, the UK Government stated that it would consider financial provision options in 2019, with the aim to include it in the Environmental Permitting (England and Wales) Regulations.⁴⁰ Revisions to the regulations had not been issued when this report was published.

The Scottish Government has introduced the Environmental Authorisations (Scotland) Regulations 2018/219⁴¹ which aim to deliver an integrated authorisation framework, which will integrate, as far as possible, the authorisation, procedural and enforcement arrangements relating to:

- water;
- waste management;
- radioactive substances; and
- pollution prevention and control.

The integrated authorisation framework is being developed in a phased manner. When this report was published, the regulations applied only to activities concerning radioactive substances.

When granting an authorisation, SEPA needs to be confident that the person being authorised has sufficient control of the activity, and is able to make day-to-day operational and financial decisions to secure compliance with any conditions.

The Guidance on persons that can hold an authorisation explains the criteria, including financial provision, used by SEPA to determine if a person is fit and proper.⁴²

15.3. Other

No other failures of financial security for environmental liabilities were reported.

16. FUNDS

There are no funds in any of the jurisdictions of the United Kingdom that provide funding for preventing and remediating environmental damage under the ELD.

16.1. Name(s)

Not applicable

16.2. Extension of existing fund to cover remedial costs under the ELD

Not applicable

February 2019); <https://www.gov.uk/government/consultations/reducing-crime-at-sites-handling-waste-and-introducing-fixed-penalties-for-waste-duty-of-care/outcome/government-response>

⁴⁰ Department for Environment, Food and Rural Affairs and the Welsh Government, 'Government Response; Consultation Outcome' (2 February 2019); <https://www.gov.uk/government/consultations/reducing-crime-at-sites-handling-waste-and-introducing-fixed-penalties-for-waste-duty-of-care/outcome/government-response>

⁴¹ Environmental Authorisations (Scotland) Regulations 2018/219; <http://www.legislation.gov.uk/ssi/2018/219/contents/made>

⁴² See Scottish Environment Protection Agency, 'Guidance on who can hold an authorisation: In control and fit and proper person tests' (version 2); https://www.sepa.org.uk/media/372007/guidance_on_who_can_hold_an_authorisation.pdf

16.3. Purpose

Not applicable

16.4. Type

Not applicable

16.5. Source(s) of funding

Not applicable

16.6. Number and amount of claims

Not applicable

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