



The FillSecure Solution – A Case Study

Introduction

Long term environmental liability has been a challenge for a range of industries over time. Financial provision for known long-term environmental costs and liabilities is a subject increasingly coming to the fore as companies seek to account, report and manage the liability. The waste management industry is no exception with the long-term management of landfill aftercare costs of particular concern.

Recent Environmental Permitting (EP) Regulations have streamlined the waste management licensing and pollution prevention and control regimes. The owner or applicant for an Environmental Permit must be able to provide adequate financial provision to meet the obligations of the Permit.

A ground breaking solution named **FillSecure** has been developed to meet the requirements of the EP regulations and work is under way to provide solutions to a range of other industries.

Background to FillSecure

The Chartered Institute of Management Accountants (CIMA) was approached by some of its members who had concerns with the Environment Agency's (EA) position that Landfill aftercare costs would be required for sixty years duration in the form of cash 'up front'.

As management accountants, the provision of management information to support decision making (including the areas of costing and investment appraisal) are CIMA's core competencies.

The areas of investment advice and surety bond or insurance brokerage are regulated by the Financial Services Authority and as a result are outside CIMA's areas of expertise. Therefore, CIMA formed a multi-disciplinary project team with Tysers (insurance and bond brokers) and Kynaston-Carnoustie (consultant independent financial advisers) to consider this issue. This team, including members of CIMA's technical staff, met with the EA to discuss a possible solution.

Kynaston-Carnoustie introduced a qualified solicitor into the team in 2006 to provide specialist legal services as the **FillSecure** solution began to gather pace.



The Fill**Secure** solution took over four years from the formation of the Fill**Secure** 'team' until the EA approved the first Fill**Secure** case in 2008.

Background to First Case

The Fill**Secure** team was approached by an operator trying to secure financial provision for a site that had the Permit application rejected over two years earlier. The refusal to issue a Permit was being challenged and at the same time the Planning Inspectorate was considering proposals for the development of the site.

The operator concerned was subject to a Company Voluntary Arrangement (CVA) and was therefore unable to secure either a bank or insurance surety bond to cover the financial provision costs. Banks were also not prepared to lend the full escrow requirement to the company for the sixty year financial provision, as this was seen to be too high a cost.

The problems faced by the company could have led to the insolvency of the operator. The site's circumstances and case law suggests (see Hillridge case*) that the local council was likely to inherit the site and would have to find funds to cover the cost of both the capping and aftercare of the landfill.

Although the Fill**Secure** solution had been approved in principle by the EA, in order to ensure that the mechanism was fully compliant with all the EA's requirements, they required an application from an operator to use Fill**Secure** as their method of providing for the aftercare of a landfill site.

At the time Fill**Secure** was asked to assist this company, on the basis that an appeal was to be heard in just one month. In addition Fill**Secure** would have to have the complete proposal with the EA in advance of this date so the EA had time to consider the details. The team reacted quickly to the challenge with a successful outcome.

The FillSecure Solution

There is clearly a significant amount of intellectual property involved with the exact workings of the Fill**Secure** solution. However, it is important to demonstrate exactly how we have met the EA's original requirements that any solution should be adequate, secure and accessible.

The Fill**Secure** lawyer, in conjuncture with a specialist Counsel, has drawn up the basis of a deed that will be used to produce each bespoke trust that will form the basis of the Fill**Secure** solution. This basic document had to have significant changes made to it for the initial case due to the special circumstances of that company, especially the fact that it was the subject of a CVA.



Before the **FillSecure** proposal could be submitted to the EA, it had to be agreed by the waste operator's company shareholders, solicitor and bank (that was going to provide the funds). As the **FillSecure** cost was around 30% of the escrow cost, the bank was prepared to lend this reduced amount.

The **FillSecure** solution was then presented to the Planning Inspectorate with the full backing of the waste company, its lawyer, bank and the EA. After a thorough review of all the facts given, the Inspectorate ordered the EA to issue the Permit with **FillSecure** as financial provision.

*The first **FillSecure** case initially saved the client approximately £3.2 million from the initial discussions to the set up of the **FillSecure** trust. **FillSecure** enabled the client to continue its business operations.*

Benefits of FillSecure

Funds within a trust are 'ring-fenced' from creditors. This is something that the EA desired, but has not achieved from any of the other options available to the waste management industry. The proceeds of an escrow account can be claimed by creditors if the operator fails and any surety bond proceeds would be paid to the company and, once again, is available for creditors to claim.

The **FillSecure** mechanism ensures that funds set aside for the aftercare of a landfill site will be used for the aftercare of that site. This is a very positive outcome for the operator, its customers, the public and the local authority (who otherwise may be expected to fund the costs for aftercare works if the operator failed). This is good practice and could be used to show the operator in a favourable light, as it displays good corporate governance – it has set aside a fund that will be used to ensure that its site is properly looked after for over sixty years.

There is both legislation and copious case law that place a high level of duty on the trustees (the persons or company entrusted with looking after the trust assets in accordance with the trust deed). The EA has insisted that no person connected with the operator can act as trustee. The **FillSecure** team believed that the most sensible course of action was to appoint the solicitor who has been involved with all the negotiations about the wording of the trust document to act as a professional trustee. There is a higher duty of care placed on professional trustees than there is on 'non-professional' trustees.

Once the trust has been set up, clearly the funds held by the trust need to be properly invested. As some of the funds will be invested for over sixty years, the trustees' obligations are such that a balanced portfolio of assets (including shares) will be held.







We have awarded the task of managing the trust funds to a professional fund manager who has been given very specific parameters under which they invest the funds and the expected performance targets. Should the existing fund managers fail to deliver the expected returns (when taking into consideration general market conditions); the investment mandate will be awarded to another fund manager.



Although the calculations do not take inflation into account (as the EA's own guidelines dictate this), there is the possibility that investment growth could be sufficient to cover the increasing aftercare costs without the operator being required to pay further funds. With the escrow arrangement, the EA regularly reviews the amount required for aftercare costs. As the return on cash (after tax) is rarely higher than the rate of inflation, this method will ensure that the operator will regularly have to top-up their arrangement.

With the **FillSecure** mechanism, this process is undertaken every five years. This gives the portfolio a reasonable period to achieve its growth target and the available trust fund will be compared with the recalculated aftercare costs at that stage.

The **FillSecure** solution is very flexible; the first case that we had approved proved this. Other operators have also seen the benefits and there are currently another two **FillSecure** proposals that are with the EA. We are also in discussion with numerous operators and the **FillSecure** mechanism also has potential applications outside financial provision for landfill sites. There are many other areas where a company needs to set aside funds for restoration work in many years time that could use this 'product'. Examples include:-

-  Contaminated land sites
-  Quarries
-  Mines
-  Decommissioning wind farms
-  Decommissioning oil rig platforms
-  Future carbon capture sites

Conclusions

The collaboration of experts from differing areas of commerce and risk management has created a ground breaking product that tackles the issue of long-term environmental liability costs.

The **FillSecure** product is cost effective when compared to other options, secure and its funding can be achieved in a sustainable structure.

The product displays 'good corporate governance', as it benefits both the community and the environment by providing long-term environmental funding for years to come.

The **FillSecure** team also believe that the product is flexible, can be tailored for a range of industry requirements, that it is a UK first and its structure and use sets a high standard.

*Environmental Agency v Hillridge Limited (2003) EWHC 3023 (CG)

