


THE ENERGY ACT 2008

Government response to the consultation on the amendment of the Nuclear Waste and Decommissioning (Finance and Fees) Regulations 2011



Department of Energy and Climate Change
3 Whitehall Place
London
SW1A 2AW

Telephone: 0300 068 4000
Website: www.decc.gov.uk

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Introduction

Background

1. On 27th April 2012 the Government published a consultation seeking views on proposed amendments to the Nuclear Waste and Decommissioning (Finance and Fees) Regulations 2011 (the **Regulations**). The changes proposed relate to three specific areas of the Regulations: reporting requirements, verification and modification of a Funded Decommissioning Programme (**FDP**).
2. This document sets out the Government response to the consultation on these matters and explains the amendments that have been made to the Regulations, both in response to issues raised in the consultation and also other minor changes that have been made with the intention of improving operability.
3. The purpose of the consultation was to seek views on whether or not the proposals strike the right balance between regulatory burden and protecting the taxpayer through ongoing oversight of an operator's FDP.
4. The deadline for responses to this consultation was 8th June 2012. DECC considered that a shortened consultation period of 6 weeks was appropriate for this consultation due to the technical subject matter of this consultation, the relatively small number of respondents to the previous consultation and the need to bring into effect the changes that the Government has identified as necessary in a timely fashion. This was consistent with the guidelines set out in the Government's Consultation Principles. Two events were also held during the consultation period to provide additional means through which interested parties could express their views.
5. A total of eight written responses were received, which are available to view on the DECC website¹. Respondents included energy suppliers, trade associations, educational establishments and advisory organisations, as well as individual members of the public. The Government is very grateful to all those who submitted responses to this consultation and those who participated in the events.
6. All responses (both formal written responses and those fed in at the consultation events) have been considered carefully. This document responds to the key questions and broad comments received. The amended Regulations are published on the Government website². The Regulatory Impact Assessment is also published on the Government website³.

¹ <https://www.gov.uk/guidance-for-operators-of-new-nuclear-power-stations#waste-and-decommissioning-financing-arrangements>

² <http://www.legislation.gov.uk/>

³ <http://www.legislation.gov.uk/>

Events Held During the Consultation Period

7. The consultation period was used as an opportunity to discuss the three areas of reporting, verification and modifications at two events for stakeholders and other interested parties, both held on 14th May 2012.
8. The first event, which was open to all stakeholders and interested parties, sought views on each of the three consultation issues and included an overarching presentation on the objectives of the consultation and the event. This was followed by three specific sessions of table discussions on each of the consultation issues. The table discussions focussed on the questions set out in the consultation document and were recorded as an input to the consultation.
9. The second event focussed specifically on the issue of verification and the level of assurance that should be provided by verifiers. Given the technical and specific nature of this session, the participants consisted of potential technical and financial verifiers and prospective commissioners of verification. The participants considered the consultation question on verification according to their area of expertise.

Structure of the Government Response

10. The consultation document posed the following questions:
 - i. Do the changes in relation to the reporting requirements strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities?
 - ii. Do the changes in relation to verification of a FDP strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities? To what extent is the standardisation approach desirable and /or achievable?
 - iii. Do the changes in relation to modification of a FDP strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities?
11. This document addresses each of the three consultation areas in turn and considers the comments received in writing and at the two events. It then sets out the Government's response and proposed way forward. Comments made have not been attributed in this Government Response.
12. The comments received during the consultation broadly supported the Government's view that the Regulations should be amended in relation to the three consultation areas. Comments were generally supportive of the proposals on reporting and modification, but

reflected a need for greater consideration of the verification regime, in particular the form of the assurance to be provided by verifiers. For each of the consultation areas, some of the responses provided technical suggestions for improving the proposals.

13. Finally, this document also sets out a number of minor miscellaneous amendments to the amended Regulations. These come as a result of comments received from some respondents regarding the complexity and clarity of the Regulations and the Government's own review of the drafting. The Government has therefore made some minor amendments to the Regulations with the intention of improving their operability and clarity.

Consultation Principles

14. The Government's Consultation Principles⁴ apply to the consultation addressed by this document.

⁴ <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

Part 1: Reporting Requirements

Summary of Proposals

1.1. The consultation proposed two amendments to the reporting requirements set out in the Regulations:

- i. To allow the synchronisation of the reporting timeframes for FDP purposes with those used for corporate reporting, as per the Companies Act 2006.
- ii. To extend the submission deadlines for Annual Reports, from three to six months, and Quinquennial Reports (**QQR**), from six to nine months.

1.2. Respondents were asked for their views on the following question:

- Do the changes in relation to the reporting requirements strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities?

Comments received on the proposed amendments to the reporting requirements

1.3. The proposals were generally welcomed as sensible without having a negative impact on the Secretary of State's ability to ensure that the operator's FDP maintained prudent provision. One respondent noted that the proposals would reduce regulatory burden on operators, reduce costs, enhance transparency and could enhance public confidence in the financial reporting of the operator in general.

1.4. However, one respondent felt that the proposals did not fully achieve the intended synchronisation of reporting requirements, since the Companies Act 2006 enabled public companies to submit their annual corporate reports 9 months following the end of the financial year, whereas the proposed amendment only allowed 6 months for Annual FDP Reports. They also queried the rationale for Annual Reports being submitted on a quicker timescale than QQRs.

1.5. Comments were received on the timing of QQRs, with some respondents suggesting that the amended Regulations were too prescriptive on this matter and should enable flexibility over the timing of Quinquennial Reviews in response to major events. They considered that this could improve the quality, relevance and cost effectiveness of QQRs. For this reason, one respondent suggested that the Regulations could allow for QQRs to occur within five years of the previous one, therefore achieving the desired flexibility. Another respondent commented that it could be desirable to allow flexibility for a situation where an operator's FDP provided for a QQR to be provided more frequently. They argued, for example, that in

the final period of the operational phase an operator may wish to conduct more regular reviews.

- 1.6. Several respondents commented on the relevance of these reporting requirements in the period between the Secretary of State's approval of the FDP and first criticality of the plant (the point at which the power station becomes operational). It was suggested that reviews during the construction period would serve no purpose, as prior to operation there would be no contributions being made in the operator's independent fund (**Fund**). One respondent suggested that a separate reporting regime should exist for this period and that the details should be agreed through the FDP. Another commented that there should be no annual reports during this period as this would be of material cost to the operator. Instead, they suggested that a QQR should be carried out to reflect the 'as built' status of the plant before first criticality. This would use relevant and up to date technical information, and would enable assessments to be made on the basis of expected rates of return close to the time that first contributions to the Fund would be made. Finally, they suggested that the Regulations could refer back to the operator's FDP to enable flexibility around reporting requirements.
- 1.7. Many respondents sought clarity on the impact of disputes, for example between the operator and the Fund's directors over the content of a report, on the timing requirements in the proposed Regulations and queried whether provision would be made for extensions to reporting deadlines in these circumstances. It was suggested that a provision similar to s442(5) of the Companies Act 2006 might be appropriate for inclusion in the Regulations.

Government Response

- 1.8. The Government agrees that it is desirable to align the timing requirements for the Annual Report with the Companies Act 2006. It is therefore amending the Regulations to enable both Annual Reports and QQRs to be submitted within nine months of the financial year end in order to better align the FDP reporting regime with the deadlines for annual corporate reporting.
- 1.9. The Government notes the points raised with regard to flexibility around the precise timing of QQRs. However, it considers that amending the Regulations to provide the suggested flexibility would introduce unwelcome complexity. The Government regards the modifications regime as sufficient to handle any need to review the FDP in response to a major event between QQRs. In this case, the operator would need to consider the impact of the event on their FDP and propose such modifications to the FDP as would be necessary to take account of the event. While the work required to underpin such a modification could be substantial, this would be focussed on addressing the consequences of the event and need not entail the breadth of review that is expected for a QQR.
- 1.10. The Government accepts that regular Annual Reports and QQRs in the period between Secretary of State approval of an FDP and first criticality of the reactor may be of limited value and present an avoidable expenditure for operators.

- 1.11. The Government is therefore amending the Regulations so that the reporting requirements begin at the point that the power station becomes operational. The first reporting requirement is for a “First Criticality Report”, as required in regulation 9. For the purposes of the FDP, first criticality is the date the first chain nuclear reaction in a nuclear installation on the site becomes self sustaining in a nuclear installation on the site. A First Criticality Report is, in effect, the first QQR of the FDP and will cover the period between first approval of the FDP and the beginning of operation. Unlike a QQR however, the First Criticality Report will not be required after a fixed interval, but will cover the whole period between approval and first criticality. As with a QQR, the First Criticality Report must contain the operator’s Designated Technical Matters (**DTM**) estimates, the operator’s valuation of the assets held in any fund, plus any specified security, a statement of any future payments the operator is required to make into any fund and other future financial provision the operator is required to make in accordance with the FDP. This is required within nine months of the last day of the financial year in which first criticality occurs (the **First Criticality Reporting Period**). The reporting regime of Annual Reports and QQRs will commence after the First Criticality Reporting Period.
- 1.12. Although there is no requirement to provide Annual Reports and QQRs during the period between approval and first criticality the modification regime will be in operation, meaning that where the operator identifies that a modification to the FDP is necessary it will need to be notified and, where required, Secretary of State approval obtained. The Secretary of State would also be able to use his powers under Section 52 of the Energy Act 2008 (the **Act**) to request information during the period between approval and first criticality if specific information regarding the FDP were to be required. The Government considers that this provides a flexible framework, that is sufficient in the period between Secretary of State approval and first criticality.
- 1.13. Regarding the points raised about the impact of disputes on reporting deadlines, it is the Government’s view that the Secretary of State would not have the vires to provide an extension to timeframes and is not convinced of the rationale to do so. The Government does not therefore propose to amend the Regulations in this respect.

Part 2: Verification

Summary of Proposals

2.1. The consultation proposed two amendments to the verification regime set out in the Regulations:

- i. To separate the verification report into two: a financial verification report and technical verification report; and
- ii. Amend the verifier's test from assessing prudence to assessing the reasonableness of the operator's evaluation of prudence.

Summary of Responses Received

2.2. Respondents were asked for their views in response to the following question:

- Do the changes in relation to the verification of an FDP strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities? To what extent is the standardisation approach desirable and/or achievable?

2.3. Overall the responses indicated that the standard for verification needed to be set out more clearly. This standard would also need to be in a form that could realistically be obtained from prospective verifiers in order to make it possible for a market for this type of verification to develop. Responses to this question focussed on the issues set out below.

Proposal to separate the verification report

2.4. The proposal to separate the verification report into a technical report and financial report was generally welcomed. It was suggested that it would be helpful for the Secretary of State to publish supporting guidance that set out the relationship between the two verifiers, as it would be important for the financial verifier to have an understanding of the basis of the cost estimates. For example, it was suggested that this guidance could also set out explicitly that technical verifiers would be expected to assess the expected effect of inflation on nuclear costs; this would be essential for financial verifiers, who would need to take such information into account in assessing the adequacy of financial provision. Another suggestion was that a lead verifier could be appointed by the operator to ensure synergy between the reports.

Prudence

2.5. Most respondents had strong views about whether the test that verifiers would need to apply should refer to "prudence". It was suggested by several respondents that the amended Regulations were unclear about this and that clear objectives and guidelines for verifiers to

test the application of prudence would be helpful. Most respondents argued that verifiers would be unwilling to commit themselves to judgements about prudence without detailed guidance in place about the meaning of prudence.

- 2.6. Some respondents contended that the key assessment of prudence is that made by the Secretary of State when approving an FDP. It was therefore argued that verifiers should not be expected to form their own view of prudence. More broadly most respondents were clear that verifiers needed a clear and objective test to verify against and concern was expressed that the proposal in the consultation did not achieve this.
- 2.7. Finally, one respondent commented that it was not clear why the DTM costs should be assessed for prudence. Instead, they suggested the verifier should be required to form a view on the accuracy or reasonableness of the operator's estimate of DTM costs. They considered that this would be consistent with section 55(2)(a) of the Act, which allows the Secretary of State to rely on estimates of the costs verified by an independent third party, and makes no reference to prudence. The provision concerning prudence, section 55(2)(b), gives the Secretary of State the power to rely on an independent third party, in this case the verifier's, assessment of the prudence of financing of the DTM costs.

Verification market

- 2.8. Concerns were expressed about the potential lack of organisations capable of carrying out technical verification. Similarly, concerns were also expressed about the market for financial verifiers, with many noting that much of this would depend on how the test to be applied by the verifier was defined. The willingness of companies to act as verifiers, and the cost of the service, would be very much affected by the nature of the test they were expected to apply. Further concerns were also raised about whether the verification market would be sufficiently attractive to build up a number of firms that could offer this service. It was likely that those organisations that might offer verification services would also be in the market to offer technical advice to operators, which would be seen as the more lucrative role. By providing verification advice, an organisation would be unable to provide technical advice to the same operator due to the requirement in the Regulations and FDP Guidance for the verifier to be independent of the operator. Therefore, potential verifiers might be reluctant to take on that role.
- 2.9. There was one suggestion that it could be helpful for a consortium of verifiers to be established. As well as addressing concerns over availability of verifiers this would help to clarify the respective roles of the technical and financial verifiers.
- 2.10. One respondent commented that the need for a verification report was less clear since the consultation suggested that the Secretary of State might need to procure his own advice in reaching a view on prudence. They suggested that an operator may consider that a less risky approach would be for the Secretary of State to procure his own advice, the costs of which could be recovered from the operator, rather than attempt to second guess his requirements. On the basis of the current proposal, the operator could not assume that there would be no additional costs. This respondent also envisaged a situation in which an

operator would work with DECC to ensure that suitably qualified verifiers were appointed and appropriately tasked, therefore reducing the risks of an inadequate verification report.

2.11. It was also noted that the operator was in the position of being responsible for defining the scope of verification and identifying a verifier, while the product being supplied by the verifier had to satisfy a third party in the form of the Secretary of State. They queried whether the operator would have recourse to compensation from the verifier if the report was unacceptable to the Secretary of State. This would mean that the verifier would be unlikely to agree to provide the required view without clarity from the Secretary of State about his expectations. To address this, they suggested that standard terms or a list of expectations/tests would help to provide clarity. It was suggested that this was something that could possibly be included in the Regulations.

Standardisation of reports

2.12. Respondents held mixed views on the subject of standardisation of verification reports, with some responses suggesting that it would help to ensure consistency and focus, while others commented that it would not be practical due to the individual nature of each operator's FDP. Indeed, one respondent noted that standardisation was unwarranted given the likelihood that there would be only three operators in total, with each submitting an individual and non-standardised FDP. Another noted that the content of the report for each FDP would need to be established between the providers of the service and the Secretary of State, rather than be standardised. Once again, it was suggested that guidance on the scope and extent of reports would be helpful.

2.13. Finally, one respondent, who was sceptical of a standardised approach, noted that in relation to the scope of financial verification, that 'financing of the DTM costs' and 'changes to the financing of the DTM costs' were undefined in the proposed Regulations. Although they considered this to be helpful, since defining these terms could restrict the structure and operation of an operator's FDP, they considered that an absence of objective verification tests would create a serious risk of being unable to instruct verifiers. They therefore proposed that the Regulations should include a reference back to the scope of financial verification as set out in the approved terms of an FDP.

Government Response

2.14. The Government continues to regard independent verification as an important element of the FDP framework. However it has concluded that the proposed amendments to the Regulations needed further work in order to achieve the intended objective of ensuring that the verification regime is both robust and practical. Therefore the requirements in the amended Regulations regarding verification have been significantly revised.

2.15. The Government agrees that verifiers need to be able to apply a clear and objective test and recognises that this is important in ensuring that a market for the provision of verification can develop.

- 2.16. With regards to technical verification, the Government accepts that an assessment of prudence in relation to the DTM estimates is not required . The amended Regulations therefore clarify that the technical verifier should make an assessment of the reasonableness of the operator's estimates of the costs likely to be incurred (the **DTM estimates**).
- 2.17. With regards to financial verification, Government's view is that the judgement on the prudence of an operator's FDP is for the Secretary of State to make. The proposed Regulations were not intended to require the verifier to form an independent view of prudence of the FDP and in light of the concerns raised over this issue in the consultation, the Regulations have been amended to be more specific about the tests that the financial verifier should apply.
- 2.18. The Government has identified the two main assessments it expects the financial verifier to make and has specified those in the definition of the financial verification report in Regulation 4.
- 2.19. Firstly, in assessing the prudence of an FDP the Secretary of State will form a view of the adequacy of the obligations the FDP places on the operator, for example, where an operator proposes to establish an independent Fund, in relation to how the operator's payments to their Fund should be calculated. A key role for the financial verifier is to provide assurance that these obligations are being complied with, for example that the operator's contributions have been correctly determined. The amended Regulations therefore require the financial verification report to include an assessment of the operator's compliance with obligations specified under the FDP.
- 2.20. Secondly, a key component of Annual Reports and QQRs is a report on the value of the operator's Fund and any other specified security. Therefore the financial verifier is required to provide their valuation of the Fund and other specified security as at the last day of the relevant reporting period.
- 2.21. The amended Regulations also provide further clarity on the specific requirements for financial verification reports when the operator proposes modifications to their FDP. The amended Regulations distinguish between modifications that are made under Regulation 11 and hence do not require Secretary of State approval, and all other modifications, i.e. which will require Secretary of State approval.
- 2.22. For modifications that will require Secretary of State approval there is no requirement for financial verification, on the basis that it is not possible to clearly define the test that a verifier would need to apply in order for the Secretary of State to be able to rely on their assessment. Therefore it is expected that the Secretary of State will commission his own advice on the approvability of any such modification and the costs of that advice will be recovered from the operator under Regulation 6.
- 2.23. Regulation 11 provides for several categories of modification that are exempt from having to seek Secretary of State approval. In this case appropriate verification is necessary for the Secretary of State to have confidence that the conditions required under

Regulation 11 have been met. Therefore Regulation 14 specifies clear requirements for verification, including some assessments that are specific to the category of modification proposed. When an operator makes a modification to its FDP for which Secretary of State approval is not required, this must be accompanied by a Modification Verification Report and other documents that provide confirmation that the operator has complied with its obligations under the FDP with regards to the financing arrangements, a valuation of any assets held in the Fund and any specified security.

- 2.24. In the Government's view these changes address the concerns raised about the workability of the verification requirements.
- 2.25. The information requirements for when an FDP is first submitted to the Secretary of State for approval have also been streamlined in the amended Regulations. The requirement for a financial verification report upon an operator's submission of an FDP to the Secretary of State has been removed. Under the amended Regulations, the purpose of a financial verification report is to provide an evaluation of the operator's compliance with its FDP. However, this will not be a meaningful assessment at the point that the FDP is submitted for approval. The amended Regulations will still require operators to submit a technical verification report since this will provide useful information that will inform the Secretary of State's decision on an FDP.
- 2.26. In response to the points made in relation to the standardisation of verification reports and requests for guidance, the Government has concluded that standardisation is not required and would expect to agree bespoke verification arrangements for each operator as part of their FDP. However, the Government will keep the need for further guidance on verification under review.

Part 3: Modifications to an approved FDP

Summary of Proposals

3.1. The consultation proposed three further classes of modification that would not require approval by the Secretary of State:

- i. Modifications that increase estimated costs by more than the 5% materiality threshold, provided that sufficient security is available to meet the increased liabilities.
- ii. Modifications that reduce estimated costs by more than the 5% materiality threshold, where the modification relates directly to a change in the fee for the disposal of relevant hazardous waste.
- iii. Modifications to matters specified by the Secretary of State at the time of approval of the FDP as not needing his consent to modify.

Summary of Responses Received

3.2. Respondents were asked for their views on the following consultation question:

- Do the changes in relation to the modifications regime strike the right balance in setting a framework which is achievable at reasonable cost to the operator while enabling the Secretary of State to have confidence that the FDP continues to represent prudent provision for the operator's liabilities?

Exemptions to the requirement for operators to seek Secretary of State approval for modifications that exceed the materiality threshold

3.3. Respondents were generally supportive of the proposals relating to exemptions to Secretary of State approval for modifications, with the creation of the additional three classes of modifications not requiring Secretary of State approval welcomed as easing the financial and regulatory burden on potential operators.

3.4. There was a request to provide greater clarity around the definition of what constituted a modification to an approved FDP. This respondent considered that, under the Act, the only matters that constitute modifications were changes to how the FDP is operated (i.e. changes to the actual terms of the FDP) and changes to cost estimates and associated changes to the Decommissioning and Waste Management Plan (**DWMP**) (e.g. due to inflation and real increases/decreases in the underlying costs). They considered that mechanical changes arising from the operation of the FDP in accordance with its terms would not constitute a modification.

3.5. One respondent noted that it was unclear from the proposed Regulations whether broad, non-financial modifications to an operator's FDP would be permissible without the necessary oversight of approval from the Secretary of State. They cited an example where an operator

wished to modify the constitution of the independent organisation holding the waste management and decommissioning funds. It was argued that, as drafted, the amended Regulations would allow the operator to make a Section 48 modification proposal and claim that under Regulation 10(1)(b) (now Regulation 11 in the amended Regulations) that it did not relate to the financing of DTM costs and that the relevant change was less than 5%. Therefore the operator could make the change without seeking Secretary of State approval.

- 3.6. Two respondents noted that the Secretary of State, in approving an FDP, could consider an FDP built up over time to be prudent, which would therefore have less than 100% coverage in the early years. One of these respondents suggested that Regulation 11(3) (now Regulation 12(2)) could be drafted to allow more flexibility such that, upon a substantial increase in estimated cost, it would be sufficient for any corresponding addition to the Fund to be enough to remedy any deterioration in the ratio of funding to liabilities at that point. Another respondent also commented that the Regulations needed to reflect that an operator may be permitted/required by the terms of an approved FDP to make up a deficit over a number of years. They were concerned by the uncertainty over the time allowed to make up the Fund in the drafting of the amended Regulations.
- 3.7. One respondent raised a concern that the drafting of Regulation 11(3) (now Regulation 12(2)) implied the provision of a parent guarantee as security. They requested that this be clarified so that 'other security' would include the operator's present and future payment obligations under an FDP, aside from monies already in the Fund and those available under any other funding proposals.
- 3.8. The exemption relating to changes in the waste disposal charge under a waste transfer contract between Government and an operator, set out in Regulation 11(4)(c), was welcomed by one respondent. However, they queried whether this exemption should be limited to such a specific reason for an increase, or whether other increased or decreased costs under a waste transfer contract should also be capable of being taken into account.

5% materiality threshold

- 3.9. It was noted by one respondent that the 5% threshold related to the total liabilities in present money terms. For example, this would mean that a change in 50 years time would be given equal weight to a change of the same money value this year, despite the former having much less significance because of the effect of discounting. They suggested that operators could be allowed to use discounted values for testing against the threshold on the basis that they provided evidence of the calculation of such discounted values.
- 3.10. One respondent sought greater clarity over whether references to costs in Regulation 10(3) (now Regulation 11) were intended to be construed in real terms. In the absence of this clarification, it could be possible for a change to the FDP to have a relatively small impact on costs (e.g. 1%), but if inflation in the period since the previous QQR had been higher than expected, the combined impact could exceed the 5% materiality threshold. The respondent considered that this intent had been expressed in paragraph 3.6 of the

consultation document, but that the amended Regulations could be made more clear. This was supported by another respondent with the same concern.

Government Response

- 3.11. The Government's view is that the meaning of "modification" is clear. Any change to the approved FDP is a modification that must be notified to the Secretary of State and, unless covered by one of the exemptions in the Regulations, approved by the Secretary of State.
- 3.12. The policy on this aspect of the Regulations remains unchanged after the consultation. Government continues to recognise that some values in the FDP may vary frequently from the automatic application of those processes set out in the approved FDP. For example, the Funding Arrangements Plan (**FAP**) is expected to include a number of key variables which will inevitably change over time, such as the value of assets held by the independent Fund (which will be regularly recalculated) and the schedule of contributions to be paid to the Fund by the operator (which will be regularly reviewed in relation to the level of estimated liabilities and the investment returns achieved on the assets held by the Fund). The Secretary of State will need to ensure at the time of approval that he is satisfied that an FDP modified in accordance with any such provisions will continue to make prudent provision. These are variables that will be reviewed and updated in accordance with the terms of the FDP. The revision of these variables is the result of the FDP working as intended and as approved by the Secretary of State.
- 3.13. As set out in the consultation document the Government therefore accepts that it is unnecessary to require Secretary of State approval of such modifications and to this end has created in Regulation 11(2) the possibility for the Secretary of State, at the time of approving the FDP, to agree a limited number of exempt modifications. These will relate to modifications set out in the FDP, where they relate solely to a change in the estimates of costs in Regulation 5(1)(a) or (b), or only to the funding of the costs likely to be incurred in connection with the designated technical matters. They will only be exempt if the conditions applicable to them in the FDP are met. They will however, be modifications that need to be notified to the Secretary and will need to be accompanied by verification reports, and notice to the Secretary of State confirming that the site operator has complied with any conditions in the FDP relating to the specified matter.
- 3.14. The Government accepts that the wording in the draft of the Regulations on which we consulted referring to "a proposal which does not relate to the financing of the DTM costs" should be clarified. The intention of this, as set out in paragraph 3.8 of the consultation document, was to capture changes to the DWMP element of the FDP (to reflect for example technical or operational changes to the power station or the periodic reviews of estimated costs) but to exclude changes to the provisions in the FAP section of the FDP. This is now made clearer in Regulation 11, by making clear that this exemption only applies to proposed changes to the details of the steps to be taken under the programme or in relation to the estimates of the costs likely to be incurred.

- 3.15. The Government has introduced a formula at regulation 11(5)(b) to clarify the operation of the 5% materiality threshold for modifications, to set out how inflation is reflected. There is no change to the Government's policy on this point but it was considered that the previous drafting did not achieve the policy intention. The formula makes the calculation of the "relevant change in A" clearer and also addresses concerns raised in some responses by addressing directly the handling of inflation on this calculation.
- 3.16. The Government has also clarified the operation of the exemption from approval for modifications that increase costs by more than the materiality threshold in regulation 12.
- 3.17. As set out in the consultation, when considering whether to approve a modification, the Secretary of State needs to be satisfied that prudent provision is maintained. Where a modification materially increases the DTM costs ie above 5%, the Secretary of State will be concerned to see that the costs have been properly calculated and that the increase in liabilities do not imply an increased level of risk to the taxpayer. Therefore, for modifications which materially increase the cost estimates, so long as the change in estimated costs has been independently verified in the correct way and a specified level of financial provision relative to the change in estimated cost is met or maintained, the modified FDP would continue to represent prudent provision and hence Secretary of State approval for such a modification should not be required. As mentioned in paragraph 2.23 above, where a modification is proposed under Regulation 11, we have introduced the requirement for a Modification Verification Report at Regulation 14. This report must set out confirmation by a verifier that the obligations relating to the costs have been met, plus the verifier's valuation of assets held in a fund, and any specified security.
- 3.18. The requirements of Regulation 12 are intended to be flexible enough to work with a range of FDPs. Where an operator plans to accumulate funds over time, it would be able to rely on this regulation provided that there was a method of referring to and meeting the required value by reference to its DTM estimates. The amended Regulation 12 therefore requires the FDP to specify a test that has to be satisfied in order for this exemption from approval to be used. This will require the FDP to provide for the calculation of a "required value" by reference to the DTM estimates. So, for example an FDP might state that by year X the fund should be at 50% of its target value. If this were approved then this would determine the level of the required value at year X.

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Department of Energy & Climate Change
3 Whitehall Place
London SW1A 2HD
www.decc.gov.uk

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