

[NNB Note: NNB has inserted square brackets in several places in the Guidance in order to aid the linkage of its comment to the specific elements of the text that are relevant.]

Introduction and background to this consultation

1. In February 2008 the Government published for public consultation draft Guidance on what an approvable Funded Decommissioning Programme (FDP) should contain¹. A total of 43 formal written responses to the consultation were received². The respondents included: energy suppliers; nuclear industry organisations; environmental organisations; public sector organisations; advisory organisations; individuals and other interested parties.
2. The Government's response was published in September 2008³. The comments received generally showed support for the proposals, which were seen, on the whole, as a sensible and practical way forward. Since 2008 there have been some significant developments with regard to the framework that the Government is putting in place concerning the financing of decommissioning, waste management and waste disposal - the Energy Act 2008 has come into effect⁴ and the Government has consulted on draft Regulations and a draft Order⁵ arising under the Act⁶. The Government has also consulted on a methodology for pricing the transfer to the Government of title to and liability for intermediate level waste (ILW) and spent fuel from a new nuclear operator⁷.
3. Also over this period the prospective nuclear operators have been developing their approach to the FDP as their development plans have progressed. The Government has engaged in discussions with the three prospective new nuclear consortia – NNB GenCo (a joint venture of EDF and Centrica), Horizon Nuclear Power (a joint venture of E.ON UK and RWE npower) and NuGeneration Ltd (a joint venture of Iberdrola, GDF Suez and SSE). The purpose of these discussions was to establish whether, as a result of the work the consortia have undertaken preparatory to the submission of an FDP, they had new or different views since they responded to the previous consultation in 2008. We asked all three consortia to write to us following these discussions detailing their views. We have published these letters alongside the revised Guidance⁸.
4. While it is not considered that the changes made to the Guidance since the 2008 consultation are significant enough to give rise to many fresh issues, there is the possibility that the changes made may lead stakeholders to have new or different views to those given in response to the previous consultation in 2008. Given these considerations the Government thought it desirable to undertake a further round of public consultation.
5. The finalised Guidance is expected to be published in spring 2011 and will assist operators in understanding their obligations under the Energy Act 2008. The Act requires operators

¹ <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file44486.pdf>

² <http://webarchive.nationalarchives.gov.uk/20090103073128/http://www.berr.gov.uk/energy/sources/nuclear/consultations/closed-response/fdp-responses/page48057.html>

³ <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file47629.pdf>

⁴ http://www.decc.gov.uk/en/content/cms/legislation/energy_act_08/energy_act_08.aspx

⁵ The Nuclear Decommissioning and Waste Handling (Designated Technical Matters) Order 2010 (SI 2010/2850) came into effect on 30 November 2010.

⁶ http://www.decc.gov.uk/en/content/cms/consultations/nuc_dec_fin/nuc_dec_fin.aspx

⁷ http://www.decc.gov.uk/en/content/cms/consultations/waste_trans/waste_trans.aspx

⁸ http://www.decc.gov.uk/en/content/cms/consultations/rev_fdp_guide/rev_fdp_guide.aspx

of new nuclear power stations to have an FDP approved by the Secretary of State of Energy and Climate Change in place before construction of a new nuclear power station begins and to comply with this FDP thereafter.

6. The Guidance is not intended to be unduly prescriptive but will instead set out principles which the Secretary of State would expect to see satisfied in the FDP prepared by an operator. The Guidance gives information on ways in which the operator might satisfy those principles.

[NNB Note: NNB welcomes this approach and notes that under section 54(7) of the Energy Act the Secretary of State must have regard to this Guidance once finalised. However, elsewhere the Guidance uses mandatory language ("must" etc.). Whilst in many instances this indicates genuine minimum criteria (which are, in NNB's view, appropriate), in other parts of the Guidance the effect of the use of such language is that the requirements are overly prescriptive. In such instances NNB's view is that the prescriptive language should be amended to allow operators to make proposals that satisfy the applicable legislative requirements and the aims of the Guidance. For the same reason, NNB considers that the current FDP Regulations are inappropriately prescriptive in a number of respects and that, to enable operators to be able to make better overall FDP proposals, the FDP Regulations should be revised (see also NNB's notes at paragraphs 1.4, 1.29, 2a.6, 2a.18 2a.22 and 2a.25 below in relation to why NNB considers that the FDP Regulations need to be revised). In any event, as the Guidance must be consistent with the FDP Regulations, NNB suggests that it will be necessary to re-consult on the FDP Regulations and any necessary modifications to them in line with the analysis of responses to this Consultation on the Guidance.]

[NNB Note: Overall, NNB's comments are aimed at ensuring that the Guidance allows FDP proposals which offer investors sufficient certainty through the initial SoS approval of mechanisms, processes, principles and parameters that avoid the need for reapproval by the SoS when the terms of the approved FDP are not proposed to be amended. Without this, investors are at risk of material change to the terms of the FDP which are material to the investment case and any future financeability.]

7. During the period of this consultation the Government is considering amending the Secretary of State's power under the Energy Act 2008 to modify an operator's FDP to ensure that there is an appropriate balance between the Secretary of State's powers to protect the taxpayer and the operator's need for clarity over how those powers will be exercised⁹. This Guidance might need to be updated if those amendments are passed.

Structure of the Guidance

8. Part 1 of this Guidance sets out those factors which may be appropriate for the Secretary of State to consider in deciding whether or not to approve an FDP, to approve with conditions, or whether to modify an FDP which has already been approved, under section 54(6) of the Energy Act 2008. Part 1 sets out the Objective of the FDP regime and what is referred to as the Guiding Factors.
9. Part 2 of this Guidance sets out information about preparation, content, modification and implementation of FDPs under section 54(5) of the Energy Act 2008.

⁹ <http://www.decc.gov.uk/assets/decc/legislation/energybill/544-energy-security-bill-brief-nuclear-operator.pdf>

10. Part 2a sets out Guidance relating to the FDP as a whole.
11. Part 2b sets out the Decommissioning and Waste Management Plan (DWMP) Guidance. This part of the Guidance will assist operators in setting out and costing the steps involved in decommissioning a new nuclear power station and managing and disposing of hazardous waste and spent fuel in a way which the Secretary of State may approve. The Guidance will include a Base Case, which will set out a realistic, clearly defined and achievable way to estimate the potential costs for decommissioning and waste management.
12. Part 2c sets out the Funding Arrangements Plan (FAP) Guidance. This part of the Guidance will assist operators in setting out acceptable financing proposals to meet the costs identified. It will set out information on the factors by which the Government would expect to assess the funding proposals submitted by operators as part of an FDP for approval under the provisions in the Energy Act 2008.
13. The Guidance has been structured in this way to reflect more closely the requirements under both section 54(5) and section 54(6) of the Energy Act 2008.
14. This Guidance uses a number of defined terms. A glossary of such terms is set out at Annex C of this Guidance.

Responding to this consultation

15. We want to hear from members of the public, industry, financial and other institutions that may be involved in the financing of new nuclear power stations, non-governmental organisations and any other organisation or body with an interest.
16. When responding please state whether you are replying as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how you assembled the views of members.

How to respond

17. A response form is included at Annex A.
18. The closing date is 8 March 2011.

Additional copies

19. You may make copies of this document without seeking permission. An electronic version can be downloaded from DECC's website¹⁰.
20. Further hard copies of the consultation document may be obtained from:

¹⁰ http://www.decc.gov.uk/en/content/cms/consultations/rev_fdp_guide/rev_fdp_guide.aspx

Publications Orderline,
ADMAIL, 528,
London SW1W 8YT
Tel: 0845 015 0010
Fax: 0845 015 0020
Minicom: 0845 015 0030

Confidentiality and data protection

21. Your response may be made public by the Government. If you do not want all or part of your response or name made public, please identify the information which you do not wish to be disclosed. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department of Energy and Climate Change.
22. You should be aware that information provided in response to the consultation, including personal information, may be subject to publication or disclosure in access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
23. If you want information that you have provided to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.
24. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
25. The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

26. A copy of the consultation code of practice criteria is set out at Annex B.
27. Please direct any queries about the consultation to our consultation mailbox: decomguidance@decc.gsi.gov.uk or in writing to the address given in Annex A.
28. If you have any comments or complaints about the way the consultation has been conducted (as opposed to comments about the issues which are the subject of the consultation), these should be sent to the DECC Consultation Co-ordinator:

DECC Consultation Co-ordinator
3 Whitehall Place
London SW1A 2AW
Email: consultation.coordinator@decc.gsi.gov.uk.

Next steps

29. We expect to publish finalised Guidance in spring 2011. Responses to the consultation will be taken into account when developing the finalised Guidance.

Complete list of consultation questions

30. This consultation focuses on the consultation questions listed below. When considering responses to this consultation, the Government will give greater weight to responses that are based on argument and evidence, rather than simple expressions of support or opposition. When answering these questions please explain and give reasons for your answers.

Consultation questions

- 1 Do you agree or disagree that the draft Guidance sets out what an approvable Funded Decommissioning Programme should contain to ensure that operators of new nuclear power stations (i) estimate the potential costs of decommissioning, waste management and waste disposal (i.e. the designated technical matters) and (ii) make prudent provision for meeting their liabilities? What are your reasons?
- 2 Does the draft Guidance contain sufficient information to enable operators of new nuclear power stations to understand the matters that their Funded Decommissioning Programmes should contain?

Description of key changes to the Guidance since the 2008 consultation

31. Since the draft Guidance was published for consultation in February 2008 changes have been made to take account of the responses to the 2008 consultation, additional information received from industry and to reflect further work on refining the policy.
32. The Guidance has also been restructured to make clearer the distinction between:
 - a) those factors which it may be appropriate for the Secretary of State to consider in deciding whether or not to approve an FDP, to approve with conditions, or whether to modify an FDP which has already been approved, under section 54(6) of the Energy Act 2008 (Part 1 of this Guidance); and
 - b) further informative Guidance made under section 54(5) of the Energy Act 2008 about preparation, content, modification and implementation of FDPs (Part 2 of this Guidance).
33. The Guidance is intended to be principles-based rather than prescriptive and some of the changes since the 2008 consultation are intended to achieve this. By revising the Guidance to be less prescriptive in certain areas, operators have greater flexibility to put forward alternative approaches while still meeting the Objective and complying with the Guiding Factors set out in Part 1 of the Guidance.
34. As set out above, the Guidance has been restructured and the drafting in many sections has been revised. We therefore recommend that, where possible, consultees read the revised Guidance (or at least those areas which are of particular interest) in full. The substantive changes since the 2008 consultation include the following:
 - The draft Guidance published for consultation in 2008 stated that the Fund must be independent of the operator meaning the "absence of the ability to control any aspect of the structure, governance or operation of the Fund" (emphasis added)

and that the governance arrangements should ensure that the operator does not have influence over the Fund. This requirement is inconsistent with other parts of the Guidance, in particular the ability of an operator to appoint a minority of the directors of the Fund. This Guidance contains revised independence requirements and focuses on the operator's control of (rather than influence over) the Fund. The revised Guidance also makes it clearer that the requirement for the Fund to be independent of the operator does not preclude the operator owning a minority stake in the Fund.

- Operators may wish to develop a number of sites and key elements and security provided in an FAP (as part of an FDP) for each site may be closely related. The revised Guidance states that the Secretary of State would be expected to approve subsequent FDPs for other sites on terms consistent with the first FDP from that operator, where the operator can demonstrate that such an arrangement is advantageous to meeting the Objective (see section on the "Fleet Approach" in Part 1 of the Guidance).
- The draft Guidance published for consultation in 2008 failed to recognise that very substantial overfunding could occur. In the event that the Fund is above its Target Value, the Guidance now allows for the return of surplus of assets during the lifetime of the Fund if it is prudent to do so and is in accordance with the approved FDP.
- The revised Guidance requires a person appointed to a governance role of the Fund to avoid any situation in which that person has an interest that *materially* conflicts with the duties of the Fund (emphasis added). Without a materiality threshold it was industry's view that the test would be too impractical to comply with as, in practice, the nuclear industry is relatively small.
- The revised Guidance provides greater flexibility in the arrangements between the Fund and the operator. The Fund, for example, can set or approve (emphasis added) the schedule for contributions to the Fund by the operator, therefore allowing the operator to provide the contribution schedule for approval by the Fund, rather than the Fund being required to set it without input from the operator.
- The revised Guidance includes security over the cash flows from the site as an additional security that may be provided to mitigate the risk of the Fund being insufficient. *[NNB Note: It is not clear how this would work in practice. Taking security over future cash flows might be able to be made workable, but in practice is unlikely to provide any material benefit. This is because there is, in any case, a legal requirement (backed by criminal sanctions) to make payments under the FDP. It is only ever where there is no such cash flow that there is a problem. Any proposals that DECC make in this regard may have implications for the investment case and any future financeability. Further, the Guidance needs to be clear and consistent as to what 'security' means. The definition in the Guidance says that 'security' means the security provided to the Fund to meet the costs of the designated technical matters under section 45(7) of the Energy Act. The unusual breadth of the term "security" in the Energy Act creates ambiguity in certain parts of the Guidance. Paragraph 34 is an example of this – where the term seems to be used to refer to security in the traditional legal/financial sense rather than the wider Energy Act sense.]*
An operator is however no longer expected to work with the financial and

insurance industry to develop financial or insurance instruments where products are currently not available in the market (see section on "Protection against an insufficient Fund" in Part 2c of the Guidance).

- The revised Guidance now clarifies that the Secretary of State would expect to be informed in advance of any situation where an associated company of the operator ceases to be an associated company, although the FDP may set out circumstances under which the Secretary of State need not be informed of such a change (see section on "Change of ownership or control of the operator or site" in Part 2a of the Guidance). *[NNB Note: Change of control has implications for the investment case and any future financeability, therefore an appropriate balance needs to be struck.]*
 - The DWMP Guidance (set out in Part 2b of the Guidance) has been revised to improve clarity and reduce repetition. The substance has not significantly changed from the draft Guidance published for consultation in 2008. For example, the revised Guidance provides more information on the scope, structure and the anticipated level of detail in a DWMP, and more clearly sets out the distinction between the "technical matters" and the "designated technical matters" under the Energy Act 2008.
 - The DWMP Guidance also makes clear that, although the Base Case sets out the main points that the Secretary of State would expect to be addressed in the DWMP, there will be flexibility for operators to propose and seek approval for alternatives. For example, it will be open to operators to justify alternative station lifetimes to the Base Case assumption of an operational life of 40 years. Whatever station life is proposed, the operator must ensure that its FDP is robust against the risk that the site has to be decommissioned earlier than expected.
35. Alongside this consultation, the Government is also publishing a "Consultation on an updated Waste Transfer Pricing Methodology for pricing the disposal of higher activity waste from new nuclear power stations"¹¹.

¹¹ http://www.decc.gov.uk/en/content/cms/consultations/waste_trans/waste_trans.aspx

Part 1: Guidance under section 54(6) of the Energy Act 2008

- 1.1. Under section 54(6) of the Energy Act 2008 the Secretary of State must publish guidance about factors which may be appropriate to consider in deciding whether or not:
 - a) to approve an FDP;
 - b) to approve an FDP with modifications or subject to conditions; or
 - c) to make a proposed modification to an FDP or the conditions, subject to which it is approved.
- 1.2. Any operator of a nuclear power station is responsible for dealing with any waste that it produces and ensuring that the site is decommissioned and remediated in accordance with relevant legal and licensing requirements. The purpose of Chapter 1 of Part 3 of the Energy Act 2008 (the Energy Act or the Act) is to establish a regime whereby operators of new nuclear power stations have in place arrangements which make prudent and effective plans for decommissioning such stations, and managing and disposing of the waste that they produce, and that they have arrangements in place whereby they are able to meet the full cost of decommissioning and their full share of waste management and waste disposal costs (i.e. the designated technical matters).
- 1.3. Section 45 of the Act places a duty on a prospective operator of a nuclear power station to submit an FDP to the Secretary of State for approval. Section 45 requires the operator to set out in its FDP its plans and corresponding cost estimates for the designated technical matters, and to provide details of any security provided in connection with meeting those estimated costs.
- 1.4. Under section 54(7) of the Act the Secretary of State must have regard to any Guidance made under section 54 of the Act when making a decision to approve, approve with modifications or conditions, or to modify an FDP. The Secretary of State will call on the advice of the Nuclear Liabilities Financing Assurance Board (NLFAB) in assessing the constituent parts of the FDP.

[NNB Note: NNB generally welcomes the Guiding Factors set out in paragraphs 1.6 to 1.25 below. NNB notes that these Guiding Factors are helpful in promoting the value of certainty for Government and for operators in relation to the terms of an FDP.]

[NNB Note: The key point, in NNB's view, is that the arrangements will be based on a number of interlocking definitions/mechanisms/processes/parameters and principles which all together go to make up the prudence of the approved FDP.]

[NNB Note: NNB considers that the clarity of the Guidance would be improved if the definition of what constitutes a 'modification' was made more explicit. Furthermore, NNB does not consider that the current FDP Regulations are unambiguously clear on this point either, which is another reason NNB considers that they should be revised and re-consulted on.]

Objective

- 1.5. Given the purpose behind Chapter 1 of Part 3 of the Energy Act, the Secretary of State's overriding concern, and therefore the objective of the FDP regime, is to ensure that operators make prudent provision for:

- the full costs of decommissioning their installations; and
- their full share of the costs of safely and securely managing and disposing of their waste; and

that in doing so the risk of recourse to public funds is remote at all times (the Objective). This Objective applies to the FDP regime as a whole.

[NNB Note: The Objective as set out above is essentially a reflection of the statutory duty of the SoS as set out in section 46(4) of the Energy Act. NNB supports the Objective, but considers that it should be made clear that the operator cannot be expected to meet the costs of political risks.]

Approval of the FDP

1.6. When considering whether to approve, to approve with conditions or whether to modify an FDP which has already been approved, the Secretary of State will consider whether such an FDP or modification satisfies the following factors (the Guiding Factors), namely that the FDP:

- provides a clear structure;
- contains realistic, clearly defined and achievable plans for decommissioning, waste management and waste disposal;
- contains robust cost estimates which take due account of risk and uncertainty;
- is transparent;
- contains clear terms and clear divisions of roles and responsibilities;
- is a durable arrangement;
- sets out a Fund structure that demonstrates:
 - a) independence of the Fund;
 - b) measures to ensure sufficiency of the Fund;
 - c) restrictions on the use of Fund Assets; and
 - d) insolvency remoteness.

1.7. Operators' proposals will be considered on a case by case basis. It will be for the operator to demonstrate how the FDP meets the Objective and how it complies with each of the Guiding Factors. More detail on each of the Guiding Factors is set out at paragraphs 1.8 to 1.25 below.

Clear structure of the FDP

1.8. The Secretary of State would expect an FDP to be divided into two parts. The first part, referred to as the Decommissioning and Waste Management Plan (the DWMP), will fulfil the operator's obligations under sections 45(7)(a) and (b) of the Act by setting out details of the steps to be taken in relation to what are called "technical matters" and the estimates of costs likely to be incurred in connection with the "designated technical matters". As set out

in the Act and by Order, "designated technical matters" refer to the decommissioning of the site and the management and disposal of waste arisings. Further details of what the Secretary of State would expect in respect of a DWMP are set out in Part 2b of this Guidance.

- 1.9. The second part, referred to as the Funding Arrangements Plan (the FAP), should set out details of any security to be provided, as required under section 45(7)(c) of the Act, in connection with meeting the estimated costs of carrying out the plans (as set out in the DWMP) for the decommissioning of the site and for the management and disposal of waste arisings (i.e. the designated technical matters). The DWMP is therefore intended to cover [all technical matters] (including designated technical matters) *[NNB Note: The reference to "all technical matters" is unclear as "technical matters" may include both operational as well as decommissioning activities. There is also a lack of clarity in relation to the information and level of detail that the operator must set out in the DWMP on the non-designated technical matters. NNB proposes that the technical matters should be described only in so far as they have implications for the designated technical matters. Further, it is important for the level of detail in relation to designated technical matters to be set out at an appropriate level given they will be binding on the operator and backed by criminal sanctions. See further comments in relation to paragraph 2b.10.]* whereas the contents of the FAP should relate only to designated technical matters. Further details of what the Secretary of State would expect in respect of an FAP are set out in Part 2c of this Guidance.
- 1.10. The purpose of this division is to aid clarity of terms in the FDP. It is not, however, a statutory requirement and an FDP compiled on an alternative basis would be acceptable for the purposes of Act, although it may require additional consideration and therefore may result in a more complicated approval process. The remainder of this Guidance presupposes a structure consisting of a DWMP and an FAP as set out above.
- 1.11. Failure by the operator, or by a body corporate associated with the operator which has obligations under the FDP, to comply with the FDP will be a criminal offence under section 57 of the Act.
- 1.12. Elements of the FDP may be reinforced through, or may include, contractual arrangements between interested parties. *[NNB Note: At paragraph 2a.28 below it states that the obligation to contribute "must be legally binding and enforceable by the Fund". In order to be enforceable by the Fund there is no alternative to imposing contractual obligations on the operator to make contributions to the Fund. In fact, contractualisation of each and every of the obligations under the FDP would offer an additional layer of protection to the FDP arrangements and so NNB agrees with DECC that such contractualisation is a "reinforcement". Furthermore, NNB considers that the clear structure and transparency of the FDP would be greatly aided by the FAP essentially comprising the contractual arrangements between the operator and the Fund which would, amongst other things, set out the basis upon which the DWMP would be updated from time to time.*
Conceptually it is important to distinguish between what is in the FDP and the powers the Secretary of State has in relation to the FDP. The Energy Act says what has to be in the FDP as well as setting out powers and obligations in relation to the FDP. These are two distinct things. There is no requirement that the powers and obligations in relation to the FDP be set out in the FDP.]

Realistic, clearly defined and achievable plans

- 1.13. The operator must [demonstrate] that the plans set out in the FDP for the decommissioning of the site and for the management and disposal of waste arisings are realistic, clearly defined and achievable, and are capable of being undertaken in a way which is consistent with the requirements and expectations of the relevant safety, security and environmental regulators]. *[NNB Note: NNB considers that the DWMP in setting out the decommissioning and waste management arrangements for the licensed site will have to be undertaken in line with regulator requirements. However, in NNB's view it is important to make clear that it is not the purpose of the DWMP to "demonstrate" consistency with regulatory requirements. In NNB's view, the proper aim of the DWMP is to give accurate and up to date estimates of the costs of decommissioning and waste management where they have been assessed to be designated technical matters. This will avoid issues of duplication, inconsistency and dual regulation.]* As set out in paragraph 1.8, the Secretary of State would expect details of these plans to be contained in the DWMP. Further details of what the Secretary of State would expect in this regard are set out in Part 2b of this Guidance.

Robust cost estimates

- 1.14. The Secretary of State would expect the FDP, by way of the DWMP, to contain effective mechanisms for ensuring that the cost estimates for the designated technical matters are kept up to date; are robust; are consistent with the state of knowledge and technology at the time of calculation; and that the calculations take prudent account of risk and uncertainty. Further details of what the Secretary of State would expect in this regard are set out in Part 2b of this Guidance.

[NNB Note: NNB agrees that effective mechanisms are vital and believe they can best be achieved via contractualisation of the arrangements (see also NNB note at paragraph 1.12 above). Contractualisation defines contractual rights for the Fund to enforce the mechanisms, which are in addition to the SoS' powers.]

Transparency

- 1.15. The FDP must ensure that the arrangements set out under the FAP to accumulate, maintain and manage funds to meet the estimated costs for the designated technical matters are transparent and visible to the Secretary of State and to other persons with obligations under the FDP.

Clarity of terms and responsibilities

- 1.16. The FDP must have clear terms. The FDP must also set out clearly the roles and responsibilities of the Fund, the operator and any other relevant entities (including the Verifier (as defined in paragraph 2a.23) and any person with obligations under the FDP) for the Secretary of State to form a clear view of their responsibilities and, where relevant, obligations under the FDP.

[NNB Note: NNB notes that setting out roles and responsibilities in the form of a contract will provide clarity and certainty.]

Durability of arrangements

- 1.17. The FDP must be durable so that the arrangements set out in the FDP remain applicable for the generating lifetime of the station, throughout decommissioning and until the operator has satisfied all of its obligations under the FDP.

Fund structure

- 1.18. The FDP, by way of the FAP, must set out, as required under section 45(7)(c) of the Act, the details of any security to be provided in connection with meeting the estimated costs for the designated technical matters. The Government would expect to see the [security] held, managed and administered by an entity which is independent of the operator and the Government (that is, the Fund). *[NNB Note: See further comment in relation to paragraph 34 above regarding the use of the term 'security'.]*
- 1.19. The FDP, by way of the FAP, must set out how the relationship between the operator and the Fund will be structured in order to meet the Objective and comply with the Guiding Factors. Further details of what the Secretary of State would expect in this regard are set out in Part 2c of this Guidance.

[NNB Note: NNB considers that it is not workable for the FAP, which is a binding legal document designed to create certainty for investors and Government, to set out explanations of how things comply with the Objective and/or the Guiding Factors. Such information could better be provided as part of an operator's wider "FDP proposal" (i.e. documentation provided to the SoS to explain/justify an operator's proposal and to explain how the FAP itself (and the associated DWMP) met the Objective, the Guiding Factors, the FDP Guidance and the Energy Act requirements). This would be analogous to the distinction between statutes/ legislation and explanatory notes in relation to such statutes/ legislation.]

Independence of Fund

- 1.20. The Secretary of State will expect the FDP to contain arrangements under which the Fund is managed in a manner that is independent of the operator and of the Government, subject to the ongoing monitoring set out in the Energy Act and in this Guidance. Independence means the absence of the ability to control, directly or indirectly, the structure, governance, maintenance or operation of the Fund once it has been established *[NNB proposed drafting: (other than setting the day to day investment strategy). Independence of the Fund from the operator and Government does not, of course, mean independence from the terms of the FDP as approved by the SoS.]* *[NNB Note: In NNB's view, subject to any overarching restrictions approved by the SoS when approving the terms of the FDP, the day to day investment strategy should be permitted to be in the control of the operator (see further comments in relation to paragraphs 2c.47-2c.53).]* Further details of what the Secretary of State would expect in this regard are set out in Part 2c of this Guidance.

Sufficiency of Fund

- 1.21. The FDP, by way of the FAP, must set out mechanisms to ensure that sufficient assets will be available to meet in full the estimated costs of carrying out the plans as set out in the DWMP for those designated technical matters.
- 1.22. The FDP, by way of the FAP, must also set out what remedial action the operator will take to restore the Fund Assets to sufficiency if, [at any date] *[NNB Note: This requirement*

potentially conflicts with the quinquennial review proposals whereby reviewing of fund contributions, and therefore sufficiency, is undertaken on a periodic basis with an agreed period for the make-up in relation to any shortfall.], they are insufficient against the Target Value, including a [prudent risk-based contingency], as at that date. [NNB Note: It would be helpful if it could be clarified that if an operator proposes a particular 'P' level for cost estimates, that 'P' level will include such a risk-based contingency. Further, NNB notes that a risk-based contingency is appropriate for cost estimates, but not for fund performance. Conceptually, fund performance risk should be dealt with via amendments to contributions as part of the QQR process.] Further details of what the Secretary of State would expect in this regard are set out in Part 2c of this Guidance.

Restrictions on the use of Fund Assets

- 1.23. The FDP, by way of the FAP, must set out arrangements to ensure that the structure and governance of the Fund is such that the Fund Assets cannot be disbursed for any purpose other than the discharge of the operator's decommissioning, waste management and waste disposal liabilities to which the FDP relates, as and when those liabilities fall due, and irrespective of any reorganisation of the group to which the operator belongs.
- 1.24. The above does not preclude the FDP from making provision for the costs of discharging the Fund's [administrative duties] relating to the FDP to be met from Fund Assets. The FDP may also make provision for the return of surplus assets to the operator from time to time. Further details of what the Secretary of State would expect in this regard are set out in Part 2c of this Guidance.

[NNB Note: The Fund needs funds to pay all of its costs (e.g. any tax liability, independent advisor fees etc). Therefore, in NNB's view, restricting provision to administrative costs is inappropriately narrow and we suggest that it should refer to discharging the Fund's liabilities. Any tax on fund growth should be able to be paid from the Fund wherever that liability arises.]

Insolvency remoteness

- 1.25. The FDP must put in place arrangements and establish a relationship between the operator and the Fund such that the risk to Fund Assets and any payments due to the Fund under the terms of the FDP is remote in the event of the insolvency of the Fund, the operator or of any body corporate associated with the operator. Further details of what the Secretary of State would expect in this regard are set out in Part 2c of this Guidance.

Other considerations

Fleet Approach

- 1.26. It is possible that an operator may wish to develop a number of sites and that key elements and security provided for in the FAP (as part of the FDP) for each site will be closely related. Where, in such circumstances, the operator can demonstrate that such an arrangement is advantageous to meeting the Objective at the time when the Secretary of State approves the first of what he expects to be a series of FDPs from the operator, then the Secretary of State in making decisions on any subsequent FDPs will have regard to the FDPs already approved. The operator would be expected to set out the self sufficiency of the initial FDP should other sites and related FDPs not subsequently arise.

- 1.27. Subject to the subsequent FDP(s) meeting the Objective at the time the decision on the subsequent FDP is made, the Secretary of State would expect to approve subsequent FDPs on terms consistent with the first approved FDP from that operator, provided that the assumptions on which the first FDP was approved have not changed. *[NNB Note: NNB notes that an FDP will always provide for some assumptions to change over time in accordance with its approved terms. It is the basis of approval rather than the specific assumptions of the initial FDP which is relevant. NNB therefore believes that the terms of an FDP for an initial site could be extended to any number of further sites as the terms could have the definitions, mechanisms, process, parameters and principles to adapt to the new site and any new circumstances then prevailing.]*

Modification of an FDP

- 1.28. In determining whether (and if so, on what terms) to propose a modification to the FDP, the Secretary of State will have regard to the matters set out in this Guidance; in particular whether the modification is a necessary, appropriate or proportionate means to ensure that the Objective is met and the Guiding Factors are complied with.
- 1.29. In determining whether (and if so on what terms) to approve a modification put forward by the operator or another person with obligations under the FDP, the Secretary of State would also expect to have regard to the provisions of the FDP and any mechanisms set out in the FDP for its updating. *[NNB Note: Given the way that the FDP Regulations are currently drafted changes to costs cumulatively over 5% (in nominal not real terms) would trigger a right of approval by the Secretary of State. Where such approval is required, investors and future financiers cannot rely on the Secretary of State having any more than "regard" to the approved terms of the FDP. This is because the only actual fetter on the Secretary of State in its decision making for such approval/veto is the "statutory objective" as set out in section 49(7) of the Energy Act ("... must be exercised with the aim of securing that prudent provision is made for the technical matters (including the financing of the designated technical matters)"). NNB does not consider it reasonable for such ordinary course changes made pursuant to the terms of FDPs that the SoS has approved at the point of the investment decision to be subject to a subsequent SoS approval/veto power which, at the SoS' discretion, can override the approved terms.*

NNB therefore proposes that the FDP Regulations be revised so as to allow the Secretary of State the option to disapply section 49 in relation to modifications to cost estimates / technical plans which are made pursuant to the approved terms of the FDP and which have been independently verified as such (or else determined as such by an independent expert).] In particular the FDP may contain suggested mechanisms relating to certain types of modification which fall above any threshold set out in the Regulations. For example, where it can be predicted in advance that a modification may be required by the operator as a matter of course and mechanisms are set out in the FDP, the Secretary of State would expect to approve any such modifications compliant with the mechanisms set out in the FDP, provided that the general principles in paragraph 1.28 above are complied with.