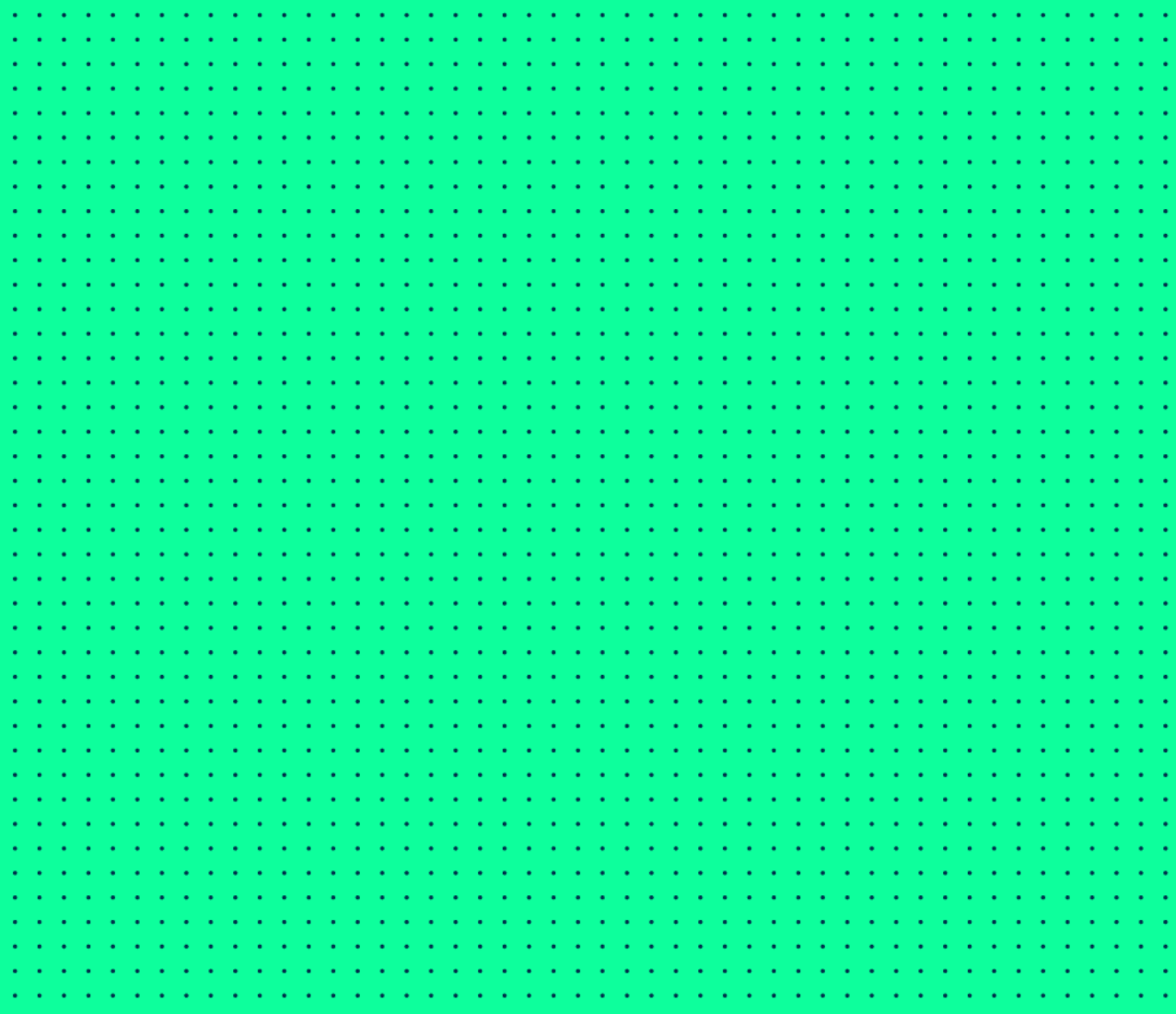
Environment Protection Authority

Consultation Report – Financial Assurances

Financial Assurance Policy and Guideline on Estimating Financial Assurances



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ISBN 978 1 922778 21 5
EPA 2022P3723
May 2022

Contents

The EPA consulted on a draft Financial Assurance Policy and draft Guideline on Estimating Financial Assurances.

The policy and guideline safeguard against future environmental liabilities.

This document describes the consultation outcomes, including key feedback from submissions received on the draft policy and guideline, and the EPA's responses.

1. What the consultation covered

The EPA developed a draft financial assurance policy and guideline to ensure that those responsible for pollution or contamination pay the costs of clean-up or remediation. Without appropriate financial security for some facilities and industries, the liabilities associated with cleaning up pollution and remediation may become the responsibility of the NSW Government and community if the polluter is unable or unwilling to pay. Environmental liabilities may arise from pollution or contamination from a person or company's operations or its historical activities.

The EPA has powers under its existing legislation to require a financial assurance to guarantee funding for potential environmental liabilities so this burden does not fall back on the NSW community. The EPA can require an independent cost assessment to provide confidence that the costs are a reasonable estimate for cleaning up or remediating a site.

The EPA developed a draft policy and guideline to provide greater certainty and transparency and sought views and feedback.

1.1. What were the draft documents?

The **Draft Financial Assurance Policy** outlined when and how the EPA may require a financial assurance under the *Protection of the Environment Operations Act 1997*, the *Contaminated Land Management Act 1997* and the *Radiation Control Act 1990*. The draft policy included a risk categorisation tool the EPA will use to decide whether a financial assurance is justified due to the level of risk of environmental harm, the remediation or other work that may be required, or the environmental record of the regulated person or company.

The **Estimating Financial Assurances: Draft Guideline on Independent Assessment of Costs** provided a transparent and consistent method for companies, consultants and others estimating the amounts of financial assurances. It will help regulated companies and individuals to obtain an independent assessment of the costs of clean-up and remediation actions from auditors when the EPA has decided that a financial assurance is needed.

1.2. What is included in this document?

This document provides a summary of key issues raised by stakeholders during public consultation on the draft policy and guideline, and the EPA's response.

The EPA's response includes several additions to the policy and guideline based on the feedback received via the consultation process.

1.3. What was the consultation process?

The consultation was open for two months, from 3 March until 1 May 2020. Stakeholders were invited to provide feedback by survey responses on the EPA's Have Your Say website and by email to the EPA's consultation mailbox.

During the consultation the EPA:

- invited feedback from over 1,900 stakeholders, including regulated parties, industry associations, environmental consultants, financial auditors and other government agencies
- hosted four information sessions attended by 88 stakeholders.

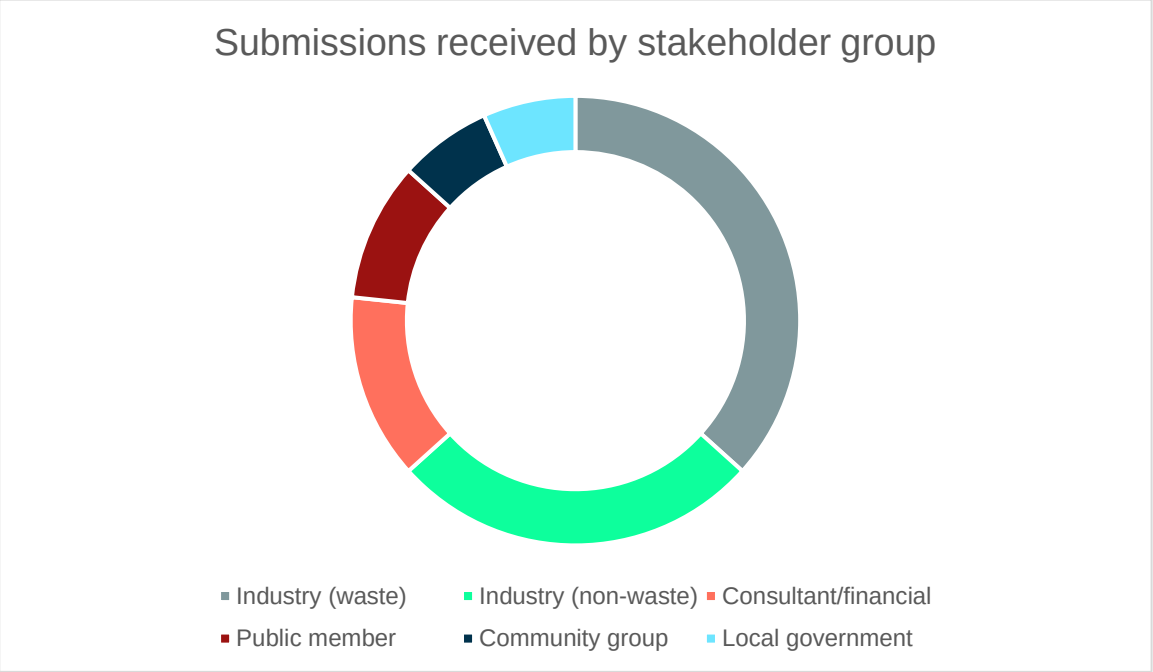
The consultation resulted in:

- 74 visitors to the online consultation Have Your Say webpage
- 24 written submissions
- eight survey responses.

2. Consultation feedback results

2.1. Who did we hear from?

The EPA received submissions from 29 stakeholders (Have Your Say surveys and written submissions) from industry, environmental consultants, community groups, community members and local government representatives. Three stakeholders made multiple submissions. A breakdown of these submissions by stakeholder type is presented below.



The key themes raised in submissions included:

- **application** of financial assurances, including when and to whom financial assurances should be applied (including **equitability** of the financial assurance framework and its potential to create market distortion and impact borrowing capacity of licensed operators)
- **risk categorisation**, specifically amendments to the proposed risk factors for determining when a financial assurance should be considered
- **alternative financial instruments** that the EPA should consider accepting as financial security
- **environmental insurance** and its interaction with financial assurance.

These are discussed in detail in the next section.

3. The EPA's response to themes raised through the consultation

3.1. Introductory statement

In reviewing feedback received in submissions on the policy and during its information sessions, the EPA categorised the issues raised with the draft policy and guidelines into key themes.

Several general comments and issues that were outside the scope of the draft policy and guideline were also raised. Comments have been summarised and simplified for this document. These are presented and discussed for each theme below. Where different submissions raised the same issue, comments have been summarised.

Unfortunately, we cannot provide individual responses to specific submissions made.

3.2. Amendments to the final policy

The EPA has incorporated several amendments into the final policy and guideline in response to the feedback received. These amendments are outlined in the response to submissions section under each of the submission themes detailed below.

3.3. Financial Assurance Policy

3.3.1. Definitions and terminology

Feedback recommended that the language adopted by the policy is amended to:

- define terms consistent with the financial, banking and insurance sectors and legislation
- refer to “environmental externalities” to clarify that the licence holder is responsible for insuring unexpected environmental externalities that would be a liability to the EPA and the community
- point to the waste and resource recovery sector as an industry that provides an essential service aimed at minimising adverse environmental impacts, including pollution
- define “completed rehabilitation” of an event, including the seasonal conditions of that rehabilitation standard and the length of time after an area is rehabilitated.

Response to submissions

The final policy has retained the language used in the draft policy, as the definitions and terminology used is consistent with the EPA’s environment protection legislation governing the financial assurance framework. The clean-up or remediation actions that may require a financial assurance will be specified by a person or company's regulatory instrument.

The purpose of the policy is not to address the EPA’s powers to require environmental insurance nor to comment on the role of the different sectors that the EPA regulates.

3.3.2. Application

Feedback questioned the application of financial assurances, including when and to whom financial assurances should be applied. Most of these concerns can be categorised into the following three sub-themes: equitability, exemptions and timing of application (discussed below).

It was also submitted that section 298 of the *Protection of the Environment Operations Act 1997* does not permit variations of an environment protection licence as a mechanism for imposing financial assurance.

Equitability

Feedback questioned the equitability of the financial assurance framework and its potential to create market distortion by impacting borrowing capacity of licensed operators.

Submissions were concerned the policy is not fair and equal regulation, as it does not address operating sites that do not hold an environment protection licence. It was submitted that legacy clean-up issues are the result of failure by councils and the EPA to control illegal or unlicensed operators, and that the policy penalises legitimate operators because of the actions of rogue or unlicensed operators. Evidence-based information and data was requested on the benefit of the proposal to the community and environment if it only targets licensed operators.

Submissions raised concerns that the policy creates an unfair competitive imbalance between licensed and unlicensed facilities (or facilities operating outside the EPA licensing system) by increasing red tape and the cost of compliance for legitimate businesses that are operating in accordance with the law and abiding by licensing conditions. It was submitted this will result in horizontal inequity and a commercial advantage for those sites without an environment protection licence.

The broad application of financial assurances to sites only holding an environment protection licence was considered to also result in significant sums in assurances held for isolated or rare events and the majority of licensed sites paying for pollution events that are unlikely to occur.

The policy was considered to have a material competitive effect by lowering the borrowing capacity of licensed facilities against smaller unlicensed facilities. Concerns included that the policy will disproportionately impact:

- the small business sector which cannot afford to provide the same assurances as multinational companies
- facilities and landfills operated by private or listed companies, as local government facilities gain a significant competitive advantage.

It was recommended that appropriate thresholds for licensing facilities should be implemented before the implementation of the policy to ensure equity in the market.

Exemptions

Submissions requested exemptions to the policy for specific sectors or activities including:

- mining and petroleum operations covered under the NSW Resources Regulator rehabilitation cost estimate tool, as the planning and cost elements in the tool are more defined than the cost estimate template in the EPA's draft guideline. It was submitted that actions that are not covered by the rehabilitation security bond and would require financial assurance under the policy should be identified in consultation with the Resources Regulator and the mining industry.
- post-mining residual risk, citing the current system administered by the NSW Resources Regulator as sufficiently robust to minimise risks to the environment post-mining tenements
- actions that are part of the day-to-day mine operations
- activities based on the essential need to carry out environmental improvement works, such as remediation works
- where significant "make good" provisions and clauses are built into financials, including post closure "make good" commitments, as additional guarantees on top of the amounts set aside are considered excessive
- where a company has emerged from a public-private partnership with the NSW Government and has a government guarantee protecting their financial and legal position, and contractual arrangements in the form of a guaranteed supply arrangement
- local government as an agency of the State whose financial security will need to be paid for by ratepayers
- the organics recycling industry, as there are no risks to mitigate – and the requirement to keep a healthy functioning organics recycling capability in the state
- smaller low-risk operations which should not have to prove their case and incur extra administrative cost outlays
- lessees, who are neither the contaminator nor landowner of legacy contamination, as long-term environmental legacy issues resulting from previous land uses must be the responsibility of the land owner, in accordance with the *Contaminated Land Management Act 1997*.

Clarification was sought on whether financial assurance requirements are likely to be placed on environment protection licence holders in relation to railway activities (railway infrastructure construction) and road construction.

It was suggested that a voluntary approach to rectify an environmental issue at a site, similar to that of a voluntary management proposal under the *Contaminated Land Management Act 1997*, as a means to avoid a financial assurance requirement.

Timing

Submissions made comments on the timing of applying financial assurance requirements. These included that:

- the circumstances in which the EPA may require financial assurance remain unclear and may be triggered after project cost estimations have been completed and contracts have been awarded at the discretion of individual officers of the EPA without using a clear template of agreed-upon unit rates for activities
- information should be included on when conditions requiring financial assurance should be imposed to ensure that resources are not unnecessarily tied up in financial assurance.

Response to submissions

The final policy retains the application of the EPA's legislative framework which sets out when and to whom financial assurances may be applied.

The issues raised in submissions concerning equitability of the framework, provision for exemptions and timing of financial assurance requirements are discussed below.

The *Protection of the Environment Operations Act 1997* does not prevent the variation of a licence to impose a condition to require a financial assurance. Section 298 of the Act is not intended to exhaustively list the circumstances in which a financial assurance can be required. This is supported by sections 58, 70, 73, 296(1) and 298(1) of the Act, as well as s33 of the *Interpretation Act 1987*.

Equitability

The EPA has existing discretionary powers under its legislation to require financial assurances for licensed activities to safeguard against a future environmental liability. The policy provides transparency for industry and the community on the EPA's application of these discretionary powers. The policy does not change the EPA's existing powers, nor does it alter the legal responsibilities for licensed activities.

The NSW Government has incurred environmental liabilities from licensed operators (as have governments in other jurisdictions). The policy applies a risk-based approach to ensure that regulated actions receive an appropriate level of regulation based on the level of risk they pose. Financial assurance is unlikely to be required for actions assessed as having a low risk of potential liabilities. This approach provides an incentive for licensees to maintain and improve their environmental performance.

The policy states the EPA can discuss your individual circumstances and may consider accepting a financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements.

If the EPA does not use your financial assurance, or uses only part of it, and is satisfied that the actions your financial assurance covers have satisfactorily been carried out, the balance of your financial assurance will be returned.

The EPA does not have legal powers to regulate or require financial assurances from businesses operating outside of its regulatory framework. The policy does not change the scope of the EPA's legal powers. The issue of appropriate licensing thresholds is outside the scope of this policy. The EPA will explore opportunities to consider whether the current licensing thresholds remain

appropriate, however activities that require an environment protection licence, or other regulatory instrument, are acknowledged to be high risk and require regulatory oversight.

Exemptions

Environmental liabilities can arise from projects and operations regardless of size. The risk-based approach to determining whether a financial assurance is required aligns with the EPA's risk-based licensing framework to ensure regulated actions receive an appropriate level of regulation based on the level of risk they pose. The EPA has discretion to determine if a financial assurance is justified (or not), depending on the circumstances.

The policy does not alter the legal responsibility for contaminated land under the *Contaminated Land Management Act 1997*. If you are issued with a management order under the Act, you may be required to provide a financial assurance for certain actions required by that management order. The EPA's legislative framework does not enable the EPA to require financial assurance as a condition of a voluntary management proposal.

The policy expressly states that a financial assurance is not intended to duplicate any other financial security already provided to the NSW Government, such as a rehabilitation security deposit. This requirement is set out in Clause 145 of the Protection of the Environment Operations (General) Regulation 2009. Rehabilitation of mining and petroleum exploration and production sites in NSW is regulated by the Resources Regulator (Department of Regional NSW). If the EPA intends to require a financial assurance for an action required by an environment protection licence for mining activities, the EPA must consider whether you have already provided a financial assurance (or security bond) to another public authority for carrying out substantially the same action, and whether your existing financial assurance is adequate to secure and guarantee funding for that action.

The EPA does not intend to require financial assurances from other NSW government agencies, state owned corporations or local councils as we do not expect other government agencies to default from their obligations.

Government guarantees will be considered on a case-by-case basis.

Timing

The policy outlines when the EPA may require a financial assurance in section 2.2. The EPA has discretion to exercise its legislative powers to require a financial assurance and will take the risk-based approach described in the policy to determine whether a financial assurance is required. The policy describes the risk categorisation the EPA will consider in making this assessment. The guideline on estimating financial assurances requires an independent assessment to provide confidence that the cost estimate is reasonable.

Changes to final policy

The final policy applies to financial assurances under:

- an approved action plan approved under the *Plastic Reduction and Circular Economy Bill 2021.* In November 2021, the NSW Parliament passed the *Plastic Reduction and Circular Economy Act 2021* to phase out the supply of certain problematic single-use plastic items and set a design standard to prevent the supply of plastic microbeads from some rinse-off personal care products. The Act enables the EPA to require financial assurance as a condition of an approved action plan, to secure funding for actions required to meet product stewardship requirements or targets.
- an ongoing maintenance order, public positive covenant or restriction imposed under the *Contaminated Land Management Act 1997.* In February 2022, the NSW Parliament passed the *Environment Legislation Amendment Act 2022*. The Act extends the existing financial assurance provisions in the *Contaminated Land Management Act 1997* to ongoing maintenance orders and restrictive and public positive covenants, as these instruments are used for managing residual contamination.

The final policy clarifies that the EPA does not intend to require financial assurances from other NSW government agencies, state-owned corporations or local councils as tiers of government.

3.3.3. Risk-based approach

Submissions provided mixed feedback on the risk-based approach proposed by the policy. Some submissions considered the risk assessment process as a good means to evaluate when a financial assurance should be required and supported the public policy position, while other submissions considered that the current risk-based approach is limited.

While some submissions considered the policy should only apply to high risk industries and that the EPA's wide ranging regulatory powers and tools should ensure a financial assurance is not applied generally and only required in the most limited circumstances – such as a compliance tool for recalcitrant operators – other submissions considered that financial assurance should be demanded of medium-risk actions.

Submissions suggested the following alterations to the risk-based approach:

- a site should be permitted to demonstrate that its financial stability or position is high to avoid a financial assurance, particularly if it is an essential service supported by government, can demonstrate a level of capital or access to capital that would clearly cover the financial assurance amount by an acceptable margin, there is a direct line of capital support to the site not shielded with an excessively complex network of corporate organisational arrangements and there is a low risk of movement of financial support away from the site or licence holder
- Australia-owned versus international-ownership, profits, and contribution to the Australian economy should be a consideration, particularly where profits head offshore and international companies “walk away leaving damaged sites”
- consider the ability of a company to fund its commitments by examining its publicly disclosed audited accounts and common funding ratios, and its capability to provide a corporate guarantee from its parent public entity
- a high-risk category trigger is too blunt and inflexible as there are cases where a large site has one high-risk issue but has a demonstrated high financial stability so it should not be considered likely to require a financial assurance.

Submissions noted the EPA is constrained by the current legislative framework for considering environmental and financial risks and that consideration should be given to how this framework could be revised to ensure a level playing field in the sector. This included differentiating between leased sites as greater polluters, compared to owned sites.

Mandatory consultation with the applicant prior to risk categorisation was requested to ensure transparent governance processes and that assessments are not based on inaccurate or out-of-date information.

It was also submitted that industry cannot support that the proposed policy is only a guide and that the EPA may make a decision based on discretion.

Risk categorisation

Submissions made a variety of comments on the risk factors set out in the risk categorisation in Appendix A of the draft policy. These are summarised in Table 1.

Table 1. Submission comments on the risk categorisation (Appendix A of the policy)

Theme	Comments

Risk categories	• Risk factors and examples that are identified as high risk seem reasonable.
	• Considerable variability of outcomes and requirements for "medium risk" activities.
	• Businesses in the low-risk category and those high performing and well-established businesses in medium categories should not require assurance.
	• Additional categories listing medium-high risks and high-high risks are required as the high risks listed range significantly in their severity and concern.
	• How will a facility with multiple activities on-site will be categorised – will the risks be aggregated? Determining these risks on a case-by-case basis does not afford the industry the confidence and certainty required to continue operations and could impose a further administrative burden.
	• Risk-based assessments need to take into consideration:
	  ○ socio-economic impacts
	  ○ liquidity of the operator to undertake any works required and/or the financial risk associated with the licence holder
	  ○ organisation and site long-term environmental performance
	  ○ years of operation which prove the business model and track record of a company relative to a newly established company with no trading/compliance record
	  ○ if the licensee is required to hold other bonds, for example with local government, or other financial assurances, before assigning the licensee into the high-risk category and triggering the need to assess a financial assurance requirement
	  ○ if the site has in place adequate insurance coverage in the event of a major pollution event
	  ○ whether the site is owned or leased by the operator, as the risk from abandoning a site is greatly reduced by a licensee who owns rather than rents a facility
	  ○ the value of the land, especially in the Sydney metro area and/or if the site is freehold
	  ○ site improvements.
	• The current set of factors and considerations are complex and lacking in clarity. Provide further examples of the types of risk actions across different industry sectors that would meet the low, medium and high-risk levels.
	• Detail factors and circumstances that the EPA will consider above and beyond the risk categorisation in Appendix A.
	• Flexibility is required to allow for other options that may develop or be introduced over time.
	• Threshold and amounts should be adjusted to capture the type of facility which has defaulted on its obligations.
	• The residual risk needs to be clearer in the guidance. It appears that the risk factor guidance does not fully reflect the inherent residual risk that takes into consideration controls that mitigate the risk.
	• Those who purchase a business or a site will find themselves in risk categories that may require significant financial assurances through no fault of their own.

Category A: Risk of environmental harm	• Conflict in the low-risk category that states "waste stockpiles are below licence amounts" and "waste stockpiles remain constant" but then requires "…waste volumes are well below licence limits…"
	• Additional considerations:
	  ○ mining operations that are already addressed in the rehabilitation security deposit (include examples that are separate from obligations under the *Mining Act 1992* and the rehabilitation security bond calculation)
	  ○ environmental management systems and practices in place

	○ information (including safety measures and controls), actions, and site improvements provided by the licence holder about why their risk profile should be downgraded. • A site that is potentially 'high risk' due to activities remains 'high risk' even if appropriate controls are in place and are being implemented.
Category B: Extent of remediation work that may be required	• Amend risk factors to better reflect levels of risk, recent company performance and scale of the activities being regulated: ○ increase indicative cost of action to less than $2 million or $3 million (low), $2 million or $3 million–$10 million (medium), and more than $10 million (high) ○ increase upper level B2 timeframe to five years (up from three years). • Consider other financial assurances that may be in place.
Category C: Environmental performance	• Indicators are unreasonable, particularly for large or complex sites as penalty, prevention or show cause notices can be issued for relatively minor non-conformance, and a show cause notice can be issued without meeting any formal standard of proof with no right of review. • Many operators choose not to fight a penalty notice, as it is more expensive to take it to court than pay the penalty. Requiring a facility to hold an additional financial assurance in these circumstances is unreasonable and unfair. There is also a risk of erroneous or vexatious complaints and could lead to a litigious relationship between the EPA and licence holders as they fight minor penalty notices, given the implication of being deemed a medium or high-risk site for the requirements of financial assurance. • If a licensee receives a penalty infringement notice, they pay a penalty and may then also face increased financial assurance which is being penalised for the same offence twice. • A penalty notice for an administrative error should not directly impact on the risk categorisation of the licensee as it may not have resulted in environmental harm. • Most of the risk factors appear reasonable. • An additional risk category as it currently ranges from very good to good and then moderate and poor are taken together – moderate should be a category on its own. • Definition of environmental performance risk needs to be clearly defined as a significant number – if not, all existing licence holders will find themselves in this category. • Reduce relevant history of compliance from the last five years to the last two (or three years). A "history" of five years is a significant time. This could be balanced with what site improvements and initiatives have been implemented and, if sufficient, then these actions could be used to reduce a risk category. • Site improvements, both following an EPA notice or direction and at a business's own initiative, should be considered to downgrade a previous penalty or notice. • Amend the high-risk factors for category C1 to better reflect levels of risk, recent company performance and scale of the activities being regulated: ○ make "one or more penalty, prevention, or show cause notices issued in the last five years" in addition to Environmental Management Category D or E (and not as a stand-alone example) ○ "last three years" (down from five) and "three or more" (up from one or more) specified allowable for penalty, prevention or show cause notices; and "in the last five years" added for environmental convictions ○ consider situations of non-compliance that are not a reflection of environmental performance or relating to land contamination, such as maintenance or calibration downtime of continuous real-time air quality monitors that lead to environment protection licence annual return non-compliances every year ○ show cause actions without further action by the EPA should not lead to a high-risk rating as they are not a penalty and if they have not led to further action then they are not a measure of environmental performance

- long term non-compliance which is not within the control of the licensee and does not have any environmental impact should not result in a high-risk rating
- environmental offences of the regulated party or its directors should only result in a high-risk rating where they have occurred in the last three years
- one or two notices (especially for larger and more complex sites) is not a suitable indicator of a high risk
- include being an environmental management category D or E, and a 'history' of poor compliance (notices) that have not been adequately cleaned up to be a 'high' risk category, and the rest can drop to medium.

- Amend the medium-risk factors to "last three years" for legal proceedings, penalty, prevention or show cause notices and "or few" added to "no" allowable number.
- Current threshold is too high as any facility issued with "one or more penalty, prevention, or show cause notices" in the last five years is deemed "medium risk".

Response to submissions

The legislative framework sets out the matters the EPA can consider when determining whether a financial assurance is required. A financial assurance is not a penalty for contravention of environmental legislation. It secures and guarantees funding for regulated actions where justified by considering the matters listed in s299 of the *Protection of the Environment Operations Act 1997*, s42B of the *Contaminated Land Management Act 1997,* s28D of the *Radiation Control Act 1990* and s26 of the *Plastic Reduction and Circular Economy Act 2021*. This includes the environmental record of the regulated party.

The EPA's discretionary powers relating to financial assurances are afforded by the existing legal framework governing financial assurances and not the policy. The risk categorisation is only a guide as it cannot fetter or change the EPA's discretion to exercise its legal powers to determine that a financial assurance is justified (or not) by considering the matters set out in the legislation.

The EPA's Regulatory Policy outlines how the EPA will use its discretion to take regulatory action that is proportionate, fit for purpose and appropriate to the circumstances. The EPA will take a risk-based approach to deciding whether a financial assurance is likely to be required to ensure that regulated actions receive an appropriate level of regulation based on the level of risk they pose. Generally a financial assurance will only be applied to medium or high-risk actions. A financial assurance is unlikely to be required for those actions required by your regulatory instruments that are assessed as low risk. This approach aligns with the EPA's risk-based licensing framework to ensure that regulated actions receive an appropriate level of regulation based on the level of risk they pose.

The EPA affords procedural fairness to persons and companies whose activities it regulates and you will be given an opportunity to review and comment on the draft regulatory instrument requiring financial assurance.

Risk categorisation

Table 2 responds to issues raised in submissions regarding the risk factors set out in the risk categorisation in Appendix A.

Table 2. Response to comments on the risk categorisation (Appendix A of the policy)

Theme	Response
Risk categories	• The risk factors listed in the risk categorisation are consistent with the EPA's legal framework which sets out the matters the EPA can consider to justify requiring a financial assurance (see s299 of the *Protection of the Environment Operations Act 1997*, s42B of the *Contaminated Land*

	Management Act 1997, s28D of the *Radiation Control Act 1990* and s26 of the *Plastic Reduction and Circular Economy Act 2021*). • The risk categorisation is a guide only and does not include all possible scenarios the EPA may consider. The EPA will use its discretion to determine that a financial assurance is justified (or not) depending on the circumstances by considering the situation of non-compliance. • The policy provides substantial examples of the factors that meet the different risk levels – adding additional categories will over-complicate the risk categorisation. • Complexity is considered in assessing the risk of environmental harm (category A), and long-term environmental performance is already captured in category C. • If your regulatory instrument requires you to take actions to manage residual risks, the financial assurance provides the EPA with access to money for the reasonable costs and expenses to carry out those actions, including the costs of directing and supervising others, if you fail to do so. • Clause 145 of the Protection of the Environment Operations (General) Regulation 2009 requires the EPA to consider whether you have already provided a financial assurance to another public authority for carrying out substantially the same action. • Potential purchasers are responsible for conducting their own due diligence to identify potential risks in any property acquisition. • Financial assurance does not typically cover the loss or damage that may occur from unexpected pollution or contamination events. • The EPA can require a financial assurance to secure and guarantee funding for one or more actions required by your licence or management order. The EPA will assess the aggregate of your regulated actions to assess your potential liabilities and determine whether a financial assurance is required or not.
Category A: Risk of environmental harm	• Rehabilitation of mining and petroleum exploration and production sites in NSW is regulated by the Resources Regulator. The EPA must consider whether you have already provided a financial assurance to another public authority for carrying out substantially the same action under Clause 145 of the *Protection of the Environment Operations (General) Regulation 2009*. If you are concerned that there may be duplication, please contact the EPA to discuss your individual circumstances. • Site improvements may be considered on a case-by-case basis.
Category B: Extent of remediation work that may be required	• The risk category thresholds for assessing potential liabilities are considered reasonable and amendments are not justified. • A financial assurance is not intended to duplicate any other financial security already provided to the NSW Government. This requirement is set out in Clause 145 of the *Protection of the Environment Operations (General) Regulation 2009*. If you are concerned that there may be duplication, please contact the EPA to discuss your individual circumstances.
Category C: Environmental performance	• The requirement for a financial assurance is not a penalty for non-compliance. It secures funding for actions that are required by your regulatory instrument, if you fail to carry them out. • A poor history of compliance is an indicator of a higher risk of potential liabilities arising from your actions when compared with licensees with a good history of compliance with EPA requirements. • Show cause notices may demonstrate actual environmental harm has occurred and be an indicator of environmental record, depending on the circumstances and the factual background giving rise to the issue of the notices.

- The decision to issue penalty notices is not taken lightly and is made according to the EPA's Compliance Policy which requires that there be a prima facie case for the offending behaviour to have satisfied all elements of an offence, particularly as the penalty notice may be challenged in court. The decision of a licensee to pay the notice rather than challenge it does not mean that these elements were not satisfied at the time the EPA issued the notice.
- Conviction for environmental offences is a serious non-compliance. Conviction also represents a higher threshold than contravention of legislation, as the latter might not ultimately result in conviction. It is therefore appropriate that any conviction for environmental offences is regarded as an indicator of high risk.
- There is still a low risk of environmental liabilities even where a licensee may have a good history of compliance. This is already reflected in the risk categorisation.
- Long-term non-compliance can pose a high environmental risk if it is not being managed by a pollution reduction program or improvement measures.
- Administrative errors can result in operational errors occurring that cause environmental harm.
- The risk categorisation is only a guide and does not fetter or change the EPA's discretion to determine that a financial assurance is justified (or not), depending on the circumstances.

Changes made to the final policy

The legislative framework sets out the matters the EPA can consider when determining whether a financial assurance is required. At the time of consultation, these factors did not include financial capacity. The *Environment Legislation Amendment Act 2022* amended the *Protection of the Environment Operations Act 1997*, *Contaminated Land Management Act 1997* and *Radiation Control Act 1990* to require the EPA to consider the financial capacity of a person or company when determining if a financial assurance is required. Consideration of financial capacity is included in the final policy's risk-based approach.

The EPA recognises that submissions considered that leased premises may present a higher risk of abandonment and environmental liabilities than owner-occupied premises. The EPA will give further consideration as to whether ownership of a site should be an additional matter for consideration when determining whether a financial assurance is justified.

The following changes have been made to the risk factors set out in the risk categorisation in Appendix A:

- reference to "waste stockpiles remain constant" has been removed from the low-risk category for risk of environmental harm from work or programs licensed by an environment protection licence issued under the POEO Act (category A1) for consistency with the low-risk indicator that stockpiles remain below licence limits
- history of compliance with EPA requirements have been amended to "good", "moderate" and "poor" across the risk levels for environmental performance (category C) and the time period for issued notices reduced to the last three years
- relevant history of notices issued has been amended from the "last five years" to "last three years" for consistency with the EPA's risk-based licensing framework
- addition of financial capacity risk factors (category D) to assess the financial health of the person or company responsible for carrying out the actions
- addition of risk factors to assess activities regulated under the *Plastic Reduction and Circular Economy Act 2021.*

The final policy clarifies that the EPA affords procedural fairness to persons and companies whose activities it regulates and you will be given an opportunity to review and comment on the draft regulatory instrument condition requiring financial assurance (see section 2.6 of the policy).

3.3.4. Amount of financial assurance

Submissions raised concerns that the level of financial assurance determined under the policy and guideline:

- significantly increases the cost of operating facilities in NSW, which may put smaller facilities at higher risk of default and would render the business unviable
- takes from funds needed (e.g. to carry out remediation)
- inflicts additional hardship on the responsible party who already holds the onerous burden of the cost of remediation.

Independent assessment of costs

Submissions included that the government should pay for the independent assessment of costs and be reimbursed by the proponent, and that operators should not need to undertake a separate independent audit process to the risk-based licensing audits conducted by the EPA for determining the risk rating for financial assurances. A threshold was suggested on the cost for actions requiring independent auditing as it was considered “overkill” for simple and straightforward projects. It was submitted that an independent assessment should not be required when financial assurances are required for low-risk activities.

Calculation of costs for certain waste-related Protection of the Environment Operations Act actions

Submissions provided mixed feedback on the standard methodology for certain waste-related POEO Act actions set out in Appendix B. Some submissions considered the calculation method reasonable and fit for purpose, while other submissions considered it would create a barrier to entry and limit the ability for small business to access capital, resulting in dominance of larger waste providers and increasing overall operating costs.

It was submitted that:

- an alternative approach of using amounts of certain volumes treated over a given period:
  - the past five years as more representative of the risk posed by the facility and successfully used as part of other government mechanisms
  - a rolling (three or five-year) average of tonnes stored at the facility – as it was submitted that using the maximum amount of waste that a facility is licensed to store leads to a disproportionately high financial assurance burden when applied to facilities treating both small amounts of high cost waste and large amounts of lower cost waste
- the proportion of positive value material is accounted for in the calculation, and treated material which has increased value is included
- the calculation is linked to the waste stream income so businesses can build this into their budget cycle as a consistent and predictable operational cost (e.g. a known dollar value per tonne cost)
- applicants should be invited to demonstrate how their insurance program will cover unexpected events that exceed the financial assurance
- three to five-year periods for recalculation are more practical and appropriate
- five-year CPI increases are calculated and included into initial amount, with five-year audits and associated updates, and calculation reviews when there are significant operational changes onsite
- actual average costs are specified at a point in time, such as the NSW Trade Waste Guidelines

- fee units under “the Monetary Act” [sic] do not correlate to all applicable non-fortuitous events.

The majority of submissions received did not support annual indexing. Submissions considered it is not feasible due to the administrative effort and cost required to rescind and reissue financial assurances.

A similar calculation method was suggested for low- to medium-risk non-waste facilities that use well established practices and technologies to negate the need for an independent auditor.

Submissions noted that the standard methodology for actions involving the transport and disposal of waste does not appear to take into consideration the proposed risk-based criteria. Submissions sought clarification that resource recovery activities are identified as low risk in the policy’s risk categorisation (Appendix A) and therefore unlikely to require a financial assurance.

Response to submissions

The financial assurance provides the EPA with access to money to carry out actions where the responsible person or company has failed to carry them out. It is a type of security to safeguard against a future environmental liability and gives effect to the ‘polluter pays principle’ to ensure a polluter should be liable for the cost of damage caused to the environment by its activities.

The EPA may consider accepting your financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements.

Independent assessment of costs

An independent cost assessment is a financial audit of the cost estimate to deliver the actions required by the financial assurance. This is not equivalent to a risk-based licensing audit.

As registered company auditors must apply relevant standards for their profession issued by the Auditing and Assurance Standards Board, the regulated person or company is responsible for engaging a registered company auditor to undertake the independent assessment and provide the report to the EPA.

The EPA will generally require an independent assessment of the cost of carrying out the clean-up or remediation actions set out in your regulatory instrument to determine the appropriate amount of financial assurance. There are exceptions to using the guideline for estimating the costs of actions where there is sector-specific guidance for determining financial assurances, such as Appendix B for certain waste-related actions.

The policy states that financial assurance is unlikely to be required for low-risk liabilities. If the EPA determines that a financial assurance is required in these cases, the independent cost assessment provides the EPA with confidence that the cost estimate is reasonable.

Imposing an arbitrary threshold for requiring an independent assessment of costs does not incentivise regulated parties to calculate a reasonable estimate of their financial liability.

Calculation of costs for certain waste-related Protection of the Environment Operations Act actions

The calculation methodology in Appendix B only applies to calculate the amount of financial assurance once the EPA has determined that a financial assurance is required. The EPA will firstly use the risk categorisation in Appendix A to evaluate your actions as either low, medium or high risk of potential liabilities and determine whether a financial assurance is required. Financial assurance is unlikely to be required for actions assessed as low risk of potential liabilities. If you are required to provide a financial assurance, the calculation methodology will then be applied to determine the amount of assurance you will be required to provide.

The methodology is a guide only and does not fetter or change the EPA’s discretion in relation to financial assurances under its legislative framework.

Transport and disposal costs vary between facilities and the type of waste requiring disposal. These variations are too large to justify an average that is applied to all facilities. The calculation

methodology in Appendix B enables the financial assurance amount to reflect the real costs of transporting and disposing waste from the site. If the amounts of waste stored at your facility are consistently below the maximum (authorised) amount permitted by your licence, you can apply to vary your licence.

The proposed methodology already excludes positive value waste (see step 3 in Appendix B) – noting that treatment of waste does not consistently increase value nor align with costs of transport and disposal.

Most submissions did not support annual indexing. The EPA will generally review financial assurance requirements and whether the amount is adequate on a periodic review of your licence, every five years or more regularly if your specific licence condition requires it.

The policy addresses the EPA's powers to require financial assurance to secure funding for actions required by the licence or management order. It does not address environmental insurance for unexpected events. A financial assurance is not a penalty for which the calculation of penalty (monetary) units applies. It calculates the transport and disposal costs of the amount of waste a facility is licensed to store.

The EPA will explore opportunities to develop simple calculation methodologies for non-waste activities in consultation with industry where appropriate.

Changes to final policy

The final policy clarifies that there are exceptions to using the guideline for estimating the costs of actions where there is sector-specific guidance for determining financial assurances in place, such as Appendix B for certain waste-related actions.

3.3.5. Type of financial assurance

Submissions provided mixed feedback on the types of financial assurances the EPA may require. Some submissions considered that the EPA should not accept other financial instruments as financial assurance other than bank guarantees and surety bonds, while other submissions suggested the EPA should accept these instruments as a form of financial assurance:

- company or accumulated third-party trust accounts
- an insurance policy, either fully or in part to bank guarantees, bonds and other sureties
- collection of the current waste levy to cover or partially cover the financial assurance, particularly where a company can prove a level of hardship because of an economic downturn or market that has shut down such that collection of a financial assurance may trigger an insolvency event
- guarantees by deed poll which provide a mechanism for companies to use the full resources of a parent company to provide a guarantee attributed to activities being undertaken by its subsidiary companies (and would bring the NSW EPA in line with available Victorian EPA financial assurance mechanisms)
- first and second mortgages held by the EPA
- land tenure, with property ownership and valuations particularly relevant where the licence extends only to a small part of the land
- a bond scheme
- surety bonds from financial institutions regulated by alternative regulatory frameworks, such as the Federal Reserve of the USA.

Submissions considered that bank guarantees tie up the working capital of a business and constrain business growth abilities. It was submitted that an unconditional bank guarantee requires businesses to have either cash surety or sufficient assets/equity to cover the value of the guarantee, and for some businesses this would require taking out a loan or another form of debt funding which the business would need to pay fees on. This extra cost of securing the bank

guarantee is a direct cost to the operation and restricts abilities to secure funding for any investment in more efficient equipment in line with emerging technologies or facility upgrades, thus affecting plant efficiencies and ongoing employment opportunities and/or must be built into the cost of producing the final product.

Standard requirements

Submissions raised concerns with the proposed requirement for financial assurances to be unconditional as having a significant impact on licence holders' available credit lines with a financial institution. It was submitted that the EPA should discuss unconditional access with the financial sector to ensure it is a workable arrangement and will not detract from issuing bank guarantees, insurance policies or other sureties.

Submissions considered that the EPA should identify the triggering events for accessing bank guarantees as there have been cases where bank guarantees have been challenged in court, based on the triggering event and whether this warranted access to the money.

Response to submissions

The governing legislation allows the EPA to require another form of security if considered appropriate (see sections 298(2)(c) of the *Protection of the Environment Operations Act 1997*, 42C(1)(c) of the *Contaminated Land Management Act 1997,* 28(2)(c) of the *Radiation Control Act 1990* and 25(3)(c) of the *Plastic Reduction and Circular Economy Act 2021*).

The EPA may accept another form of security if it can be demonstrated that the security will provide the EPA with unconditional access to funds if you default on your obligations. The EPA can discuss with you if you wish to provide a financial assurance by another form of security, other than a bank guarantee or a surety bond.

The EPA will only accept financial assurance instruments from an Australian financial institution or an Australian Prudential Regulation Authority (APRA) due to the constraints of enforcing compliance associated with non-Australian instruments.

An insurance policy is not considered an equivalent alternative to a bank guarantee or surety bond as an insurance policy does not provide the EPA with unconditional access to funds. Payments on claims made under an insurance policy are determined by the insurance provider.

The EPA may also consider accepting your financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements.

Standard requirements

Financial sector representatives were consulted about the draft policy.

The financial assurance must include a description of the actions it covers. Under the governing legislation, the EPA must first give you written notice of its intention to access your financial assurance and invite you to make written representations before deciding to access it.

Changes to final policy

The proposed standard requirement – that a financial assurance provided to the EPA includes a clause that enables funds to be paid directly by the issuing bank to a third party engaged by the EPA to deliver the work secured by the financial assurance – has been removed from the final policy to align with financial sector anti-money laundering policies.

3.3.6. Accessing the financial assurance

It was submitted that if the EPA uses all of a proponent's financial assurance, the licence should be suspended or cancelled.

Clarity was sought on how the EPA will release or transfer financial assurance responsibilities for construction projects where responsibility for long-term environmental monitoring is retained by state government agencies.

Excess costs

Submissions highlighted that if a financial assurance is not enough to cover the EPA's costs, recovering costs as a debt in court provides no protection if a company is in financial difficulties, has moved its profits offshore or has gone bankrupt.

Response to submissions

The reasons the EPA can suspend a licence are listed in Part 3.7 of the *Protection of the Environment Operations Act 1997* and s13 of the *Radiation Control Act 1990*. These reasons include if a condition of the licence is contravened. If the EPA uses some or all of a financial assurance, the EPA can require the licensee to provide another one as a condition of its licence. The EPA can suspend the licence if the licensee does not comply with this condition.

A financial assurance secures and guarantees funding for your actions required by your licence, not for responsibilities of others. If the EPA does not use your financial assurance, or uses only part of it, and is satisfied that the actions your financial assurance covers have satisfactorily been carried out, the balance of your financial assurance will be returned.

Excess costs

Recovering excess costs as a debt is authorised by sections 303(8) of the *Protection of the Environment Operations Act 1997*, 42G(8) of the *Contaminated Land Management Act 1997*, 28H(7) of the *Radiation Control Act 1990* and 30(7) of the *Plastic Reduction and Circular Economy Act 2021*. The ability to recover debts will be limited if the company is in financial difficulties or has quarantined its assets and a financial assurance is one mechanism to mitigate against these risks.

3.3.7. Reviewing the financial assurance

Submissions considered that:

- there should be a simple process for reviewing an EPA officer's decision to require financial assurance, or the amount of the assurance, available before seeking redress from the Land and Environment Court
- if a licensee has been operating a business for a significant period of time in a professional and environmentally responsible manner, then any existing financial assurance arrangements that have been considered acceptable to date should remain in place going forward, with reviews at each licence review period to maintain relativity with external cost increases
- financial assurances should be reviewed every five years, with the option for licensees to seek earlier reviews if their operations and risk profile has changed
- no financial assurance should extend beyond five years without a clear and transparent review process.

Response to submissions

The EPA affords procedural fairness to persons and companies whose activities it regulates and you will be given an opportunity to review and comment on the draft condition requiring financial assurance.

If you have already provided a financial assurance to the EPA as a condition of your regulatory instrument, it is unlikely that the EPA will require changes to it until the next review of your regulatory instrument or at the next review of your financial assurance (if specified in your regulatory instrument condition), whichever occurs earlier. However, you are able to request a review at any time.

Due to the administrative burden on regulated parties to revise financial assurance instruments annually, the EPA will generally review financial assurance requirements and whether the amount is adequate on periodic review of your licence every five years. The EPA retains discretion to review more regularly as a specific condition of your licence.

3.3.8. Lapsing of financial assurance

Submissions requested detailed clarification of the process that the EPA will follow to return all or part of the financial assurance provided, including how the EPA's satisfaction will be achieved. It was requested that close out is limited to the works associated with the financial assurance to ensure inappropriate application or extended holding of the financial assurance does not occur. It was suggested that, at licence surrender, licence conditions and all relevant compliance information are reviewed by a suitably qualified and technically experienced EPA representative. Early and extensive consultation with the licence holder was requested where any compliance concerns arise so these will not delay the release of financial assurances.

Response to submissions

The legislation outlines the requirements for the lapsing of financial assurance where the EPA is satisfied the work or program for which the financial assurance was required has been satisfactorily carried out and has given the holder, or former holder, of the regulatory instrument written notice of the lapsing of the financial assurance (see sections 304 of the *Protection of the Environment Operations Act 1997*, 42H of the *Contaminated Land Management Act 1997*, 28I of the *Radiation Control Act 1990* and 31 of the *Plastic Reduction and Circular Economy Act 2021*). This is outlined in section 2.6.4 of the policy.

The EPA's satisfaction is determined on a case-by-case basis by considering whether the relevant condition of the regulatory instrument has been met. The EPA will give you written notice that your financial assurance has lapsed and arrange for it to be returned. The EPA will arrange a time and place for you to collect your financial assurance instrument.

You can request the EPA to consider if it is satisfied you have carried out the actions for which your financial assurance is held.

Changes to final policy

The final policy clarifies that you can request the EPA to consider if you have satisfactorily carried out the actions that your financial assurance covers and return your financial assurance to you.

3.3.9. Disputes

Submissions considered there is a lack of clarity and transparency in the financial assurance requirements and process, and that the EPA's decision should be determined based on set and publicly available pre-requisites. Submissions considered that there should be a clear and transparent appellate process in the event that the decision does not follow this process, and that guiding documents detailing the review process if an operator seeks to overturn the EPA's decision should be developed and made publicly available.

Response to submissions

The policy describes the factors the EPA will use to determine the risk of potential liabilities arising from your actions and whether a financial assurance is required.

The EPA affords procedural fairness to persons and companies whose activities it regulates and you will be given an opportunity to review and comment on the draft condition requiring financial assurance, and provide written representations on its proposal to access your financial assurance.

If you disagree with the EPA's decision, you can apply to the Land and Environment Court to determine the dispute.

3.3.10. Environmental insurance

Submissions considered it unreasonable for an entity to hold environmental insurance for an event on the basis that it may occur while its nature is unknown. This was considered at odds with the need for financial assurance.

It was submitted that insurance can be used to cover known risks and liabilities and that insurance policies already provide the same level of protection the EPA is seeking through a financial assurance. It was recommended the EPA should consider how it can work with the insurance sector to minimise financial assurance impositions, how the insurance sector can support the government's intent to manage environmental liabilities, and how businesses may use insurance as a resource (for example, excess payments) to put up their financial assurance bond.

Submissions considered that fortuitous environmental externalities create far greater financial risk to the NSW EPA and community if not insured, although unknown environmental liabilities cannot be managed by environmental insurance in certain industries (such as coal seam gas and other extractive industries). It was suggested the final policy remove reference to obtaining environmental insurance against unknown environmental liabilities, or exempt mining operations from this potential requirement as it is not possible to insure against unknown environmental risks.

Response to submissions

The EPA has powers to require both financial assurance and insurance under the *Protection of the Environment Operations Act 1997*. These financial security instruments are intended to cover different liabilities as outlined in the final policy. Financial assurances are one mechanism by which the EPA seeks to manage the costs and expenses related to damage or potential damage to the environment. The final policy notes that financial assurance does not typically cover the loss or damage that may occur from unexpected pollution or contamination events and that these unknown environmental liabilities can be managed by environmental insurance.

The final policy does not address the EPA's powers to require environmental insurance. The EPA is exploring opportunities to develop policy proposals for environmental insurance.

3.3.11. Transitional arrangements

Submissions requested clarity on the timeframe for which financial assurances will be determined, how and when this process will be rolled out, and what transitional arrangements will be developed to assist industry. A period of notice (six to 12 months in advance) was requested for facilities to scale up to meet the requirement of the proposed assurances, with all licensees immediately notified of their assessed rating so businesses can organise their plans and finances accordingly.

It was submitted that the NSW EPA has a large number and value of bank guarantees in its favour and the significant changes proposed by the draft policy and guidelines were not supported.

Response to submissions

The EPA affords procedural fairness to persons and companies whose activities it regulates and you will be given an opportunity to review and comment on the draft condition requiring financial assurance. The EPA may consider accepting your financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements.

If you have already provided a financial assurance to the EPA, it is unlikely the EPA will require changes to it until the next review of your regulatory instrument or at the next review of your financial assurance (if specified in your licence condition or management order), whichever occurs earlier.

3.4. Estimating financial assurances; Guideline on independent assessment of costs

3.4.1. Estimating costs

Submissions provided mixed feedback about the guideline's requirement to prepare a cost estimate.

Some submissions considered an appropriately qualified technical expert should be required to prepare the cost estimate in all cases. Other submissions considered that there should be a cost threshold for the requirement to engage external technical experts, as there should be sufficient information, as well as precedence of well-established practices and technologies, for the EPA to scrutinise the validity of a cost estimate in the low-risk category, negating the need for an independent financial audit.

Some submissions considered the qualifications required for technical specialists appropriate. Other submissions considered that the categories be widened to include independent auditors recognised by other professional certification bodies, such as contaminated land auditors. Membership of professional bodies was not considered necessary for actions below a certain threshold (such as for those risks identified as low or medium by the financial assurance policy) where the costs can be estimated by in-house technical personnel with appropriate qualifications, and supported by quotes from independent contractors or consultants engaged to undertake the work. It was submitted that quotes from suppliers and contractors engaged to undertake the work on behalf of the licensee should be included if the cost estimate is prepared by the licensee's in-house technical specialist.

Submissions also raised the following concerns:

- the cost of engaging a consultant and auditor, given the EPA can set aside the report in making its determination
- the cost of assurance should never be less than the cost estimate
- the guideline be updated to include direction with respect to the EPA's administrative costs associated with financial assurance, and for supervising works – as these would be costings which are difficult to estimate
- operations are already required to undertake rehabilitation in accordance with requirements detailed within existing statutory approvals, including site development consent and mining lease conditions.

Contingency

Submissions provided various comments on the provision of contingency including that:

- a maximum contingency amount of no more than 10% is reasonable, as the costs will have been estimated by a technical expert, reviewed by an independent auditor and (for actions over more than a few years) will likely have periodic reviews where an increase in the financial assurance that is required above this contingency account could be applied as part of this periodic review process
- using 10% to 20% contingency is arbitrary and could underestimate the amount of contingency required. It may be an overestimate of the amount of contingency required affecting the financial status sheet. It was suggested that the cost estimator and independent assessor set the contingency amount, as it depends on various factors such as scope of work, timing to implementation, and the level of confidence the estimator has in the costs.
- the 10% contingency rate reflects the mining rehabilitation cost calculator which does not include adequate provision for contingency, despite a recommendation that this be increased.

Guidance on actions informing cost estimates

Submissions made several comments on the guidance in the guideline about the actions informing cost estimates (in Appendix A):

- an indicative industry financial assurance total is equivalent to years of pre-tax profits of certain industries at current levels and the impost of financial assurance would render some businesses insolvent
- exclude operational costs from the cost estimate as they may not be incurred if a financial assurance is called upon to undertake rehabilitation works

- more support and guideline material are required, including a formulated spreadsheet for data entry, for many local government-run sites are unable to afford external consultants to calculate financial assurance amounts for waste-related licensed activities
- actions should be identified relevant to mining that are not captured by the rehabilitation security bond, in consultation with the Resources Regulator and mining industry.

Response to submissions

The governing legislation allows the EPA to require you to provide an independent assessment of the cost of the relevant action for which the assurance is required. The guideline requires an independent assessment of your cost estimate to be undertaken by a registered company auditor to provide the EPA with confidence that the cost estimate is reasonable, and assist the EPA to determine the amount of financial assurance that may be required. The guideline does not require you to engage a technical specialist (consultant) to prepare your cost estimate but you can engage one to assist if you choose.

Registered company auditors must perform their work in accordance with relevant standards issued by the Auditing and Assurance Standards Board. They are also subject to extensive professional obligations and codes for independence. This ensures consistency of application and increases the level of confidence about the reasonableness of the cost estimate. The EPA will consider whether the cost estimate is reasonable using its own experience with similar actions. The EPA will calculate its likely cost and expenses in directing or supervising the work when determining the amount of financial assurance you are required to provide.

The EPA expects that a technical specialist such as a contaminated land auditor will prepare and potentially cost the scope of the clean-up or remediation actions in many cases. The guideline does not prohibit using internal resources to prepare your cost estimate. Appendix C outlines considerations for engaging technical specialists if you choose to engage a technical specialist to assist you. Where a technical specialist is involved, the registered company auditor may be able to rely on their work and would not need to re-assess the scope of clean-up or remediation actions.

The EPA retains discretion under the law to determine the amount of financial assurance required. The cost estimate relates to the actions of your regulatory instrument that you are required to provide a financial assurance for. It does not apply to your requirements from other statutory approvals.

Contingency

The guideline requires contingency that is appropriate to reflect the risks. The rate applied must be documented and rationale clearly explained. The guideline states that 10% to 20% reflects the contingencies commonly applied in overseas jurisdictions and is a guide only.

Guidance on actions informing cost estimates

Appendix A is only a guide of the types of actions that may need to be costed, depending on the requirements of the conditions of your regulatory instrument for which the financial assurance is provided. Operational costs may be incurred, for example, to deliver ongoing monitoring or maintenance requirements.

The policy states that the EPA may consider accepting your financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements.

The rehabilitation of mining sites in NSW is regulated by the Department of Regional NSW.

Changes to the final guideline

The proposed requirement for the cost estimate to include the costs to the EPA if you do not fulfil your obligations required by your regulatory instrument has been removed from the final guideline. The EPA will calculate its likely cost and expenses in directing or supervising the work when determining the amount of financial assurance you are required to provide.

The final guideline clarifies that the cost estimate relates to the actions of the regulatory instrument that you are required to provide a financial assurance for, and does not apply to your requirements under other statutory approvals.

3.4.2. Independent assessment

Submissions provided mixed feedback on the requirement to appoint an auditor to undertake an independent assessment:

- the EPA should be responsible for appointing or providing lists of appropriate auditors to ensure independence. If the EPA appoints the auditor, the auditors must have competitively set rates and estimates for such work.
- it should not matter who appoints the independent auditor. If the responsible person/company appoints an independent auditor, then this should be acceptable unless the EPA has objective valid doubts about the integrity of such an auditor, which would then need to be discussed as part of the financial assurance process. It is expected that EPA discretion would be used here.
- the responsible person or company should be responsible for appointing the auditor who prepares the independent assessments, given that they will be paying for the service. However, the chosen auditor should be approved by the EPA.
- the assessment should be carried out by a certified environmental professional or site auditor who understands environmental-related costs, and allow suitably qualified and registered quantity surveyors to undertake assessment of the cost estimates. They have a much better appreciation of market costs, future escalation and typical caveat used when preparing estimates.
- remove the requirement for independent assessment and instead provide greater guidance on the costs of the types of activities that would most frequently require financial assurance for the regulated parties to apply. Require regulated parties to use an appropriate expert(s) to prepare the estimate and provide for review of the estimates by appropriate EPA officers who have expertise in the area of environmental liability/industry.
- to further improve transparency and clarity in processes, guiding documents should be developed, and made publicly available, that detail any prerequisites that independent assessors and auditors must meet.

Submissions suggested these requirements are adequate for actions greater than $1 million. However, the cost of an independent assessment by an auditor are disproportionate and unnecessary for a project that costs less, and such an audit may not be warranted. Submissions considered that an independent audit of cost estimates should only be required for actions above $1 million (to align with the low-risk indicative estimated cost of action threshold [category B1] in the financial assurance policy's risk categorisation). Discretion could be applied where actual costs are between $1 million to $5 million (aligning with medium-risk indicative estimated cost of action threshold [category B1] in the financial assurance policy's risk categorisation) and the costs are readily understood and able to be calculated using a method similar to Appendix B in the financial assurance policy. It was submitted these actions should not require an independent auditor to verify, especially if these costs are disproportionate to the cost of the action and risk delaying the action being completed in a timely manner.

Submissions also considered further details are needed on the dispute resolution process if an auditor and a licence holder disagree on a cost estimate.

Alternative independent assessment

Submissions considered that there must be an alternative method of cost estimation developed or an alternative audit process for financial assurances estimated to be below $1.5 million to $2 million, as the cost of determining a financial assurance can be far higher than the cost of a smaller valued financial assurance. The requirement for a verification engagement was considered

reasonable for actions where an audit cannot be performed, but only for actions where the estimated cost is greater than the recommended threshold of $1 million.

It was submitted that a verification engagement should be at the EPA's discretion (not mandatory) where the EPA is satisfied with the cost estimate because the action is undertaken in accordance with well-established practices and costs, and a verification may unnecessarily delay the timely delivery of the remedial action.

Response to submissions

The guideline requires a registered company auditor to undertake an independent assessment. This is a person (or an authorised audit company) registered as an auditor with the Australian Securities and Investment Commission (ASIC) for the purposes of the Corporations Act 2001. Registered company auditors can be found on ASIC Professional Registers.

The responsible person or company, not the EPA, is responsible for engaging the registered company auditor to undertake the independent assessment. Registered company auditors must perform their work in accordance with relevant standards issued by the Auditing and Assurance Standards Board. They are also subject to extensive professional obligations and codes for independence. This ensures consistency of application and increases the level of confidence about the reasonableness of the cost estimate.

The EPA expects that a technical specialist – such as a contaminated site remediation expert – will prepare and potentially cost the scope of the clean-up or remediation actions in many cases. Where a technical specialist is involved, the registered company auditor may be able to rely on their work and would not need to reassess the scope of clean-up or remediation actions.

The registered company auditor provides an opinion on the reasonableness of the cost estimate based on the cost calculation tools and information supporting the cost estimate. The role of the auditor is not to negotiate an agreed cost estimate with the licensee and therefore no dispute resolution process is necessary.

Engagement of an auditor to independently assess the potential cost of liabilities may incur administrative costs upwards of $20,000, depending on the complexity of the audit.

Imposing an arbitrary threshold for requiring an independent assessment of costs does not incentivise regulated parties to calculate a reasonable estimate of their financial liability.

Alternative independent assessment

The EPA will explore opportunities to develop simple calculation methodologies for non-waste activities in consultation with industry, where appropriate.

3.4.3. Reviewing the cost estimate

Submissions provided mixed feedback on the requirements to review the cost estimate. It was submitted that the criteria used in section 5.2 (revising the cost estimate) appear reasonable. It was also submitted that requirements for reviews or multiple independent assessments are not in accordance with the legislation.

Submissions noted that the guideline does not identify the timeframe for calculating the cost estimate or the stage that the liability is to be estimated. Regular reviews for costs estimates greater than $10 million and possibly an annual review of "high risk estimates" were suggested. It was also considered that the EPA should monitor the activity of responsible persons and companies, technical specialists and auditors to ensure compliance with the requirements of the guideline when the licensee has breached a condition of their licence or any other relevant legislation (e.g. through providing regular progress reports to the EPA).

Major and minor changes to the cost estimate

Submissions made the following comments on the criteria for when a change in the cost estimate is considered major or minor:

- percentage change may not be suitable. For example, if the original cost estimate was $500,000, a change of $60,000 should not warrant an audit as the monetary change is not substantial
- renegotiated contractor rates and savings associated with productivity improvements are standard performance indicators and will vary as the work progresses. It should be assumed that contractor rates and savings would be achieved and they should be identified in the initial cost estimate, but not considered a major change to the estimate
- remove mention of “weather delays” as how does the EPA propose to quantify what is considered a significant weather delay?
- a change in percentage terms would better reflect the scale of different operations in different industries covered by the policy (e.g. it is common for changes to rehabilitation cost estimates for mining projects to exceed $1 million).

Response to submissions

The governing legislation does not specify a limit on the number of independent assessments the EPA can require to inform its opinion of the reasonableness of the amount of financial assurance required. Although there is no legislative requirement for a review of an independent cost assessment, the EPA can require such a review as a condition in your licence or management order. The review is intended to reduce the administrative and cost implications of requiring multiple independent assessments.

The timeframe applied to estimate costs will vary, depending on the actions of your regulatory instrument that the financial assurance is required for. A periodic review of the financial assurance will ensure the amount remains adequate. Monitoring of responsible persons or companies and auditors – to ensure they are maintaining compliance with the requirements of the guideline – will be undertaken as required.

The independent assessment of costs provides the EPA with confidence that the financial assurance amount is reasonable, and periodic review requirements will ensure the amount remains adequate. A generic requirement for annual reviews may pose onerous administrative and cost burdens on regulated parties. The EPA will generally review financial assurance requirements and whether the amount is adequate on periodic review of your licence every five years. The EPA retains discretion to review the amount more regularly as a specific condition of your licence. Additional progress monitoring will impose significant administrative burdens on regulated parties and is not justified.

Imposing an arbitrary threshold determining when a change in the cost estimate will be considered minor or major does not incentivise regulated parties to calculate a reasonable estimate of their financial liability.

Changes made to the final guideline

The criteria for when a change in the cost estimate will be considered minor or major have been amended to:

- remove proposed references to a percentage change or monetary amount
- remove proposed reference to “adverse weather” as an example of a significant delay
- clarify that unless renegotiated contractor rates result in a significant revision to the cost estimate, these will not be considered a major change to the cost estimate.

3.5. General comments

Submissions made several general comments on the policy and guideline. Table 3 summarises these comments and the EPA's response.

Table 3. Response to general comments on the policy and guideline

Key messages	EPA response
Alternative approaches • Businesses have already been identified as a 'risk' if regulated by the EPA through an environment protection licence and its monitoring, reporting and auditing requirements. • Withdrawal of an approved voluntary management proposal and issuing a management order should be a first step consideration for sites before a financial assurance is required. • The EPA should provide calculation tools for specific activities (similar to the Regional NSW's comprehensive bond tool for mines [quarries] which does not require third party review). • Establish a reference group to discuss and develop alternative systems. • Insurance policy or a voluntary approach to rectification of poor practices could be considered as an alternative to avoiding in full or in part the financial assurance.	The EPA has existing discretionary powers under its legal framework to require financial assurances from regulated parties to secure funding for actions required by your regulatory instrument. The policy provides guidance and transparency on how these discretionary powers may be applied. The EPA does not have power under the *Contaminated Land Management Act 1997* to require a financial assurance as a condition of a voluntary management proposal. The EPA will consider developing sector-specific guidance for additional sectors with well-established practices and technologies in the future. Insurance or voluntary approaches are not a reasonable alternative to secure funds for actions that are required by a regulated party's licence or management order if the person or company fails to carry out the required actions.
Implementation • Guiding documents and internal procedures be made publicly available that detail procedures to ensure that EPA officers follow a systematic and transparent process of determining financial assurances. • In light of the current COVID19 pandemic, reconsider the need to progress additional regulations such as this at present, which will place undue financial and operational pressure on operators who are facing extremely difficult times. • The policy and guideline set out a broad process that is highly subjective and there is no clarity on exact triggers, timing and extent of financial assurance. • Understand the need for financial assurances to manage environmental liabilities from industry and appreciate that the EPA will use discretion when assessing need and can stage the implementation of the total amount to reduce financial stress. • Request transparent engagement of the public by the EPA in the application of financial assurance required for the coal seam gas industry above and beyond its Petroleum Act rehabilitation security deposit.	The policy does not introduce any new regulations. The policy provides guidance and transparency on the application of the EPA's existing discretionary powers to require financial assurances. The EPA has discretionary powers under its legislative framework to require a financial assurance. The EPA will take the risk-based approach described in the policy to determine whether a financial assurance is likely to be required. The policy and guideline also outline how the amount of financial assurance will be calculated. The EPA will publish any operational guidance it prepares for its officers handling financial assurance.

National approach Consistency with other state and territory policies, risk categorisation and methodology to determine assurance amount.	The NSW EPA has chaired (2019–2021) the Australasian Environmental Law Enforcement and Regulators network (AELERT) environmental liabilities community of practice to discuss approaches to managing environmental liabilities across jurisdictions, noting that the scope of legislative powers regarding financial assurances varies between jurisdictions.
Regulatory outcomes • Smart and practical regulation • Level-playing field • Transparency • Licensed recycling facilities defaulting on their environmental obligations and the Environmental Trust paying the costs of remediation does not justify increasing financial assurances • Does not assist the EPA to together work with industry for the benefit of the environment.	The policy and guideline do not propose more regulatory action. The policy and guideline provide a consistent and transparent approach to applying the EPA's existing regulatory powers under its legislative framework to ensure those responsible for pollution or contamination pay the costs of clean-up or remediation. The approach is consistent with the EPA's legislative framework and risk-based approach to licensing to ensure that regulated actions receive an appropriate level of regulation based on the level of risk they pose. Glass Recovery Services and SKM Recycling are both recent examples of insolvent recycling companies resulting in potential environmental liabilities in NSW and Victoria.
Financial impact • Financial impost on legitimate businesses • Adds significant pressure to industry already under significant financial stress and heavily regulated • Impacts liquidity and cash flow of an organisation • Financial assurance will be recognised as a liability in the company's accounts • Funds that could otherwise be spent improving property to reduce environmental harm risks is 'held up' in guarantees and other types of surety • Provide a scoring/risk statement in conjunction with the financial assurance to inform financial institutions and reduce impacts on an entity's borrowing capacity • Does not provide certainty and encourage investment in NSW due to the ambiguity of when the policy may be applied • A cost-benefit analysis should be conducted to understand the economic and industry impacts of the reforms • Balance the level and application of financial assurances with jobs and broader economic requirements.	The policy does not introduce new regulatory or financial burdens on industry. The EPA has existing discretionary powers under its legal framework to require financial assurances from regulated parties to secure funding for actions required by your regulatory instrument. The purpose of a financial assurance is to safeguard against a future environmental liability and give effect to the polluter pays principle to ensure that these costs are paid by the person or company that created or acquired the liability, and not by the NSW community. The policy provides guidance and transparency on when and how the EPA will apply these discretionary powers. The policy aligns with the EPA's risk-based approach to regulation that ensures an appropriate response based on the level of risk posed. The EPA may consider accepting your financial assurance in instalments if you can demonstrate financial hardship in meeting your financial assurance requirements. Issuing your financial security instrument is a matter for your financial institution who may wish to conduct its own due diligence and risk assessment. You can choose to provide a copy of your independent cost assessment to your financial institution if you wish.

Consultation period • Face-to-face meeting was cancelled. • No provision for those without ability, knowledge or equipment to be part of a Skype or telephone conference. • Unable to contribute to webinar.	Two of the four information sessions in March 2020 were delivered online only due to the health risks associated with the escalating covid-19 pandemic at that time. These sessions were held online and telephone access was available to those without internet access. Step-by-step dial-in details were provided to participants as requested. We apologise for any technical difficulties experienced in joining the online information session.
Notices Notices of financial assurance, cost estimates and independent assessments should be made available on the register.	The requirement to provide a financial assurance can be viewed by searching the relevant licence or management order in the EPA's public registers. Notices issued under the *Protection of the Environment Operations Act 1997* are also available to view on the POEO public register. This is clarified in section 2.7 of the final policy. Cost estimates and independent assessments will only be published with the consent of the regulated party to ensure that industrial or commercial information that is in-confidence is not disclosed.

3.6. Out of scope issues

Several submissions raised matters which were out of scope of the consultation. Table 4 summaries the broader issues raised and the EPA's response. The EPA welcomes your feedback for future consideration.

Table 4. Response to out of scope issues

Key messages	EPA response
Licensing Regulation of unlicensed sites and operators Approvals should not be given to high risk actions (short or long term), a person or company with a bad environmental or financial record, and actions that risk water resources. Mandate environment protection licences for every company, business and partnership registered to operate in NSW with a renewal term of three years.	The EPA does not have legal powers to regulate and require financial assurance from sites operating outside of its regulatory framework. Financial capacity is included in the final policy's risk-based approach. The EPA can consider financial capacity and record of compliance with environmental protection legislation when determining whether the person or company is a fit and proper person to hold a licence under s83 *Protection of the Environment Operations Act 1997* and section 5 of the *Radiation Control Act 1990*.
Insurance • Pollution insurance • Industry insurance pool • Multi-tiered environmental insurance framework against unknown environmental liabilities and a long-term environmental rehabilitation fund to pay for and manage indefinitely after certain land uses, such as mining.	This policy only addresses the EPA's powers to require financial assurances. It does not address insurance or an environmental rehabilitation fund.

Waste levy • Divert portion of waste levies into the Environmental Trust (or other instrument) to cover the cost of remedial works for insolvencies for all industry participants, licensed and unlicensed.	The waste levy aims to reduce the amount of waste being landfilled and promote recycling and resource recovery. It is not intended as financial security for regulated parties that fail to meet their licensing obligations. The suggested approach does not support the polluter pays principle or encourage industry to meet their licensing obligations.
Waste Strategy • Impacts on delivery of NSW 20-Year Waste Strategy • Market force distortion and deterrence of new investment	This policy has no impact on the delivery of the NSW Waste and Sustainable Materials Strategy 2041. The policy does not introduce new regulatory or financial burdens on industry. The EPA has existing discretionary powers under its legal framework to require regulated parties to provide financial assurance to secure or guarantee funding for certain actions required by their licence or management order. The policy provides guidance and transparency on how and when the EPA will apply these discretionary powers, and aligns with the EPA's risk-based licensing framework.
Coal seam gas • Inadequacy of proposals to fulfill Chief Scientist's requirements as deemed by the NSW Parliamentary Inquiry • Clean up of environmental damage caused by coal seam gas industry • Insurance for coal seam gas	The policy and guideline apply to all activities regulated under an environment protection licence issued under the *Protection of the Environment Operations Act 1997*, including gas operations. This policy does not address the EPA's powers to require insurance.
Mining activities • Apply a similar approach for activities under the Mining Act • No clear line between a rehabilitation activity for which an assurance under the Mining Act may have been provided and environmental management activities under an environment protection licence.	Rehabilitation of mining and petroleum exploration and production sites in NSW is regulated by the Resources Regulator. Clause 145 of the Protection of the Environment Operations (POEO) (General) Regulation 2009 restricts the EPA from requiring a financial assurance where the licensee has already provided a financial assurance to another public authority for carrying out substantially the same action. Section 70 of the *Protection of the Environment Operations Act 1997* enables the EPA to require a financial assurance as a condition of suspension, revocation, or surrender of an environment protection licence to cover the costs of ongoing management and monitoring requirements.
Consultation and engagement • Prohibited from meeting with the EPA when tendering for work and contracts entered without ability to understand the EPA's concerns relating to specific sites.	This issue is outside the scope of this consultation process.

Director accountability • Legislation already provides for director accountability.	A financial assurance does not affect the liability of a person or company to carry out actions required by their regulatory instrument, including the liability of directors for offences by the corporation.