

TOR Reference No.: 2016/20	Author(s): Kim Bradley
Version: 3	Date: November 2015
<b>TERMS OF REFERENCE FOR WORK UNDER THE AUSPICES OF IMPEL</b>	

## 1. Work type and title: Mechanisms to address legacy liabilities

1.1 Identify which Expert Team this needs to go to for initial consideration	
Industry	x
Waste and TFS	x
Water and land	x
Nature protection	<input type="checkbox"/>
Cross-cutting – tools and approaches -	x
1.2 Type of work you need funding for	
Exchange visits	<input type="checkbox"/>
Peer reviews (e.g. IRI)	<input type="checkbox"/>
Conference	<input type="checkbox"/>
Development of tools/guidance	x
Comparison studies	x
Assessing legislation (checklist)	<input type="checkbox"/>
Other (please describe):	<input type="checkbox"/>
1.3 Full name of work (enough to fully describe what the work area is)	
Financial Provision –developing mechanisms to address the problem of legacy liabilities (arising from major incidents and insolvency)	
1.4 Abbreviated name of work or project	
Financial Provision – what works when?	

## 2. Outline business case (why this piece of work?)

2.1 Name the legislative driver(s) where they exist (name the Directive, Regulation, etc.)
<ul style="list-style-type: none"> <li>• This is a broad issue which cuts across many legislative drivers including but not limited to: Environmental Liability Directive</li> <li>• Landfill Directive</li> <li>• Waste Framework Directive</li> </ul>

- Mining Waste Directive
- Waste Shipment Regulation
- Water Framework Directive
- Industrial Emissions Directive
- Seveso
- Carbon Capture and Storage Directive and
- The planning system

## 2.2 Link to IMPEL MASP priority work areas

- |  |                                     |
|--|-------------------------------------|
| 1. Assist members to implement new legislation   | <input type="checkbox"/>            |
| 2. Build capacity in member organisations through the IMPEL Review Initiatives               | <input type="checkbox"/>            |
| 3. Work on 'problem areas' of implementation identified by IMPEL and the European Commission | <input checked="" type="checkbox"/> |

## 2.3 Why is this work needed? (background, motivations, aims, etc.)

When sites go into liquidation provisions are generally not made for environmental clean-up and leave substantial **environmental legacies** which need subsequently to be addressed. Different solutions have been sought across Europe and include the use of insurance policies, financial provisions, and bonds. The issue of insolvency remains and even if provisions are made these are often ignored by the liquidator with the result that nothing is left for the environment as it is seen as subservient to company law. Ultimately lengthy legal battles may still result in the tax payer covering the expense – in direct contradiction of the polluter pays principle.

This is most critical where environmental licencing has permitted short term degradation of the environment on the explicit condition that the degradation will be at least reversed at the end of the life of the activity and that suitable financial provision will be maintained by the operator to cover the risk of business failure before this restoration has occurred.

The interaction between company and insolvency law and environmental law is complex and will differ between countries. Initiated by the CEOs of Scotland and Ireland EPAs, this issue has been raised by the Network of heads of European Environment Protection Agencies (EPA Network). The EPA Network held a workshop in Oslo in February 2014 organised by the Norwegian EA, SEPA and the Irish EPA; with the respective CEOs leading the discussion. EPA Network members and the IMPEL Board were invited to contribute. The outcome of this workshop was presented to the EPA Network at its plenary in Vienna in April 2014 where it was agreed that the Network (via its Better Regulation Interest Group (BRIG)) and IMPEL seek to promote the development of pan-European guidance on the practicalities of providing financial security; both for accidents and for bankruptcies. The BRIG/IMPEL group met in October 2014 where it was agreed to continue this as a work area in a sub group to try and identify a solution and to share this around the networks and understand who is facing this issue with a view to submitting a formalised project to IMPEL in time for IMPEL's 2015 discussion on its work programme. This ToR is now intended as the mechanism to take this work forward as a formalised project.

It is intended that this project will focus on compiling guidelines on the principles of recommended financial provisions addressing the three key issues:

Is it sufficient?

Is it secure?

Is it available when required?

There is desire to do something of this nature now as it was recognised by the EPA Network that regulations, should they come, would take considerable time. These seemed to be most relevant to legacies of landfill and mining, and harmonisation of existing approaches (preferred to reinvention).

It is notable that this proposal also times well with DG ENV's expected report on ELD in Autumn 2015 and SEPA understands that DG ENV's lead on environmental liabilities would welcome IMPEL looking into the implementation challenges of ELD in more detail.

The European Commission (Hans Lopatta) support the proposal and have offered their support. In addition, UK environmental insurance and insolvency specialists (Valerie Fogelman and Colin Mackie) have recognised the need for the project and offered their support.

#### **2.4 Desired outcome of the work (what do you want to achieve? What will be better / done differently as a result of this project?)**

Regulators will have a better understanding of what financial provision will work in different scenarios, appropriate financial provision tools can be selected and the issue of creating future legacy liabilities will be better addressed

#### **2.5 Does this project link to any previous or current IMPEL projects? (State which projects and how they are related)**

Lessons learnt from accidents. Firstly, even in well regulated industries, **operational accidents** can occur and responsible businesses may still face very substantial financial demands to address environmental damage caused by such accidents. National EPAs may expect and require, under certain regulatory regimes, that financial provision may be made to cover such instances.

There may also be synergies with existing IMPEL work on soil protection.

### **3. Structure of the proposed activity**

#### **3.1 Describe the activities of the proposal (what are you going to do and how?)**

1. Project Team (of 6 people) meeting 1 - Identify who is facing the issue and how it may be taken forward, plan workshop
2. Organise and run the workshop (30 people)
3. Project Team meeting 2 – consider need for post workshop interviews, evidence etc. and approve interim report
4. Post workshop interviews, if required
5. Collate case studies (particularly success stories) with analysis of why it worked or not in the legal context of the Member State (interim report)
6. Expert financial and legal advice on interim report
7. Produce final report on the findings making recommendations, if appropriate for the preparation and shape of guidance/tool

8. The following action would take place in Year 2
9. Produce tool based on the year 1 outputs that analyses the different financial provision options and explains what works in different legal frameworks and different scenarios (e.g. pre, during, post development) and different sectors e.g. mining, landfill, major incidents. (The report may also consider whether there is a role for a pan-European financial instrument to be created that would offer financial security, flexibly across all countries.

### **3.2 Describe the products of the proposal (what are you going to produce in terms of output / outcome?)**

The long game is to produce a tool to assist regulators in making decisions about financial security, supported by case studies to share good practice and innovative approaches. This one year project aims to produce a report of evidence, case studies and approaches that would then be used in year two to produce the tool.

### **3.3 Describe the milestones of this proposal (how will you know if you are on track to complete the work on time?)**

- Invitation to Workshop
- Post workshop interviews
- Completion of interim report (post workshop and interview analysis)
- Publication of final report.

### **3.4 Risks (what are the potential risks for this project and what actions will be put in place to mitigate these?)**

This is a low risk project. The main risks are associated with delivery within the timescale. This will be managed by structuring the project with in-project milestones and timescales. These will be agreed at the first meeting of the project team.

## **4. Organisation of the work**

### **4.1 Lead (who will lead the work: name, organisation and country) – this must be confirmed prior to submission of the TOR to the General Assembly)**

Scotland and Ireland to lead. With support from others to be confirmed by the EPA Network's BRIG secretariat.

### **4.2 Project team (who will take part: name, organisation and country)**

Kim Bradley (SEPA Scotland), Frank Clinton (Ireland) Chris Dailly? Partners from 4.1 tbc

### **4.3 Other IMPEL participants (name, organisation and country)**

TBC as indicated above.

### **4.4. Other non-IMPEL participants (name, organisation and country)**

Hans Lopatta (European Commission)  
Valerie Fogelman (Environmental and Insurance Law Consultant and lecturer )  
Colin Mackie – insolvency law specialist  
Financial provision ELD representative - tbc

**5. High level budget projection of the proposal. In case this is a multi-year project, identify future requirements as much as possible**

	Year 1 (exact)	Year 2	Year 3	Year 4
How much money do you require from IMPEL?	15560	?		
How much money is to be co-financed				
<b>Total budget</b>	15560	? Presume Similar 2016		

**6. Detailed event costs of the work for year 1**

	Travel € (max €360 per return journey)	Hotel € (max €90 per night)	Catering € (max €25 per day)	Total costs €
<b>Event 1</b>	1800 (5*360)	1080 (6*2*90)	150 (25*6)	3030
<i>Project Team 1</i>				
<Data of event>				
<Location>				
6				
1				
<b>Event 2</b>	7200 (20*360)	1800 (20*1*90)	500 (25*20)	9500
<i>Workshop</i>				
<Data of event>				
<Location>				
30				
1				
<b>Event 3</b>	1800 (5*360)	1080 (6*2*90)	150 (25*6)	3030
<i>Project Team 2</i>				
<Data of event>				
<Location>				
6				
1				
<b>Total costs for all events</b>	10800	3960	800	15560

**7. Detailed other costs of the work for year 1**

<b>7.1 Are you using a consultant?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> X
--	--

<b>7.2 What are the total costs for the consultant?</b>	
<b>7.3 Who is paying for the consultant?</b>	
<b>7.4. What will the consultant do?</b>	
<b>7.5 Are there any additional costs?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No      X Namely:
<b>7.6 What are the additional costs for?</b>	Administration, reporting etc
<b>7.7 Who is paying for the additional costs?</b>	Project Lead organisations
<b>7.8. Are you seeking other funding sources?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No      X Namely:
<b>7.9 Do you need budget for communications around the project? If so, describe what type of activities and the related costs</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No      x Namely:  Tbc

## 8. Communication and follow-up (checklist)

	What		By when
<b>8.1 Indicate which communication materials will be developed throughout the project and when</b>  <i>(all to be sent to the communications officer at the IMPEL secretariat)</i>	TOR ✓ *	<input type="checkbox"/>	Prior to inception
	Interim report ✓ *	<input type="checkbox"/>	9 months
	Project report ✓ *	<input type="checkbox"/>	12 months
	Progress report(s) ✓	<input type="checkbox"/>	
	Press releases	<input type="checkbox"/>	
	News items for the website ✓ *	<input type="checkbox"/>	Inception, 9 and 12 months
	News items for the e-newsletter	<input type="checkbox"/>	Inception
	Project abstract ✓ *	<input type="checkbox"/>	
	IMPEL at a Glance ✓	<input type="checkbox"/>	
	Other, (give details):		
<b>8.2 Milestones / Scheduled meetings (for the website)</b>	Tbc		

diary)	
<b>8.3 Images for the IMPEL image bank</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> x
<b>8.4 Indicate which materials will be translated and into which languages</b>	Tbc
<b>8.5 Indicate if web-based tools will be developed and if hosting by IMPEL is required</b>	Tbc
<b>8.6 Identify which groups/institutions will be targeted and how</b>	Regulators, European Commission, Financial provision sector through IMPEL member contacts
<b>8.7 Identify parallel developments / events by other organisations, where the project can be promoted</b>	REFIT of Environmental Liability Directive, Scottish guidance on financial provision for the waste management sector, Environmental Claims Conference 2016

✓ ) Templates are available and should be used. \*) Obligatory

## 9. Remarks

*Is there anything else you would like to add to the Terms of Reference that has not been covered above?*

*In case of doubts or questions please contact the  
IMPEL Secretariat.*

*Draft and final versions need to be sent to the  
IMPEL Secretariat in word format, not in PDF.*

*Thank you.*

