

Response by Ashurst LLP

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1	Do you agree or disagree that the draft guidance sets out what an approvable Funded Decommissioning Programme should contain to ensure that operators of new nuclear power stations (i) estimate the potential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 and (ii) make prudent provision for meeting their liabilities? What are your reasons?
Response	Generally agree, subject to the responses set out in the annex to this response form (See attached document)
2	Does the draft guidance contain sufficient information to enable operators of new nuclear power stations to understand the matters that their funded decommissioning programmes should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?
Response	Generally agree, subject to the responses set out in the annex to this response form.

**FUNDco's RESPONSE TO THE DECC CONSULTATION ON REVISED FUNDED
DECOMMISSIONING PROGRAMME GUIDANCE FOR NEW NUCLEAR POWER STATIONS
DATED DECEMBER 2010 (THE "CONSULTATION")**

1. This response to the Consultation is submitted by Ashurst LLP on behalf of the as-yet unincorporated entity (which, for the purposes of this response, we refer to as "**FundCo**") which would be the custodian of the Fund Assets relating to NNB Generation Company Ltd's ("**NNBGenCo**") FDP if NNBGenCo elects to become a new nuclear operator. This response reflects the views of FundCo's prospective management team currently in place.
2. This response may be made public by the Government and is not confidential.
3. References in this response to paragraphs are to paragraphs in the Consultation and capitalised terms have the meanings given to them in the Consultation, unless defined in this response.

General comments

4. Subject to the comments which we make below, we regard the content of the Consultation as being generally sensible and helpful as a key stepping stone on the path to providing the finalised Guidance.
5. We note in particular, and we support, the notion¹ that the Guidance is not intended to be unduly prescriptive, but rather is intended to be principles-based and to offer information on the ways in which those principles might best be satisfied. We believe that the flexibility which this approach affords to NNBGenCo and to FundCo in the manner in which the FDP is created, whilst still meeting the Objective and complying with the Guiding Factors, is a critically important practical consideration.
6. Whilst we recognise and agree with the imperative in the Consultation that management of the Fund should be in a manner that is independent of NNBGenCo and of the Government, it is essential also to understand the precise role that FundCo will be expected to perform in connection with the FDP, particularly given the possibility that FundCo will be committing a criminal offence if it fails to fulfil any of its obligations under the FDP. All of FundCo's obligations under the FDP therefore need to be both clear and achievable, failing which it may be difficult or impossible for FundCo to recruit its management. This is an issue which arises throughout the Consultation, as evidenced in the following comments:
 - (a) Our belief is that the principal responsibility for determining FundCo's **investment strategy**, and for providing overall direction regarding investment decisions in respect of the Fund, should lie with NNBGenCo and not with FundCo. This is justified because, as a matter of law, NNBGenCo has the ultimate responsibility for any insufficiency in the Fund (see also recommendations 17 and 18 of the European Commission recommendation of 24 October 2006 (2006/851/Euratom)). Provided they are properly made within the terms of the FDP as approved by the Secretary of State, FundCo should execute any necessary investment decisions, and in doing so should seek assistance from independent fund managers which it will engage for that task, but consistent always with the primacy of NNBGenCo's investment strategy.Consequently, references in the Consultation to management of the Fund being "**independent**" of the operator should be read subject to FundCo's adherence to NNBGenCo's defined investment strategy for the Fund (e.g. paragraphs 1.20, 2c.10, 2c.24, 2c.27 and 2c.50).

¹ Expressed for example in paragraphs 6, 2b.11 and 2c.3.

- (b) Whilst FundCo would expect to be responsible for confirming that NNBGenCo has performed the objective investment obligations which NNBGenCo has agreed in the FDP approved by the Secretary of State, FundCo would not expect to be liable should the Fund Assets prove insufficient, nor to opine (after the FDP is approved) as to the adequacy of those obligations or the suitability of any investments (e.g. last sentence of paragraph 2a.27 and not necessarily having regard to the factors listed in paragraph 2c.51).

In furtherance of this principle:

- (i) FundCo would not expect to be subject to a duty to ensure the accumulation of Fund Assets sufficient to meet the Objective as to do so would imply an obligation on FundCo to make good a shortfall in Fund Assets should NNBGenCo fail to do so (e.g. paragraph 2c.20 and also see our specific comment below on paragraph 1.2.1, which refers to other examples);
 - (ii) FundCo would not expect to set the contribution schedule (as perhaps envisaged in paragraphs 2c.39 and 2c.44) as the mechanism for this will be set out in the FDP approved by the Secretary of State, and the level of contributions will only be capable of amendment in strict accordance with that mechanism;
 - (iii) the disbursement policy for the Fund should be largely subject to the relevant mechanisms set out in the FDP approved by the Secretary of State and the role of FundCo should be to ensure that the mechanisms are adhered to (e.g. paragraphs 2c.55 and 2c.57); and
 - (iv) determinations regarding a reduction in the contribution rate or withdrawal of surplus assets should be taken in accordance with the relevant mechanisms set out in the FDP approved by the Secretary of State, and if so taken should be deemed to be prudent (e.g. paragraph 2c.62).
- (c) While we agree with the general principle that NNBGenCo should never have control of FundCo (see, for example, of paragraph 2c.27) we envisage certain limited exceptions where NNBGenCo would necessarily be obliged to exert some control, for example to appoint a new independent director if all of the independent directors of FundCo resigned simultaneously.
7. It would be helpful, given that the Guidance is primarily guidance as to the form and content of an FDP which will in practice always be approved by the Secretary of State before becoming effective, for the Guidance to include a statement that any FDP agreed with the Secretary of State should not be capable of any challenge by reference to conflicts or perceived conflicts with the terms of the Guidance. We would in due course ideally expect to see a statement in the FDP that the Secretary of State agrees that the FDP is consistent with the Guidance, and in particular with the Guiding Factors and the Objective.

Specific comments

We also make the following specific comments in respect of the following numbered paragraphs of the Consultation:

No.	Paragraph	Comment and suggested amendments (if any)
8.	30	<p>The Consultation questions contained in this paragraph contain the first reference to the requirement that the arrangements for waste management, waste disposal and the eventual decommissioning of a nuclear power station are "prudent" and that "prudent provision" is made. This concept of prudence makes repeated appearances throughout the Guidance² and yet nowhere in the Guidance is there any suggested definition of what "prudent" is intended to mean.</p> <p>Given that this will be of vital importance to the obligations of the parties associated with an FDP, it will be essential that there is clear agreement between those parties and the Government as to what the applicable level of prudence is. We would expect therefore to see an operating definition of prudence agreed between NNBSGenCo and FundCo, set out in the FDP which is approved by the Secretary of State. It would be helpful if the Guidance could, in each place where there is a reference to prudence, state that it is envisaged an FDP may set out what is prudent in the relevant context.</p> <p>We note that there is language in paragraph 2a.25 which attempts to give similar comfort in the context of a Verifier considering issues of prudence, albeit it only says that "[I]n most cases" compliance with an FDP will result in prudent provision. It would be helpful if clarification could be given as to when, if ever, compliance with an FDP (assuming the FDP included adequate mechanisms and it is envisaged that NNBSGenCo's FDP will do so) would not result in prudent provision in this context.</p>
9.	1.11	<p>The Guidance should make clear that the criminal liability of a person is intended to apply only in respect of that person's alleged wrongdoing, and that any person associated with that first person will not be vicariously liable for that first person.</p>
10.	1.12	<p>It is essential that the specific rights and obligations of those involved in an FDP should be clearly established, and to this end it is our expectation that the FDP will in fact be recited principally through contractual arrangements to which NNBSGenCo and FundCo will be parties.</p> <p>The Government is an interested party which will, as a minimum, evidence its approval of an FDP's terms. It would be helpful if the Government also set out whether it expects to be able to enforce an FDP by becoming a party to it, or whether it just proposes to rely on its statutory and regulatory rights. We note by way of relevant and well-established analogy that the template decommissioning security agreement used in the context of UKCS oil and gas decommissioning programmes does envisage the Secretary of State being a party.</p>
11.	1.15 & 1.16	<p>It is not clear to us what the phrase "transparent and visible" is intended to mean in both paragraphs and further clarification would be helpful.</p>

No.	Paragraph	Comment and suggested amendments (if any)
12.	1.21	Change " to ensure " to " with a view to ensuring ". Mechanisms in the FDP to ensure the sufficiency of assets can only be intended to ensure such sufficiency - they cannot of course guarantee such sufficiency themselves. The same comment is relevant elsewhere, including in paragraphs 1.6, 1.23, 2a.6, 2a.13, 2a.18, 2c.20, 2c.47, 2c.64 and 2c.69. We feel it is important for the language in each of these instances to be made clear to avoid the implication that FundCo or the terms of an FDP must ensure sufficiency of assets.
13.	1.22	<p>The reference to the need to restore Fund Assets to sufficiency "at any date" should be modified to clarify that such sufficiency must be judged over the long term (in light also of anticipated growth in the Fund and anticipated withdrawals from the Fund). There could well be specific, individual dates upon which insufficiency (in isolation) might be suggested but this would not present an accurate view of the Fund. The drafting "at any date" implies that the value of the Fund Assets should be assessed on a regular, even daily, basis. We note that the detail on this issue in Part 2c of the Consultation confirms that insufficiencies can be corrected over time.</p> <p>The same principle applies elsewhere, including in respect of the reference to "at any point" in paragraph 2a.28, "at any time" in paragraph 2a.40, "at any point" in the first bullet point in paragraph 2c.65 and "at any time" at the start of paragraph 2c.66. In each of these we welcome further clarification as to what exactly is intended.</p>
14.	1.24	It should be permissible to use the Fund Assets to meet amounts owed by FundCo from time to time other than the cost of discharging its "administrative duties", an expression which could be narrowly interpreted. We suggest adding after "administrative duties" the words "and taxation and other liabilities".
15.	1.25	While we can see how Fund Assets can be made insolvency remote, we do not see how "any payments due to the Fund", i.e. due in future, would be so made, and additional clarification here would be helpful.
16.	1.26	We note there appears to be some inconsistency here and with paragraph 2a.50, which allow for a "fleet approach", in that paragraph 1.26 suggests that there must be a different FDP for each site (whereas paragraph 2a.50 envisages modifying an existing FDP). Such a requirement could materially increase the burden of work on FundCo with no tangible benefits.
17.	1.28 – 1.29	<p>We note that the Secretary of State has very wide powers under the Energy Act to make modifications to an approved FDP, including to the obligations of FundCo, which causes concern to FundCo. It would be helpful if the Guidance went into more detail on how these powers might be exercised in practice.</p> <p>We feel it is important that clarification be added here and elsewhere that things which change strictly in accordance with a clear and detailed mechanism set out in an FDP (i.e. pursuant to an FDP) are not be seen as modifications per se, because they will merely be a function of how an FDP is designed to work. This point is relevant elsewhere, for example, at paragraphs 2a.40-52 and in particular 2a.43 and 2a.47.</p>

No.	Paragraph	Comment and suggested amendments (if any)
		We also believe that the current drafting of the Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2011 (the " Regulations ") means that in practice no modification to an FDP may be capable of coming within the exception created in Regulation 8 (also relevant for paragraph 2a.40) and we would welcome a re-examination of the Regulations.
18.	2a.6	<p>We note that the timings given in Regulation 6 of the Regulations for the provision of Annual Reports and Quinquennial Reports do not allow for additional time, particularly in the event of a dispute between an operator and a Fund or Verifier. If the Regulations are not amended it would be helpful to include some comfort in the Guidance that the Secretary of State would not seek to prosecute or direct compliance with the relevant requirements while a dispute is being resolved in accordance with the mechanism set out in an FDP. However, we feel strongly that the Regulations should be amended to ensure that investment in new nuclear build is made on the clearest possible regulatory basis.</p> <p>We recommend changing "ensure that" to "demonstrate whether" in the third line.</p>
19.	2a.8	We assume that in the last sentence, where there is a reference to "over the course of the reporting period", the Secretary of State would only expect to see this information in the Annual Reports and not at any other time and suggest that this be clarified.
20.	2a.18	Where the last sentence refers to an "ongoing duty to ensure the FDP is up to date" there should be clarification that this duty is only as often as the Annual or Quinquennial Report process entails. See also paragraph 2a.28 which refers to where the Fund "becomes, or is at risk of becoming, underfunded at any point".
21.	2a.20	<p>FundCo should only be obliged to notify the Secretary of State of the events described here (insolvency, breach etc) where FundCo is directly affected, or, in relation to the operator, where FundCo has actual knowledge. (This principle is also relevant for paragraph 2a.40.)</p> <p>In relation to the last bullet point, it is not envisaged that FundCo will have a credit rating.</p>
22.	2a.23	It would be useful to have further clarification here of what is required for the Verifier to be independent of the operator and FundCo, so that FundCo can be confident of satisfying the requirement. In particular we note that the Regulations require the Verifier to be appointed by the operator. It would be helpful if the Guidance stated that a joint appointment by the operator and a Fund is also acceptable. This is particularly relevant in the case of an expert, appointed in accordance with the dispute resolution procedure set out in the FDP (as envisaged by paragraph 2c.44), who has to be jointly appointed and who will effectively be the Verifier in respect of the issues subject to determination.

No.	Paragraph	Comment and suggested amendments (if any)
		We also note there is inconsistency here with the Regulations which say the Secretary of State "must not" rely, rather than the "may refuse to rely" here in the Guidance. Similarly paragraph 2a.22 suggests a verification report is always required with an Annual or Quinquennial Report which we do not believe will always be the case.
23.	2a.25	We have concerns that the Regulations require a verifier to undertake too wide ranging a task, at least in the case of an FDP which contains sufficient mechanisms to mandate that actions are taken which are prudent (as such term may mean in the relevant context), and we would welcome amendments to the Regulations so that FundCo can be confident as to its obligations under the FDP Agreement. In such a case the Regulations, and the Guidance, should permit a verifier to conduct a review only of such matters as are detailed in the FDP, and not be permitted to attack the mechanisms set out in the FDP approved by the Secretary of State.
24.	2a.33	It is not apparent to us that FundCo's position under the FDP would be necessarily affected by any change of control of the operator or the site and we do not envisage a change in control of FundCo. This point is also relevant for paragraphs 2a.39 and 2c.63.
25.	2a.36	This paragraph provides that the Secretary of State will take into account the views of the Fund before approving modifications to the FDP in relation to a change of control. In the interests of clarity around FundCo's rights here and other relevant paragraphs it would be helpful to clarify exactly what is meant by "change of control". Is it just a change in "control" or any alteration in the share ownership of an operator? We suggest it be limited to the former.
26.	2a.40	This provides that the Secretary of State will "expect" the operator and/or FundCo "to promptly inform" him of events requiring a change to the FDP. We submit any obligation of this nature should only be on the operator, and not FundCo or at a minimum be limited, in respect of FundCo, to matters of which FundCo has actual knowledge.
27.	2a.49	<p>We suggest this paragraph could be deleted because we envisage an FDP would provide a detailed mechanism requiring increased contributions in the event the Fund Assets underperformed. In this case it would not be appropriate for the Secretary of State to require a modification if the mechanism were being complied with by the operator. The Guidance does envisage such a mechanism in Part C.</p> <p>In any case, the reference to "a period of time" where the Fund Assets are under-performing is vague. We envisage underperformance would only be assessed at an Annual or Quinquennial Review.</p>
28.	2a.51	It is not envisaged that FundCo will seek a separate credit rating.
29.	2b.1	While FundCo has few specific concerns with Part B of the Guidance, as a general comment, FundCo is interested in the level of detail required to be included in the DWMP, which should not be excessive (particularly as to non-designated technical matters), because FundCo and possibly other stakeholders will need to understand and confirm the cost estimates on an ongoing basis. For example clarity as to what is "sufficient detail" as referred to in paragraph 2b.13 (in addition to that provided in paragraph 2b.15) would

No.	Paragraph	Comment and suggested amendments (if any)
		be helpful.
30.	2b.26	While not a point directly relevant for FundCo, we do not think it is for the operator to demonstrate a credible disposal route, or rather that compliance by an operator with a waste transfer contract should automatically satisfy relevant requirements, for example here and at paragraph 2b.34.
31.	2b.35	We note that the Lump Sum Payment will not be finally ascertained for many years which increases uncertainty as to whether the Fund Assets will accumulate on schedule. It might be helpful for FundCo if the discount rate to be applied in relation to the Lump Sum Payment could be ascertained as early as possible to increase certainty.
32.	2b.36	Please provide clarification as to what is meant by "conservative, evidence-based" and "commensurate risk premiums". We suggest these are really substitutes for "prudent", and refer you to the first specific comment in this table on paragraph 30.
33.	2b.43 – Table 3	We note that it is likely some of the cost of the last item on page 50 ("transport of operational and decommissioning ILW for disposal"), i.e. that incurred after the Transfer Date, will be catered for by the Lump Sum Payment and is therefore only indirectly sourced from the Independent Fund. It would be helpful if clarification changes could be made.
34.	2c.4	<p>This paragraph suggests that a proposed structure for the FDP is set out in the Guidance. We query if this is correct or if the reference is merely to the list of items set out in the bullet points in this paragraph. Either way, clarification would be welcome.</p> <p>We do not think the first bullet point referring to "background information", and indeed the next two bullet points, is appropriate given the FDP will be legally binding and background information and the other information referred to could be a wide range of information, some of which may not be relevant and should not be constituted as a legally binding obligation.</p>
35.	2c.12	This provides that FundCo must itself be insolvency remote. It would be useful to have further clarification as to what might satisfy the requirement. We agree with the analysis here and query if insolvency remoteness could be adequately achieved if a Fund were an entity incorporated and owned in or through a jurisdiction outside of England, whereas if the Fund is an entity incorporated and owned in or through England then we consider section 56 of the Energy Act should give adequate comfort.
36.	2c.16	<p>We suggest the drafting here be tidied up to be consistent with the definition of Objective in paragraph 1.5.</p> <p>This could be achieved by replacing the words "Objective of" with "purpose of ensuring that operators make prudent provision for" before the word "accumulating".</p> <p>Above all, there should be no implication that the Fund is responsible if the Fund Assets turn out to be inadequate.</p>

No.	Paragraph	Comment and suggested amendments (if any)
37.	2c.20	<p>We believe the second bullet point requires amendment because it suggests that there must be liability for FundCo in the event that the Fund Assets do not in practice accumulate to meet the Objective.</p> <p>Regarding the eighth bullet point which contains a restriction on borrowing, we believe an exemption should be added to allow FundCo to enter arrangements ancillary to its anticipated day-to-day trading.</p> <p>Regarding the ninth bullet point, we do not envisage that the Government would be given any security over the assets of the Fund and we do not see what benefit that might give, given the insolvency remoteness provisions in section 56 of the Energy Act 2008.</p> <p>In relation to the tenth bullet point, we envisage that the operator would enter into a covenant to keep FundCo whole, rather than give an indemnity in favour of FundCo. Both should be permitted. In addition FundCo's arrangements with its directors may create or be deemed to create an employment relationship and ideally an exemption should be added to recognise this.</p>
38.	2c.28	<p>This paragraph provides that people appointed to a governance role in the Fund "would be expected to affirm their competence and... independence". We suggest clarification be added that these would be satisfied by the appointment of such persons being in compliance with the relevant requirements set out in the Articles of Association or equivalent governing documents for the Fund, which we envisage will be part of the FDP approved by the Secretary of State.</p>
39.	2c.29	<p>After "materially conflicts, or may" please add "materially" and after "potential" in the last line add "material", for consistency.</p> <p>We note the requirement that rules at least as strict as the Independence Principles of the UK Corporate Governance Code be applied to individuals involved in the management of FundCo. The fourth bullet point in paragraph 34 recognises the nuclear industry is relatively small so conflicts can be hard to avoid, a consideration we sympathise with, particularly in relation to the persons to be hired specifically for their technical knowledge in the nuclear sector. We welcome further clarification on this point to ensure that FundCo can appoint suitably qualified management to enable it to carry out its duties under the FDP Agreement.</p>
40.	2c.30	<p>We do not envisage that a corporate body would be appointed to govern FundCo but rather that the independent directors of FundCo will satisfy these requirements directly.</p>
41.	2c.31	<p>The second bullet point here provides that the operator should have no control over the succession of board members. It should be clarified that, in the event that all of the independent directors of FundCo resign at the same time, then the operator should be permitted to find and appoint a new independent director, subject to the terms of the Articles which we envisage will be part of the FDP approved by the Secretary of State.</p>

No.	Paragraph	Comment and suggested amendments (if any)
42.	2c.33	It is our understanding that an FDP may go into considerable detail as to the percentage of costs covered and the probabilistic basis of the cost estimate. It would be helpful if the Guidance (and FDP) clarified that compliance with relevant mechanisms set out in an FDP could be deemed to be prudent.
43.	2c.35	Because there is at present insufficient detail regarding the Waste Transfer Price and we understand the price may not be determined until the handover date or other relevant date it is not possible for there to be complete certainty around the target amount of the Fund. As a consequence of this FundCo cannot be sure of meeting the Objective. This is an example of why FundCo may not be able to "ensure" that the Fund Assets will be sufficient.
44.	2c.38	Although not directly an issue for FundCo, it could be clarified here that the paragraph is referring to payments into the Fund or to the FundCo by the operator before the operator services its debt and/or other costs, and that there should be an exception here to allow the operator to pay essential operating costs.
45.	2c.39	As noted in the general comments, FundCo would not expect to "set or approve the contribution schedule with reference to the Investment Strategy" except in so far as FundCo is involved in negotiating the FDP. Rather FundCo envisages that the FDP approved by the Secretary of State will contain a clear mechanism detailing when contributions would need to be changed, and FundCo would seek to enforce the mechanism against NNBSGenCo. This comment also applies to paragraph 2c.44.
46.	2c.50	As noted in the general comments, we do not envisage that FundCo will be making individual investment decisions.
47.	2c.51	This provides that FundCo should take account of the "suitability" of investments having regard to various factors. As noted in the general comments, we believe this goes too far, and FundCo should just be limited in this area to ensuring that the Investment Strategy is being complied with.
48.	2c.62	As noted in the general comments, we do not envisage that FundCo should be required to consider whether a reduction in contribution rate or withdrawal of surplus assets is prudent. Rather, where applicable, FundCo should just be required to check that the relevant mechanisms in an FDP approved by the Secretary of State are being complied with.
49.	2c.64 and 2c.69	As noted in the general comments, the FDP cannot of itself "ensure" that Fund Assets will be sufficient. References to "ensure" should be changed to "with a view to ensuring" or a similar formulation.