

SCOTTISH ENVIRONMENT PROTECTION AGENCY

A PRESENTATION TO CAED SEMINAR



APRIL 2021



Financial Provision – Protecting the Environment and the Public Purse



THE PROBLEM

Insolvency can leave large unrestored holes in the ground and big holes in the public purse.

Taxpayers may end up footing the bill for major accident clean-up

The costs range from 10s to 100s of millions EUR.



What can we learn from successful claims ?





IMPEL PROJECT



SECURE

Ring fenced to the
environmental
liability for its
duration

**PRINCIPLES
FOR
SUCCESSFUL
FINANCIAL
PROVISION**

SUFFICIENT

To cover the
costs of the
potential liability

AVAILABLE

When required
to pay for
restoration or
clean up

<https://www.mapchart.net/>



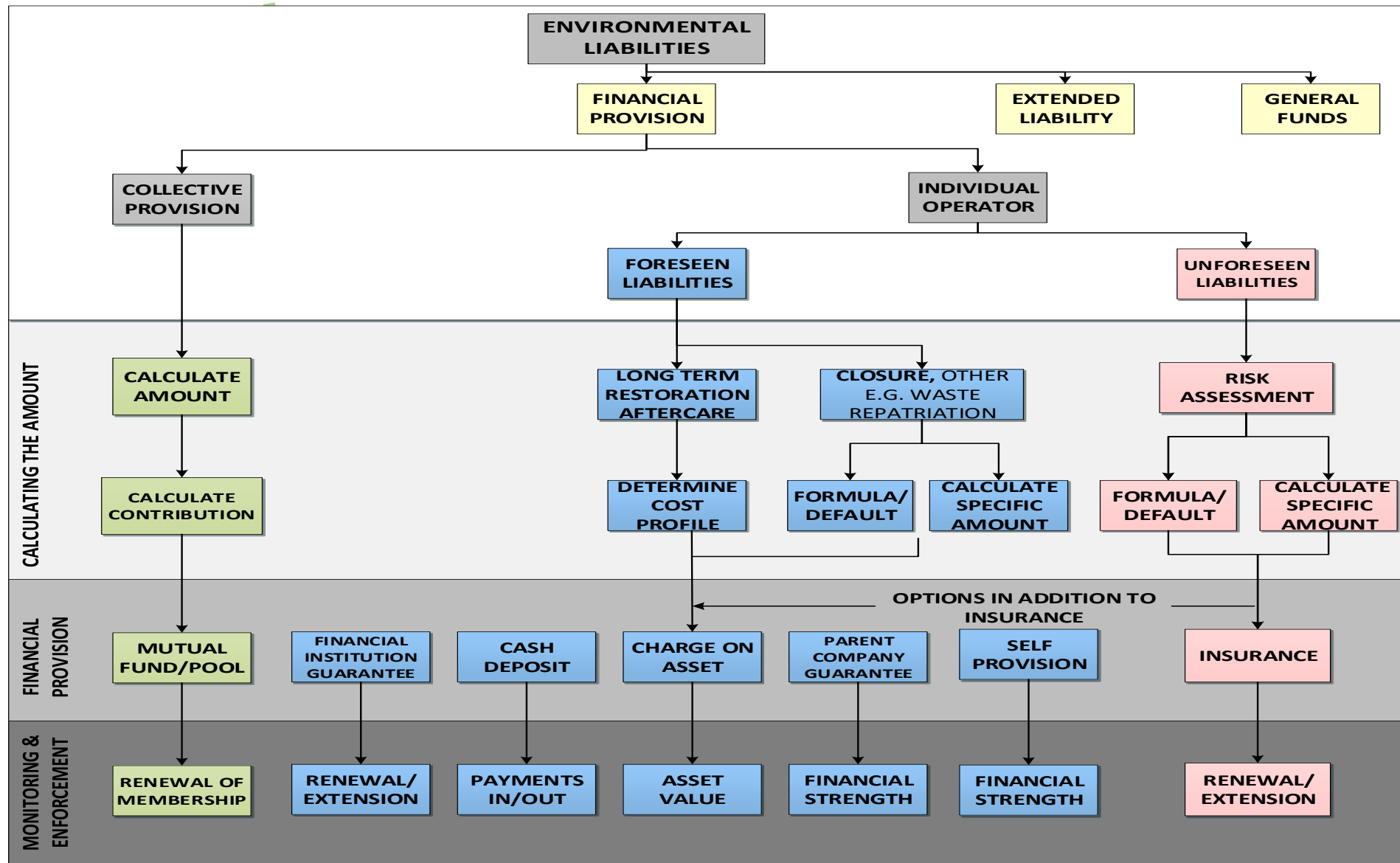
ADDRESSING THE NEEDS OF REGULATED BUSINESS



IMPEL PROJECT – SCHEMATIC OF CONTENTS



“The Gold
Standard”





ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE

An insurance policy is a contract that transfers liability for the risk of the loss specified in the policy from the insured (policyholder) to the insurer on payment of a premium. It is important to be aware of the differences between insurance policies. Traditional general third party liability policies typically provide no, or limited, cover for environmental liabilities, beyond cover for bodily injuries and property damage from sudden and accidental pollution incidents. Endorsements that provide cover for remediation costs may be added but they tend to be much more limited than environmental insurance policies.

ADVANTAGES	DISADVANTAGES
<ul style="list-style-type: none"> ✓ Does not require collateral so may be more accessible to small and medium businesses and does not tie up capital. ✓ Should not be affected by negative changes in the operator's financial strength or its dissolution provided the policy provides that it is payable in the event of the operator's insolvency or dissolution. 	<ul style="list-style-type: none"> ✗ Must be renewed annually or at some other interval. ✗ Cover may be invalidated by non-disclosure or misrepresentation. ✗ Limits/sub-limits to indemnity, deductibles, conditions, exclusions, specific policy periods and triggers may restrict which environmental liabilities may be covered.

Documentation

In addition to the standard documentation the following may be required: insurance policy or certificate of insurance, evidence of financial strength and payment of premium.

Reporting and monitoring

In addition to the standard requirements the following may be required: notification of cancellation, expiration, intent to renew, renewal or non-renewal and expiry dates.

Enforcement

In addition to the standard requirements the regulator will need to make sure that the financial provision is maintained/renewed/acceptable or require a replacement provision.

CONTENT OF PRACTICAL GUIDE - CHECKLIST

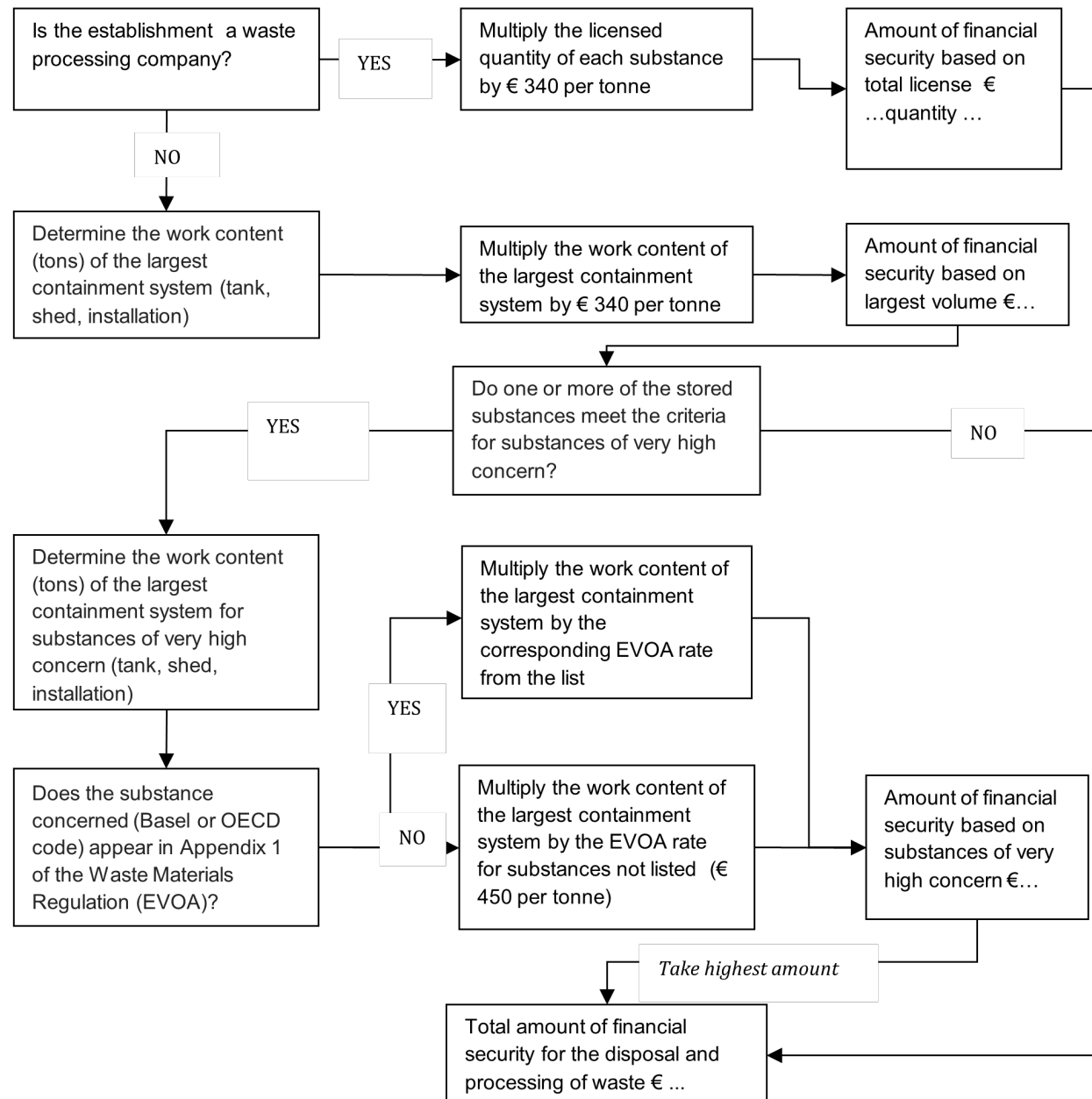


Key things to check	Insurance	Financial Institution	Guarantee Company	Cash Deposit	Mutual Fund/Pool	Charge on Asset	Self-Provision
Basic considerations							
The provision provides for the estimated environmental liability	•	•	•	•	•	•	•
Certainty of amount to be received and immediacy of access	•	•	•	•	•	•	•
Payable on demand	•	•	•	•	•	•	
Provider is authorised to provide that provision in the jurisdiction	•	•	•				
Provider has sufficient financial strength	•	•	•				•
Supplementary cover for intentional acts or excess	•						
Supplementary cover due to illiquidity of the asset						•	
Supplementary cover while the provision is being accumulated				•			
Protection against insolvency or dissolution of the operator – first ranking charge				•		•	



TOOLS

Netherlands





TOOLS – Spain

[ARM-IDM-MORA \(mapama.gob.es\)](https://servicio.mapama.gob.es/mora/idm/editarSeleccionIdmAgentes.action?id=31545&idIdmAgenteFormula=)

The screenshot shows a web browser window with the URL <https://servicio.mapama.gob.es/mora/idm/editarSeleccionIdmAgentes.action?id=31545&idIdmAgenteFormula=>. The page header includes the Spanish Government logo and the text "GOBIERNO DE ESPAÑA", "MINISTERIO PARA LA TRANSICIÓN ECOLÓGICA Y EL RETO DEMOGRÁFICO", and "y Reparación de Daños Medioambientales". The user is logged in as "Kim.Bradley@sepa.org.uk". The main heading is "Environmental Damage Index (IDM) estimation". On the left, a sidebar menu lists "ARM Reports", "IDM Reports", "MORA Reports", and "My Profile". The main content area is titled "Damaging agents" and includes a description: "The damaging agents are the elements of the model that may significantly affect natural resources." Below this, a list of agents is shown with checkboxes: Chemical (Halogenated VOCs, Non-halogenated VOCs, Halogenated SVOCs, Non-halogenated SVOCs, Fuels and Non-volatile Organic Compounds (NVOCs), Inorganic substances, Explosives), Physical (Extraction/Disappearance, Inert waste discharge, Temperature), Fire, Biological (Genetically Modified Organisms (GMO), Invasive alien species, Virus and bacteria, Fungi and Insects). A "Browsing outline" box on the right contains "Scenario general data" and "Agents". The Windows taskbar at the bottom shows the search bar and various application icons.

FINANCIAL PROVISION – BUILDING EXPERTISE



environmentanalyst



Environmental Evaluators Network
Réseau des Évaluateurs Environnementaux

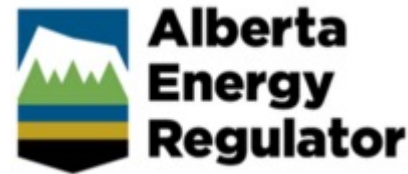


UN 
environment
programme

Building Expertise



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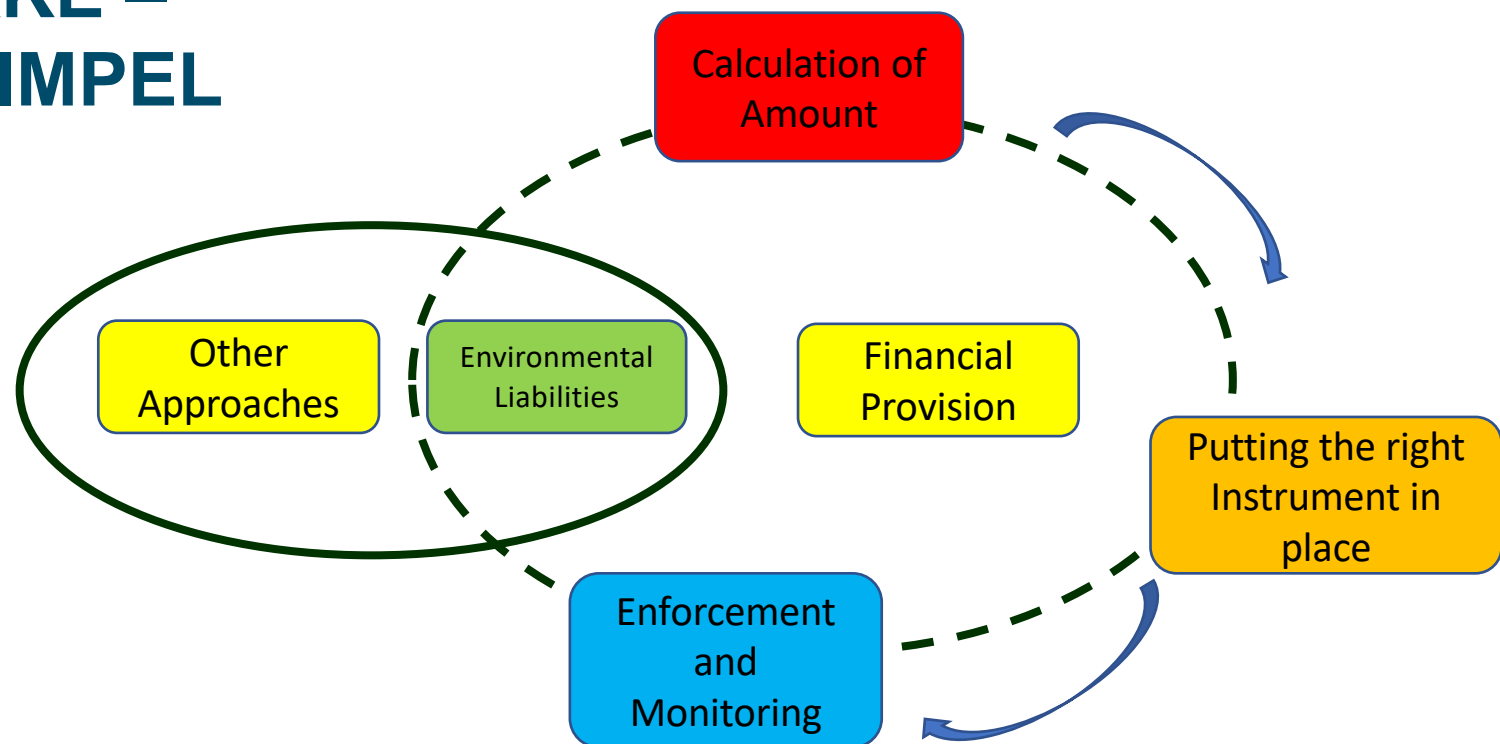


WORLD
ENERGY
COUNCIL





BETTER ACCESS AND UPTAKE – 2022/2023 IMPEL PROJECT





CURRENT STATE OF PLAY

- Increased operator demand for financial security
- Financial security for waste chain – on the increase
- Financial security for IED and SEVESO - on the increase
- Financial security for return to satisfactory state (IED) – on the increase
- Move away from unsecured provision e.g. self provision
- Move away from reliance on financial viability health checks
- Move towards extending liability to directors and others

STEVENS&BOLTON

**IMPROVING FINANCIAL
SECURITY IN THE CONTEXT OF
THE ENVIRONMENTAL LIABILITY
DIRECTIVE (ELD)**

Valerie Fogleman
Consultant, Stevens & Bolton LLP
Professor of Law, Cardiff University School of Law

[Liability - Legislation - Environment -
European Commission \(europa.eu\)](#)

- EU Environmental Liability Directive (ELD) Multi Annual Rolling Work Programme ([ELD_MAWP-approved.pdf \(europa.eu\)](#))

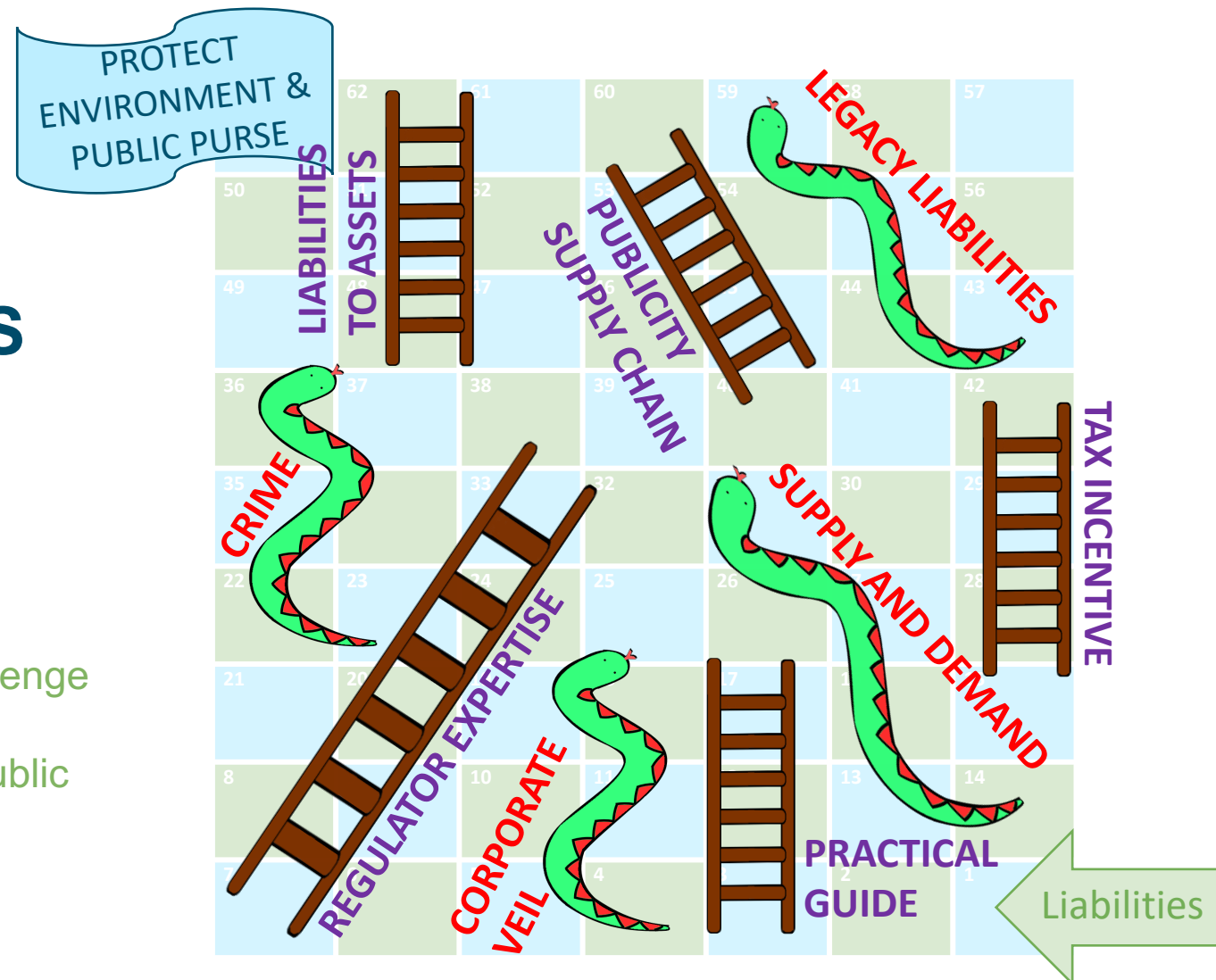


PILLAR 3 – Ensure secure, sufficient, available financial security

- Promote availability of financial security to ensure operators have sufficient financial capacity to meet their liabilities
 - Increased enforcement of the ELD – various tools and trainings to be provided to MS particularly SMEs and loss adjusters
 - Identify and publish best practice on financial provision and insolvency
 - Encourage MS to require mandatory financial provision for Seveso (COMAH), PPC and waste activities phased in according to risk
 - Encourage extension of secondary liability so public purse is protected on insolvency
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- United National Environment Programme (UNEP)/Alberta Energy Regulator (AER)/EU network on environmental liabilities
 - European Parliament Resolution suggesting mandatory Financial Provision for ELD

FINANCIAL PROVISION IS NOT A PANACEA

Can financial provision alone address the challenge of protecting the environment and the public purse?



Procedural Guidance – relevant to Scotland only

Technical Guidance

1. Damage to water, protected habitats and species and land
2. Determination of damage to protect habitats and species– how to determine if there is a significant affect on conservation status
3. Determination of damage to water– how to determine if there is a significant affect on status of a water body
4. Determination of damage to land – guidance on assessment of significance of risks
5. Identifying and making decisions on remedial measures – how to evaluate options including an introduction to resource equivalency analysis
6. Cost Recovery
7. Examples of cases that might meet the threshold of environmental damage
8. Case studies of determination of damage and remedial measures

Link to Scottish Government Guidance

<https://www.webarchive.org.uk/wayback/archive/20170702032135/http://www.gov.scot/Topics/Environment/waste-and-pollution/Pollution-1/ELD/ELDGuidance>

SUCCESSFUL IMPLEMENTATION OF THE ELD



Successful implementation of the ELD

Compensatory remediation for a large fish kill.

Fish barrier mitigation measures to open up 10s of kms of river to migratory trout and salmon

Competent authority was able to recover their costs





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 ScottishEnvironmentProtectionAgency

 ScottishEPA

