European Union Network for the Implementation and Enforcement of Environmental Law

IMPEL

Financial Provision

Protecting the Environment and the Public Purse

Kim Bradley, Scottish EPA

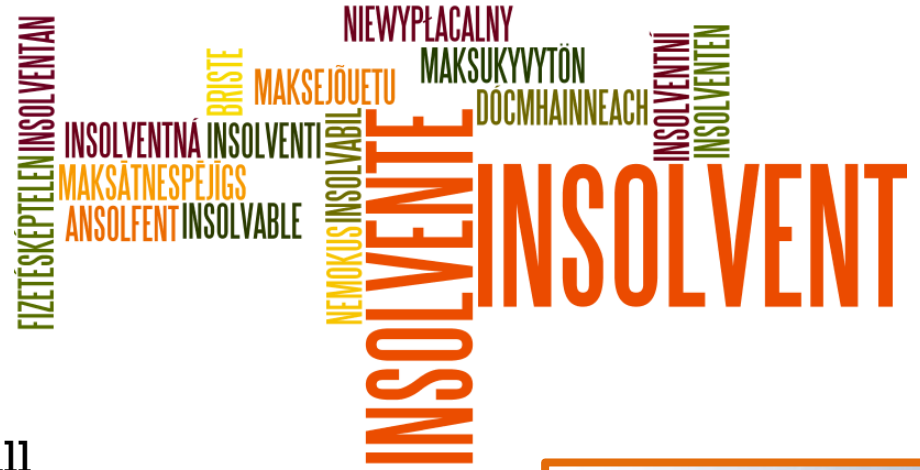
Introduction to the Practical Guide. Case study on Compensatory Remedial Measures

23rd November 2017, Royal Society, Edinburgh

The Problem


Financial provision – protecting the environment and the public purse
Mineral extraction industry
IMPEL
Bonds in place for planning restoration, e.g. realigning streams.
No financial provision for other environmental liabilities e.g. managing polluting discharges.
Profit
Loss
£m
Problem: Increased costs e.g. environmental levys combined with reduced revenue e.g declining price of globablly traded product. Restoration was behind schedule at some sites.
Proactively sought buyers for assets aiming to avoid compulsory liquidation.
Aimed to trade its way out of trouble through expansion of operations.
Business was restructured with new partners.
All or part of business transferred to liquidator.
INSOLVENT
New partner paid to extend bond.
Liquidator tried to disclaim land and environmental licences.
SUCCESS
Continued in business.
Courts decided that liquidators don't have the right to abandon onerous property.
Success: the sites are in environmental compliance.
Success: the sites and assets transferred to a charity – Scottish Mines Restoration Trust.
SMRT

Project Aim



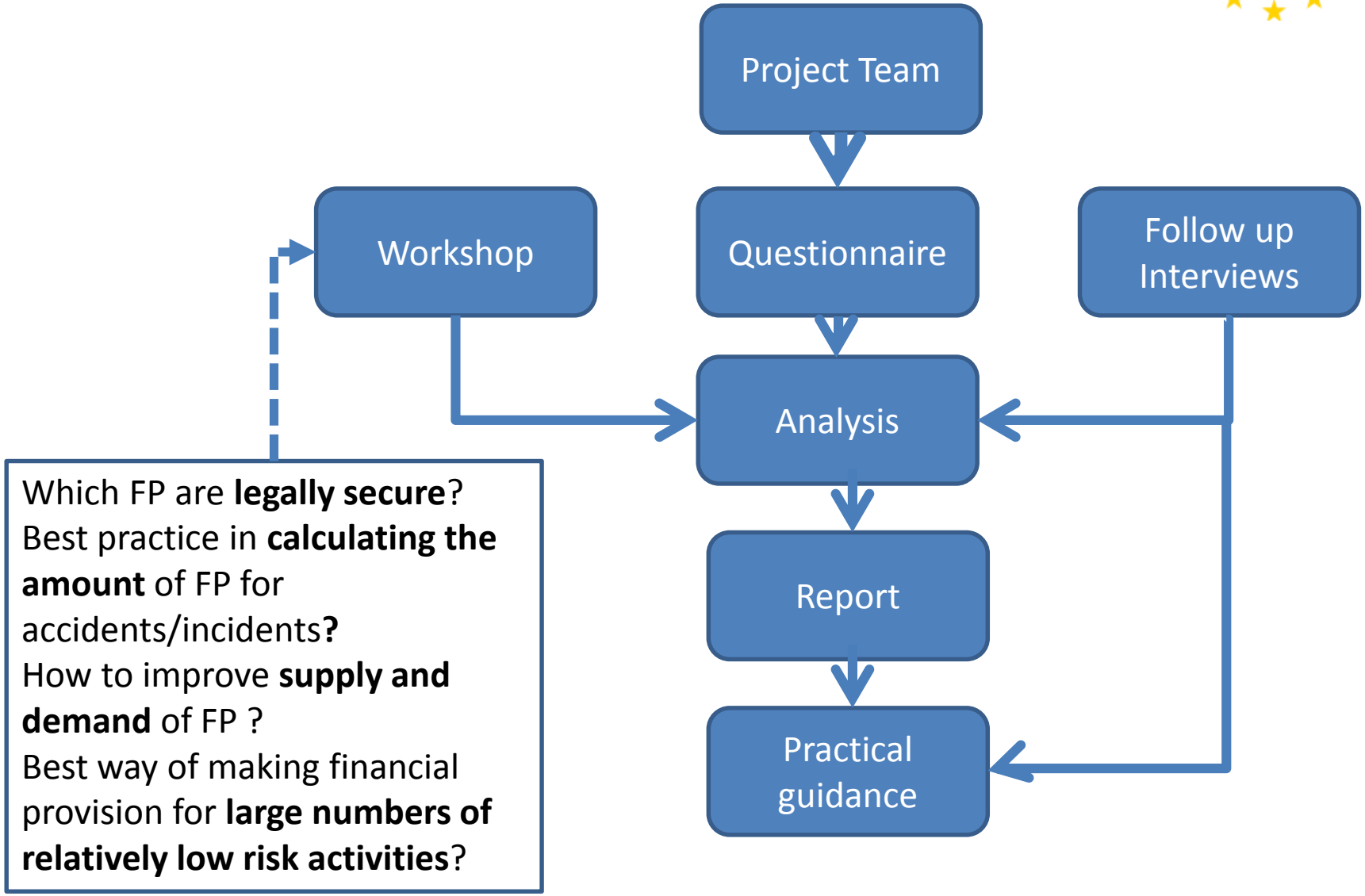
To produce practical guidance that will **better equip** regulators and others to make informed decisions about financial provision for unforeseen and foreseen liabilities resulting in improved:

Protection of the environment
Protection of the public purse
Implementation of polluter pays principle
Investment in pollution prevention

Team, Time, Budget

2 years

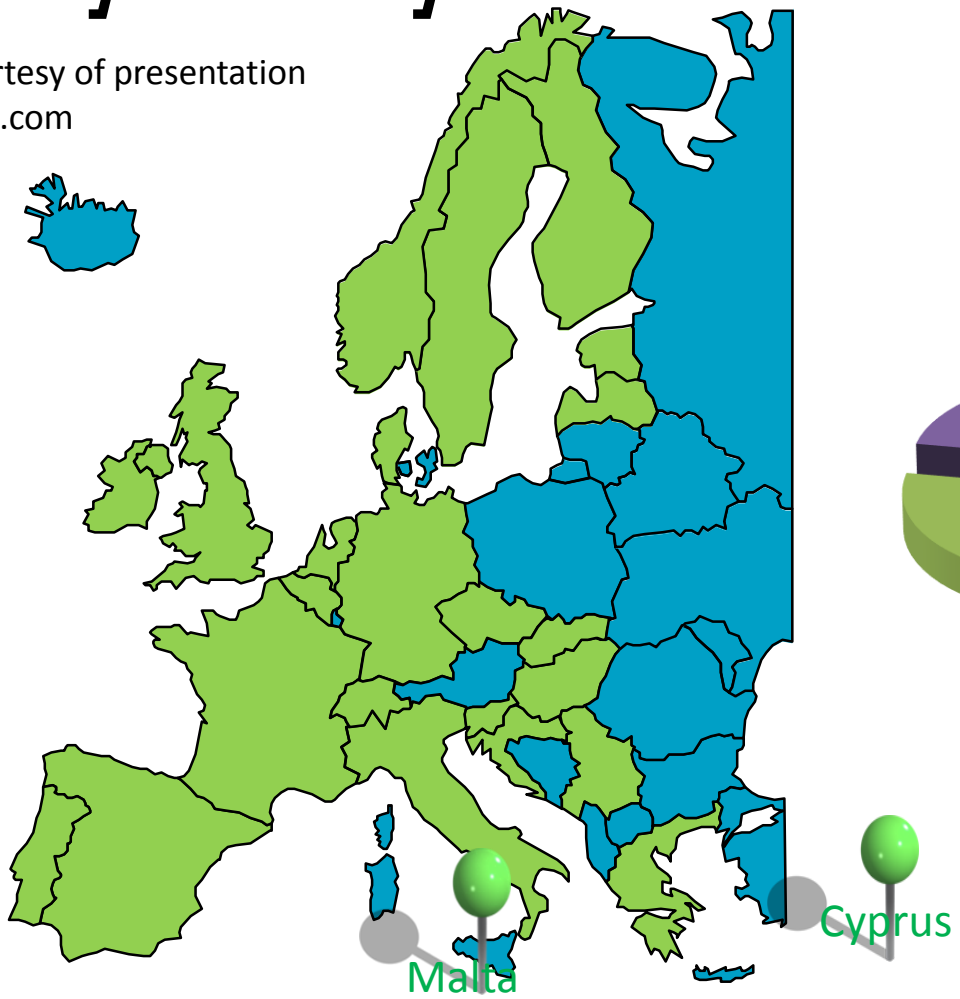
Project Methodology



Questionnaire Participation

By country

Slide courtesy of presentation magazine.com

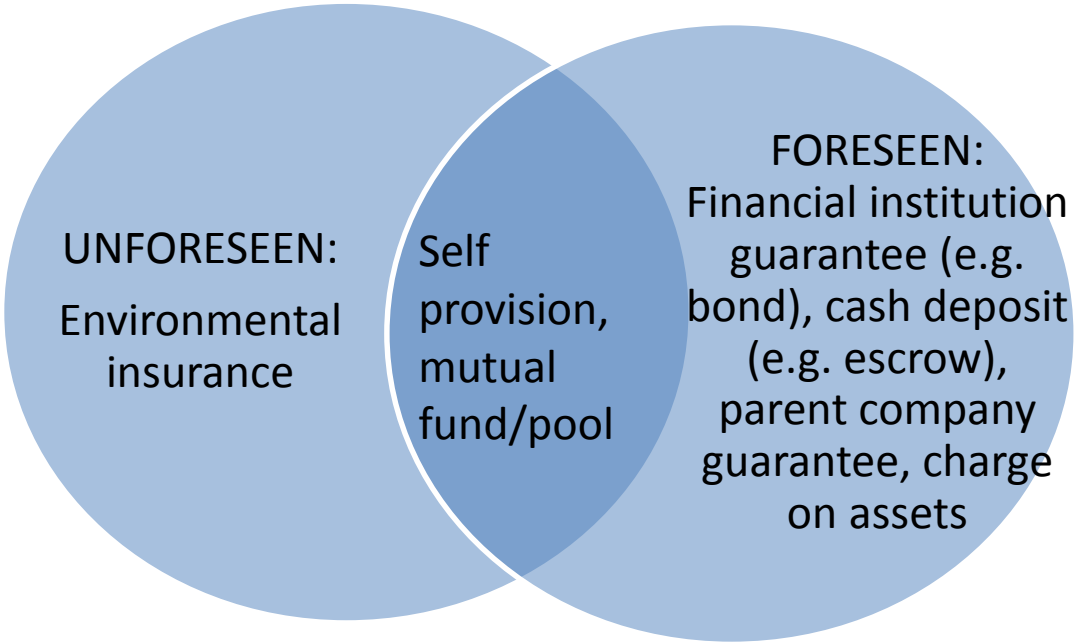


By sector

- Operator
- Financial Provision
- Regulator
- Academic/ Consultant/NGO

Findings

Regulatory consistency and time



More options and flexibility for Small Medium Enterprises E.g. pools

Success highly dependent on construction and monitoring of the Financial security and sufficiency

Concerns around the role of corporate law and insolvency/bankruptcy law in hindering cost recovery

The Role of Regulators

- Firm enforcement
- Regulatory acceptance
- Publicity campaigns
- Working with the supply chain

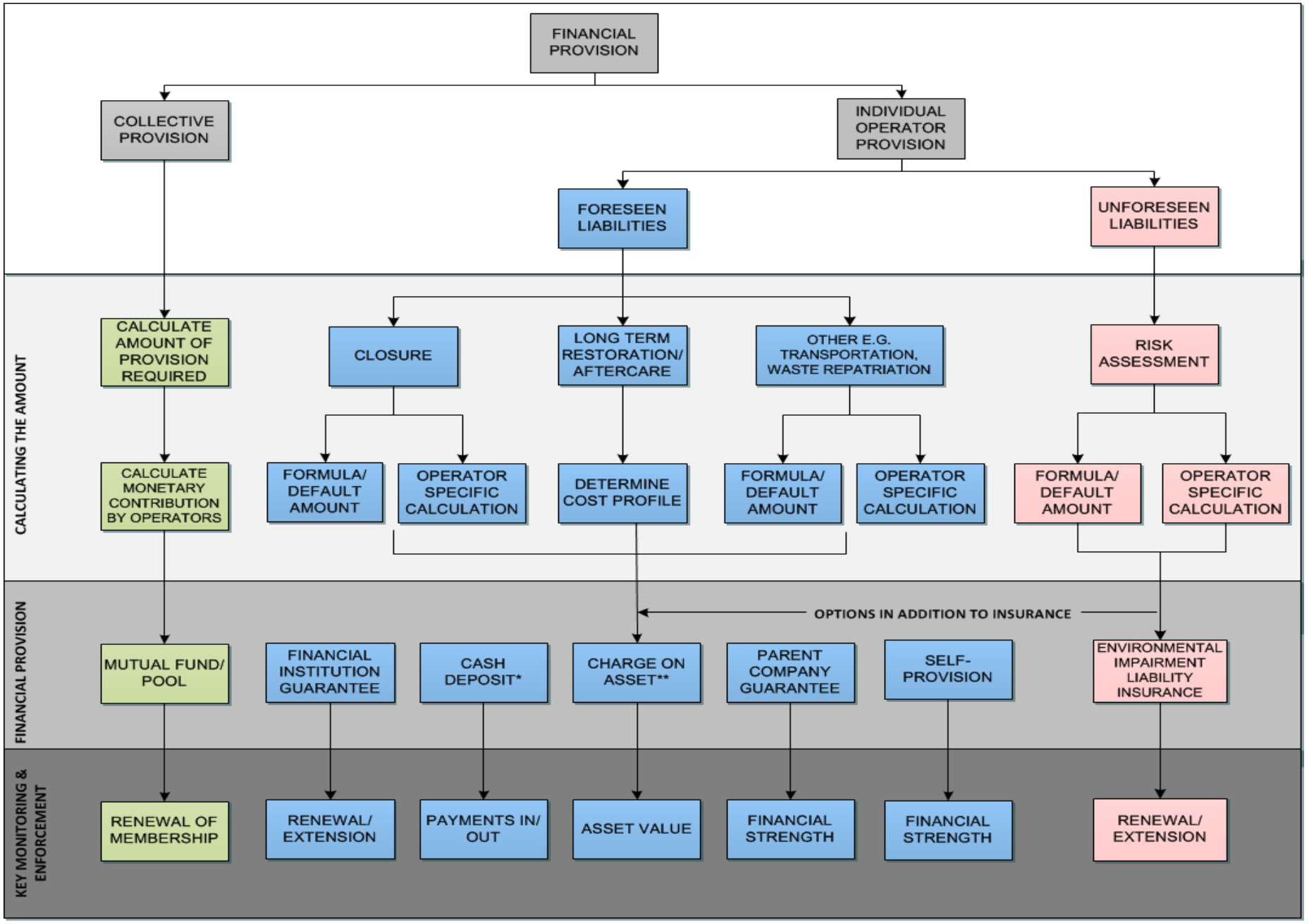
- Tax breaks
- Mandatory provision - conflicting views

Financial Provision for Environmental Liabilities – Practical Guide

Polluter pays principle

Financial provision principles:

- secure
- sufficient
- available



*A COMBINATION OF FINANCIAL PROVISIONS MAY BE REQUIRED WHERE A CASH DEPOSIT IS ALLOWED TO BUILD UP OVER TIME UNTIL THE VALUE OF THE DEPOSIT IS SUFFICIENT TO MEET THE LIABILITY.

**A COMBINATION OF FINANCIAL PROVISIONS MAY BE REQUIRED WHERE A CHARGE ON ASSET IS USED DUE TO ITS ILLIQUIDITY.

Information sheets

A mutual fund/pool is a mechanism by which a group of operators may satisfy financial provision requirements by demonstrating their membership of it. Acceptance into the mutual fund/pool requires the members to provide evidence of a specified amount of financial provision, and/or to pay a specified amount into the fund/pool each year. Members must agree to pay up to a specified (or unspecified) amount if a member of the fund/pool fails to do so. If the amount of such payment exceeds the monies held by the fund/pool, an additional drawing may be made on the members.

A mutual fund/pool may be used as financial provision for unforeseen incidents. It is not feasible for first-party cover for foreseen liabilities because this is a responsibility that must be carried out by individual operators as part of their permit or licence commitments. However, a mutual fund/pool may, depending on the nature of the pool, be used to cover the foreseen liabilities of a member that has become insolvent. Mutual funds/pools can be viewed as contrary to the polluter pays principle.

ADVANTAGES		DISADVANTAGES	
✓	The cost to operators may be relatively low and does not tie up capital.	×	Cost, time and expertise needed to establish and monitor the mutual fund/pool.
✓	May avoid the complexity and costs associated with establishing, maintaining and monitoring financial securities on a site-specific basis.	×	May be perceived as failing adequately to implement the 'polluter-pays' principle. Membership may be strictly limited, making it unavailable to many operators.
✓	May reduce the risk of a financial provision failing in any given case for legal or other issues.	×	Where contributions are not differentiated according to the risk of the individual member, members may not be as motivated to improve their safety levels.
✓	Should not be affected by negative changes in the financial viability of individual members or their insolvency or dissolution as long as the amount of assets in the fund/pool is sufficient to pay a claim(s) and/or other members have sufficient funding to respond to a call for additional funding in the event of a claim.	×	Where the terms and conditions for payment from the fund/pool are construed overly strictly, this may make it difficult to draw upon when necessary.
✓	Potential to provide a source of funds for large-scale losses.	×	May not be feasible to establish a fund/pool for diverse operations; funds/pools tend to be used mainly for specific industrial or other sectors.
✓	Potential to provide a source of funds where a member has entered into insolvency proceedings.	×	The mutual fund/pool may provide insufficient cover in the event of multiple calls on the pool; for example, where the industry covered by the pool goes into decline.
✓	Depending on the structure of the pool, contributions may be segregated from the operator's assets, meaning that they are likely to be beyond the reach of its creditors should it enter into insolvency or dissolve.		
✓	Protects operators themselves from the financial consequences of environmental liabilities arising by spreading costs among members.		
✓	Capacity to ensure that funds will be available to cover liabilities arising in the mid to long term.		
✓	Where the amount that a member is required to contribute is determined by its individual risk profile (i.e. contributions are differentiated), this provides an incentive for it to reduce the risk.		
✓	Where provision of an environmental management system is a requirement of membership, this provides an incentive to members to adopt them in order to be able to gain and continue their membership and lower their contribution (if relevant).		

Information sheets

Basic considerations	Careful attention will need to be paid to the structure, management and governance of the mutual fund/pool. The fund should be ring-fenced for environmental liabilities and protected from investment risk.
Documentation	In addition to the standard documentation, the following may be required: evidence of continued membership.
Documentation specifications	In addition to the standard specifications, the following may be required: specification of joining criteria and specification of the structure, governance and management of the mutual fund/pool.
Reporting and monitoring	In addition to the standard requirements, the following may be required: reporting and monitoring of payments in, maintenance of membership and breach of membership criteria.
Enforcement	In addition to the standard requirements, the regulator will need to ensure that membership of the mutual fund/pool is maintained and may need to act in the case of declining financial health of the mutual fund/pool or the industry.

Key checks

Key things to check	Insurance	Financial Institution Guarantee	Parent Company Guarantee	Cash Deposit	Mutual Fund/Pool	Charge on Asset	Self-Provision
Reporting, monitoring							
Triggering events	●	●	●	●	●	●	●
Cancellation, expiration, intent to renew, renewal or non-renewal	●	●	●				
Developments that affect financial strength or ability to ensure provision	●	●	●	●	●	●	●
Annual audited financial statements			●				●
Annual inflationary adjustments	●	●	●	●		●	●
Payments in				●	●		
Progress reports on cost profile and restoration etc.		●	●	●	●	●	●
Withdrawals or demands	●	●	●	●	●	●	
Performance of institution or fund or asset value	●	●	●	●	●	●	●
Maintenance of membership					●		
Breach of membership criteria					●		
Use of the asset to secure other obligations						●	
Ongoing insurance to protect the asset						●	
Annual valuation						●	
Expiry dates	●	●	●				
Environmental compliance	●	●	●	●	●	●	●
The level of liability against the value of the financial provision	●	●	●	●	●	●	●

2018 Terms of Reference

- Secure, **sufficient**, available when required

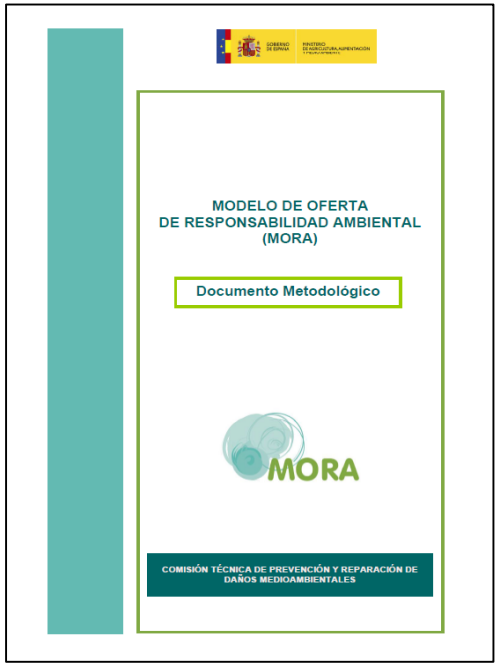
2018 Terms of Reference

Evaluation of the potential application of the Spanish and Irish models to other jurisdictions

Confidence in decision making

Streamlining

Reducing regulatory burden



Email: Kim.Bradley@sepa.org.uk
Email: s.mccarthy@epa.ie
Website:
https://www.impel.eu/projects/financial-provision-what-works-when/

Case Study – Compensation for Environmental Damage

400 dead fish removed over 400m, area based electro-fishing survey showed low fish abundance, pre-incident data not available.

Assessing the amount of damage

- Option 1 – scale to length of water affected (5km) (4300)
- Option 2 – scale to length of water taking into account fish barriers (1600)
- Option 3 – historical timed electro-fishing survey (qualitative comparison)
- Option 4 – historical area based electro-fishing survey of similar waterbody (estimated 3100)

Evaluating compensatory remedial options

Resource to resource

Resource value to remediation value

€ €

Resource to service

Resource value

€

Questions

- What are the obstacles to evaluation of financial provision for environmental liabilities?
- What approaches are others taking to establishing baseline condition and damage?
- What methods are available to assist with evaluating compensatory remedial measures?