

Isobel Walsh
Office of Environmental Enforcement
Environmental Protection Agency
PO Box 3000
Johnstown castle Estate
County Wexford
Ireland
(email: i.walsh@epa.ie)

6 November 2014

RE: Ibec submission under EPA consultation on Draft Guidance on Financial Provisions

Dear Isobel,

Ibec is grateful for the opportunity to submit its views on the Environmental Protection Agency (EPA)'s Financial Provisions regime as set out most recently in the Agency's Draft Guidance on Financial Provisions.

In furtherance of promoting a fair, efficient and competitive regime that keeps licensee costs minimal while protecting the State and the Agency from the environmental liabilities of those licencees Ibec, through consultation with its Environment Policy Committee, offer the following observations, concerns, suggestions and requests.

1. General observations and recommendations

Ibec members generally appreciate the Draft Guidance's simple layout and concise narrative style. Such an efficient approach to guidance documents would be welcome as an Agency standard. We also appreciate the Agency's stated willingness to continue considering Financial Provision proposals on a case-by-case basis (insofar as it does not further increase costs to licensees.)

However, Ibec members are generally disappointed that, considering the large amount of time and energy members have spent engaging with EPA on the issues of Financial Provisions and environmental liability assessment and costing, particularly over the past 2 years, this Draft Guidance does not offer an improved Financial Provisions regime.

While there is likely to be some benefit from the Agency's re-consideration of insurance for certain licensees, and while the Guidance does much to clarify recent practices by the Agency when agreeing Financial Provisions with licensees, the negative impact of the regime on existing and potential licensees will increase should the Guidance as currently drafted become final.

Reasons for this include the Guidance's lack of rationale for a number of its key provisions, its potential for significantly increasing legal and other transactional costs to the licensee, and its lack of detail with respect to key administrative practices by the Agency under the regime.

Our concerns with the current Financial Provisions regime and the changes to it proposed under the Draft Guidance have been heightened by the implicit – and sometimes explicit – threat by the Agency to suspend, revoke or otherwise limit the operation of a licenced activity should a licensee's Financial Provision not be agreed by EPA. Ibec members consider any such threats wholly unacceptable, particularly under circumstances where material aspects of the Financial Provisions

regime have been subject to considerable examination by both the Agency and stakeholders for some time, and especially where the current Draft Guidance serves to introduce new aspects of the regime that will warrant continued examination.

Above all, however, the Draft Guidance and the Financial Provisions regime generally fail to address the need for a statistical, quantitative or other “actuarial” analysis of the risk of the State or the Agency being required to cover the cost of licensees’ environmental liabilities. Likewise, it offers no appreciation of the compliance burden the regime places on existing and potential Irish industry relative to the compliance burden that industry would experience in other Member States.

With respect to understanding Agency or State risk, EPA has repeatedly pointed to licensee insolvency as the primary catalyst for State or Agency-assumed remediation cost liability. While it may be reasonably foreseeable that a small fraction of EPA licensees will become insolvent over a defined period, a regime that requires substantially large sums of money to be set aside by *all* licensees seems to assume a high likelihood of all or most of those licensees becoming insolvent over the same period.

Without a solid, sufficient and quantified understanding of the risks to the State and the Agency, such an assumption renders the entire regime disproportionate to the problem it seeks to address.

Several passages in the Guidance refer to a licensee’s *failure to meet its obligations under the licence* as a trigger of the Agency’s rights to access funds. Such a broad trigger threatens to place licensee funds at the mercy of the Agency in a potentially unlimited number of subjective circumstances. A licensee’s simple failure to meet obligations should not constitute justification for the Agency’s demand of funds under an instrument unless such failure is material and related to a real risk of pollution.

With respect to Ireland’s competitiveness, this Financial Provisions regime must be considered alongside its counterpart regimes in other Member States, particularly as Irish businesses face competitors – including their own sister sites – operating in other jurisdictions where more balanced or less costly regimes may be in place. Indeed, Ibec’s own investigations point to Ireland as unique in its approach to addressing environmental liability through a mandatory Financial Provisions regime. These investigations have also shown that insurance is the dominant instrument used by industry in other Member States for purposes of addressing environmental liability.

In view of the foregoing concerns, EPA should not progress the Draft Guidance to final form until it has conducted regulatory due process. This would entail, *inter alia*, the Agency’s clearly setting out in a background paper the problem that the regime is designed to address, why the 2006 Guidance (on Financial Provisions) warrants replacement, and why the Agency has pursued the solutions it has, particularly in relation to limitations on the use of insurance and parent company guarantees. EPA should then invite meaningful comment on the background paper from stakeholders and engage with those stakeholders formally and comprehensively. Any final Guidance should be accompanied by an impact assessment.

Sections 2 through 6 address a number of specific concerns to Ibec members.

2. *Insufficient explanation for certain Agency approaches*

The Draft Guidance fails to explain a number of its key provisions and why certain approaches have been taken by the Agency. For instance, there is no explanation given for:

- Why a secured fund is the only Financial Provision which is suitable to cover inevitable closure costs.

- Why a charge on property is not a suitable Financial Provision for most liabilities or why it may be a suitable Financial Provision only in very limited circumstances.
- Why an on-demand bond is not an acceptable Financial Provision to cover the costs of inevitable closure.
- Why a parent company guarantee is not an acceptable Financial Provision to cover the costs of inevitable closure, (particularly, for example, where the parent is of sufficient financial strength in the eyes of the Agency or where the activity generating the liability is a small part of the parent company's interests.)
- Why insurance is not a suitable Financial Provision for licensees with an RBME categorization of "A."

Such prescriptive statements, when offered without rationale, become Agency policy and cannot be taken as guidance. Not only does this substantially change the nature of the Guidance document itself, increasing the scope for policy and legal challenges, it also increases the likelihood of disputes between Agency and licensee, and, by extension, creates the additional costs of remedying such disputes.

The EPA should complement these key provisions with the appropriate explanations.

3. *Increased costs to licensees*

The Agency's Financial Provisions regime, as set out in the Draft Guidance, is highly likely to increase a variety of costs to licensees.

Above all, where secured funds or on-demand performance bonds become the most frequently acceptable instruments, putting such funds or bonds in place will present a significant, and in some cases unfeasible, financial burden on licensees.¹

A number of type-specific costs may be incurred with respect to each instrument the Agency considers acceptable in the Draft Guidance. Bonds, charges on accounts or property, and similar instruments can have strong, negative effects on a company's cash flow, borrowing capacity and credit rating. Members have also raised concerns about the potential negative effects the regime may have on bond availability and cost where licensees become over-reliant on them. Finally, the benefit to the Agency or State of a particular instrument may be reduced where the instrument's issuer has a credit-rating lower than that of the licensee. The Agency's own commitment to vetting such issuers offers little comfort where the requisite due diligence seems likely only to add to the transaction costs.

The potential for increased legal and other transactional costs is significantly higher under the Financial Provisions regime as characterized in the Draft Guidance. This is true primarily because the Financial Provisions regime is of a legal and financial nature, requiring expertise that neither the average licensee nor the Agency readily possess. As a result, there is a high likelihood that both the Agency and licensees will be obliged to incur significant costs of legal, financial and other relevant professional services.

¹ Where the EPA licenses over approximately 800 sites and where it indicates in its 2014 Guidance on Assessing and Costing Environmental Liabilities that each site should cost its environmental liability at a minimum of €1,000,000, there is a dangerously high risk that more than €1,000,000,000 of working Irish capital will be rendered unavailable for investment, growth, and job creation because it is tied-up in instruments under effective control and at the disposal of the EPA.

What is more, the Guidance acknowledges that significant external costs are likely to be borne by both parties and in so doing sets out EPA's right to pass on its own costs to the licensee, as follows:

Reasonable, directly associated legal fees and associated costs incurred by the EPA arising from agreed changes to these templates may be transferred to licensees. Licensees are responsible for their own legal and associated costs. The EPA may also pass on the entire cost relating to out of pocket expenses such as registration fees and the procurement of legal opinions. (Page 7)

This statement *anticipates* the incurring of legal costs when the various template documents are sought to be modified.

Exacerbating this acknowledgment is the statement on Page 4 of the Draft Guidance that if amendments to the EPA templates are proposed, the wording for the Financial Provision will be reviewed by EPA's lawyers. This is followed by an acknowledgment of the possibility that EPA lawyers may liaise directly with a licensee's lawyers.

The chance that modification to a template will be required is higher where the templates are largely untested and where there is such a wide variety of complex industrial activity underlying the liabilities the agreements seek to address.

It is unacceptable that EPA operate a regime in which it is stated policy to incur external costs if the licensee does not accept a template document outright. This effectively converts the template agreements into adhesion contracts, thereby dramatically limiting the licensee's freedom of contract. This is unfair and inappropriate for agreements involving substantial sums of money, multiple parties, and significantly lengthy contract time periods.

Fundamentally, the Agency's legal and other costs should only be borne by a party other than the Agency where a competent court of law has so ordered. We question whether a legal basis exists for the passing on of such costs. Any means by which EPA would seek to do so – either directly or indirectly – should be sufficiently detailed and must be legally justified.

Furthermore, where EPA must procure outside expertise in implementing a regime such as this one, it becomes a matter to be addressed through the Agency's relationship with the State and not something the cost of which should be passed on to licensees.

4. Insurance

Generally, Ibec members appreciate EPA's renewed consideration of insurance as an acceptable Financial Provision instrument, even where its acceptability is limited.² The option of insurance as a means of covering environmental liability is critical within the Agency's Financial Provisions regime, particularly given that liability costings will dramatically increase under the Agency's revised ELRA

² It should be noted that EPA have only actively limited the use of insurance as a Financial Provision instrument over roughly the last 18 months. Indeed, as highlighted in Ibec's letter to EPA of 19 May 2014, a survey of our members suggested that up until EPA's recent prohibition on insurance as a Financial Provision instrument, many licensees have procured environmental and other liability insurance specifically in response to previous requirements by EPA to make Financial Provision for unknown environmental liabilities. In some instances, such insurance may be the only instrument in place for this purpose. Where the Agency has explicitly, tacitly or constructively permitted such insurance to satisfy licensee obligations, any sudden reversal of this policy would potentially subject these licensees to 1) a financial loss where the insurance is no longer considered suitable, 2) a new cost where a new financial instrument must be procured in place of the insurance, and 3) the risk of being held in non-compliance where an immediate replacement by another Financial Provision instrument is either not possible or is cost prohibitive. To date, EPA has not satisfactorily addressed these issues.

methodology, and where the cost of a bond or fund is comparatively extraordinarily high, and in some cases prohibitively so.

We also note that the use of RBME scores to exclude certain licensees from using insurance may dramatically reduce the number of eligible licensees to the point where insurance is a rarely used instrument.

EPA have set out no rationale for why insurance eligibility is restricted under the current Financial Provisions regime. But even where such a restriction may be warranted, it is unclear why EPA have chosen the RBME mechanism as the filter.

RBME is a tool used by EPA to determine its enforcement priorities and the allocation of resources necessary to pursue those priorities. Its place as an eligibility filter for insurance is at odds with its intended design for several reasons.

First, RBME determinations do not correlate to potential residual risk of environmental damage. RBME determinations are also highly sensitive to change, where, for example, a slight increase in the number of public complaints about site noise, the number of a licensee's minor non-compliances, or changes to emissions can trigger an RBME category to jump from a B or a C to an A automatically and suddenly. Proximity to designated sites or nearby river or aquifer water quality may *a priori* preclude a site's categorization of B or C. In such instances, a licensee enjoying EPA acceptance of insurance while operating in RBME Category B would presumably suddenly see that acceptance nullified when the RBME Category becomes A. Such nullification would incur significant financial costs and operational difficulties on the part of the affected licensee.

If we assume that EPA have adopted RBME scores as a filtration mechanism on the basis of degree of environmental risk, then one must consider why the ELRA and CRMP would not be considered sufficient for this purpose. If the ELRA and CRMP processes are insufficient to determine risk for purposes of underwriting insurance risk, one must consider how the RBME is better suited to the task.

Ultimately, whether or not insurance is a suitable Financial Provision instrument is largely a function of insurance policy wording. Likewise, whether or not the insurance industry would find it commercially attractive to offer such policies is largely a function of market size. An arbitrary exclusion of Category A sites may preclude this market entirely.

Ibec is aware that EPA engaged with representatives from the insurance industry during the months preceding the current consultation with the view to driving the creation of an acceptable model environmental impairment or liability policy.

We respectfully ask that EPA disclose as part of its subsequent consultation on Financial Provisions the outcomes from said engagement and explain how the Agency reached the conclusions found in the Draft Guidance with respect to insurance, and in particular, how the RBME process can be justifiably applied as an eligibility filter.

5. Administrative processes

Central to the smooth functioning of a regime such as the EPA's on Financial Provisions is administrative process. The Draft Guidance, however, falls short of detailing how the Agency will conduct itself in the context of day-to-day consideration of licensee instrument proposals.

For example, the Draft sets out no time-frames – statutory or otherwise – for how long the Agency will take to review a Financial Provision proposal or under what circumstances such time-frames may be modified by either the Agency, a third party, or an extraneous event.

Similarly, the Draft Guidance gives no clear indication as to how long a particular Financial Provision arrangement will be acceptable to EPA and under what circumstances EPA may instigate a review. Without any limit on the Agency's power to require updates or changes to a Financial Provision, the regime allows for arbitrary review, with the consequent risk of mal-administration or abuse, and the generation of associated costs. Ibec strongly recommends that EPA consider a policy of not requiring review or modification of a Financial Provision except where warranted by a reasonable schedule or by some material breach of a relevant licensee obligation.

EPA should also clarify its administrative practices with respect to the following:

- How EPA will “carry out a reasonable investigation on the proposed provider of a financial provision to satisfy itself that the provider is of an adequate financial standing” (Page 4) where there is a likelihood that some providers will resist such scrutiny?
- What statutory authorities other than EPA may access Financial Provisions and in what circumstances? What power does the EPA have to assign, transfer or otherwise provide access to those authorities? What power do those authorities have to receive such an assignment, transfer or other access to a licensee's Financial Provision?
- What legal effect will the finalization of the Draft Guidance have on existing agreements between EPA and Licensees where Agency approval of the Licensee's Financial Provisions has previously been granted?

6. *Instrument templates*

Despite that the Financial Provision instrument templates associated with the Draft Guidance are not subject to the Agency's current consultation, Ibec members have nonetheless expressed serious concerns with certain provisions found in the templates. Particular concern has been expressed in relation to the demand provisions in the Performance and Payment Agreement and On-demand Performance Bond Agreement templates.

Ibec reserves its right to submit its views on the templates at a later date. However, we urge EPA to generally consider the triggers and demand provisions in all the instrument templates to ensure that their application is restricted to the context of insolvency or where a breach of or failure to meet a license obligation is material and related to a real risk of pollution.

7. *Summary*

Ibec appreciates the opportunity to voice its members' views in relation to the Agency's Financial Provisions regime. To recap:

1. EPA should explain how its Financial Provisions regime compares to similar regimes in other Member States such that it can clearly show that the regime does not threaten Irish competitiveness by way of increased compliance costs.
2. EPA should demonstrate that it has sufficiently assessed – in quantitative and qualitative terms – the risk that the State or the Agency will be required to cover the cost of

environmental remediation to the full scale and extent that the current Financial Provisions regime would anticipate.

3. EPA should formally and publically undertake to refrain from revoking or suspending licences or issuing non-compliances or other sanctions where a Financial Provision has not yet been agreed between the Agency and a licensee until such time as the Financial Provisions regime and accompanying guidance documents have been subjected to due consultation process and have received final approval from the EPA Board.
4. Ibec urges the Agency to continue seeking a full and progressive understanding of the financial, operational and other impacts on businesses of the various financial instruments it considers acceptable, and that it works toward expanding the range of acceptable instruments accordingly.
5. EPA should rethink its position in relation to legal costs and should carefully consider how to improve the Financial Provisions regime such that it results in less cost to licensees, not more. EPA should set out the legal basis for any policy that allows for the direct or indirect passing on of Agency costs to licensees.
6. EPA should disclose the results of its engagements with the insurance industry and explain the Draft Guidance's provisions with respect to insurance, particularly as to why the RBME process was chosen as an insurance eligibility filter.
7. EPA should clarify within the Draft Guidance its administrative practices, including with respect to reviewing, approving or denying Financial Provision proposals by licensees, how EPA would vet Financial Provision providers, when and under what circumstances a review of Financial Provisions would be triggered or scheduled, and what statutory authorities other than EPA may access Financial Provisions and under what circumstances and powers.
8. EPA should consider opening the Financial Provision templates to consultation and should carefully review the provisions in those templates so as to ensure that demand and other similar conditions are restricted to situations of insolvency or where a breach of or failure to meet a licence obligation is material and related to a real risk of pollution, and such that the likelihood that the templates will be subject to modification is minimized.
9. Ibec requests that EPA make accessible the information listed in the Appendix to this submission, so as to, among other things, facilitate further analysis of the Financial Provisions regime in context. The information provided should be included in any background paper or other consultation.

In light of the above, and considering the tremendous importance of EPA's Financial Provisions regime to all stakeholders, Ibec further advises EPA to ensure sufficient and comprehensive continued consultation on the Draft Guidance, its associated template agreements, and any other legislation, regulations, guidance, policy or other documents that constitute the entire regime for environmental liability assessing costing and the making of Financial Provisions.

This should include distinct – and meaningful – consultations on specific issues, publication of all consultation responses, meetings with stakeholders where requested, publication of any draft decisions, request for further comments, and a proper impact assessment prior to final publication.

As such, Ibec hereby requests the opportunity to make submissions pursuant to a re-issued Draft Guidance on Financial Provisions. Without such due process, industry and other stakeholders are

deprived of effective participation in the consultation process. Ibec likewise requests a meeting with EPA to discuss the views contained in this submission.

It is our hope and expectation that through further engagement by EPA and industry, a fair, efficient and competitive regime for assessing, costing and providing sufficient financial coverage for environmental liabilities will emerge.

Yours sincerely,

Morgan Baker
Environment Policy Executive

Cc: Ger O'Leary, EPA (g.oleary@epa.ie)
Cc: Lorna Dempsey, EPA (l.dempsey@epa.ie)
Cc: Dave Walsh, DECLG (David.Walsh@environ.ie)

Appendix

This appendix contains a non-exhaustive list of the information that Ibec requests from EPA to allow better assessment of the Agency's Financial Provisions regime.

- a. The total number of EPA licences, broken down by license type.
- b. The number of EPA licenses which contain Financial Provision requirements.
- c. The number of EPA licenses which contain requirements for the production of an ELRA.
- d. The number of EPA licensees with whom EPA have agreed a particular Financial Provisions arrangement.
- e. The total number of licensees operating under each RBME category.
- f. The number of EPA licensees with whom EPA have not yet agreed a particular Financial Provisions arrangement.
- g. The total number of each Financial Provision instrument, by type, currently subject to acceptance by EPA.
- h. The total monetary value of all Financial Provision instruments currently subject to acceptance by EPA.
- i. The total number of instances in the past 10 years where the State or EPA have paid for the cost of covering environmental liabilities that should have been covered by an EPA licensee.