

Performance Bonds and Financial Viability for Clean Up Costs: *Must History Repeat for Environmental Damage?*



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“A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because the opponents eventually die, and a new generation grows up that is familiar with it.” (trans. Frank Gaynor, 1950)

[Max Planck 1858–1947](#) (Nobel Prize in Physics, 1918)

Major development proposals, that may have a significant impact on the environment, are required to undergo some form of environmental assessment as part of the legal obligations for approval as set by Government. The *Environmental Impact Assessment* (“EIA”) process is probably the most common assessment process adopted for use throughout the world.

The EIA process involves the systematic appraisal of the likely, or possible, positive and negative environmental consequences of a proposed development. It alerts the government, developer and the community, as fully as possible, to any environmental risks associated with the proposal.

The EIA process assists the decision-making process by Government. The final decision may take the form of an approval, deferment or rejection of the developmental proposal - *or approval of the proposal with conditions that incorporate measures to mitigate the predicted adverse environmental impacts.*

As part of a decision to conditionally approve a developmental proposal, a **performance bond** is a common condition set by Government to offset potential adverse environmental impacts identified in the assessment process.

It is also relevant to note that *“[The use of performance bonds](#) is usually restricted to industries with a greater than average risk of causing significant*

environmental damage – oil transport, forestry, mining, heavy industry – where the additional cost of the bond insurance is commensurate with the risk”.

Where a performance bond is a condition for approval for the development, it must be in place before the development can commence. The company would be required to provide a financial assurance to Government to remediate any environmental damage that may arise from its activities. That is, by having sufficient funds, in the form of a performance bond, to cover any future clean-up costs.

It should also be recognized that “*One [potential disadvantage of performance bonds](#) is that they may not be able to compensate for irreversible environmental damage. Where large-scale irreversible damage is possible, it may be more effective to rely on direct regulations”.*

Case Study: Remediating Environmental Damage and Major Development Projects in Queensland, Australia

Concern has emerged recently as to the relative certainty that performance bonds may provide to effectively remediate environmental damage associated with the activities of some major developments.

One example reported in the Brisbane “Courier Mail” on 17 April 2016 highlighted the significant disparity in costs for the potential clean-up bill for contaminated farmland: The cost of the clean-up being estimated at some 8 times greater than the upfront bond held by the Queensland Government.

[Further media attention](#) has focussed on a problem for clean-up costs if a company runs into financial trouble and goes into administration.

Claims about the extent of these problems in Queensland, or that some development approvals may have inadequate bonds, need to be objectively examined by Government e.g. as part of the regulatory control by Government to monitor the conditions of development approvals.

Queensland’s Environment Minister, Dr Steven Miles has drawn attention to the importance for regulatory control to provide the State Government with

"[The] need for better laws to ensure companies can't avoid their environmental obligations."

Dr Miles referred to the [Environmental Protection \(Chain of Responsibility\) Amendment Bill \(2016\)](#) – now before Parliament. Its aim is to provide Government with a broad framework to recover costs from people or parties, where a "relevant connection" to a mine can be established. Dr Miles said:

"If you try to walk away from your mess we will impose a chain of responsibility to bring you back to clean up after yourself".

Precaution, Scientific Uncertainty and the Flexible Environmental Assurance Bond

A prudent path for the Queensland Government to now consider is what – if any - alternatives to the performance bond exist?

“[Costanza and Perrings \(1990\)](#) advanced the concept of an incentive-based model to manage the environment for precaution under uncertainty – the *Flexible Environmental Assurance Bonding System*.

The Flexible Environmental Assurance Bond is a variation of the performance bond and is designed to incorporate both known and uncertain environmental costs into the incentive system and to induce positive environmental technological innovation.

An assurance bond is levied equal to the current best estimate of the largest potential future environmental damages arising from a proposed development seeking legislative approval from Government in the form of an “*environmental authority*”, “*licence*” or “*permit*”. The assurance bond would be kept in an interest-bearing account for a predetermined length of time.

In keeping with the precautionary principle, the approach requires a commitment of resources, up front, to offset the potentially catastrophic future effects of current activity.

Portions of the bond (plus interest) would be returned if, and when, the holder of the environmental authority or licence could demonstrate that the suspected worst case damages had not occurred, or would be less than was originally assessed.

Where environmental damages had occurred, portions of the bond would be used to rehabilitate or repair the environment; in addition, to possibly compensate injured parties”.

Conclusions

- 1.0 Environmental problems in the 21st century are characterized by their complexity being interwoven with scientific uncertainty. To resolve environmental management problems, today, science is confronted with natural and economic limits that would have been improbable in the past.
- 2.0 Yet, we continue to rely on scientific concepts and methods from the past which were devised to address issues far less complex and uncertain.
- 3.0 Recent concerns draw attention to specific circumstances where there may be problems with performance bonds to guarantee sufficient funding to remediate environmental damage.
- 4.0 Finding solutions to effectively remediate environmental damage problems associated with the activities of some major development approvals should not be seen as the exclusive domain of law, nor as the sole province of science. It requires effective integration between law and science.
- 5.0 The Flexible Environmental Assurance Bond warrants review as a possible new cornerstone for environmental management. Regulatory control continues to be an essential complement where large-scale irreversible environmental damage may be an issue.

The material on the ‘Flexible Environmental Assurance Bond’ has been extracted from the Author’s book, [*“Finding Solutions for Environmental Conflicts: Power and Negotiation”*](#) (2008) Edward Elgar Publ., Cheltenham, UK.

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