

Part 2c: Funding Arrangements Plan Guidance

Content of the FAP

- 2c.1 This section of the Guidance contains guidance for operators of new nuclear power stations to assist them in drawing up an FAP. The FAP is that part of the FDP which addresses those matters referred to in section 45(7)(c) of the Energy Act (namely the security to be provided in connection with the estimates of costs of the designated technical matters). Together with the separate DWMP Guidance in Part 2b of this document, this Guidance provides information about the preparation and content of an FAP.
- 2c.2 The FAP should set out the operator's detailed arrangements for one or more Funds to deliver sufficient assets to meet the estimated costs of carrying out the plans as set out in the DWMP for the designated technical matters. In doing so, the FAP should set out details for establishing, contributing to, maintaining, managing and administering the Fund and for making disbursements from it, together with all or any other forms of additional security to address risks such as the insufficiency of the Fund.
- 2c.3 It is not intended that this Guidance be unduly prescriptive as to the legal structure and administrative arrangements for the Fund, nor is it to set out the relative advantages and disadvantages of possible vehicles which may be capable of discharging the various functions of the Fund in achieving the Objective and meeting the Guiding Factors.
- 2c.4 It is for the operator to decide how to structure its FAP. If, however, an alternative structure to the one set out below is used the operator should make clear how their proposal covers the following items:
- [\[Background information](#)
 - Description of Fund structure and constitutional arrangements
 - Explanation of Fund governance] *[NNB Note: NNB intends to provide an explanation of fund governance. However NNB considers that explanations (and background information etc.) are not appropriate for inclusion in a document which is intended to be legally binding and with criminal liability for breach. NNB proposes that the Guidance should be amended to ensure that it is only a requirement to include such information in the background/supporting material in an FDP Proposal which is a separate and non legally binding document. The reasons for this are the same as explained in NNB's note to paragraph 1.19 above.]*
 - Target Value for Fund and contribution schedule to the Fund
 - Process for reviewing the funding arrangements
 - Fund Investment Strategy
 - Payment and disbursement policy
 - Financial security against early decommissioning risk and Fund insufficiency
 - Proposals for remedial action to make good any shortfall in the Fund during station generating life

- Any future change in ownership or control of the operator or site
 - Winding up the Fund
- 2c.5 The FAP, as part of the FDP submitted to the Secretary of State for approval, should be supported by documents setting out detailed analyses and justification of information provided under each of the subheadings given under the preceding paragraph and the fully termed agreements between the parties involved. *[NNB Note: The supporting documents are where the operator should set out the information set out in the first three bullets of paragraph 2c.4 above rather than in the legally binding FAP.]* It would assist the Secretary of State and NLFAB if an explanation could be provided alongside the FDP as to how any tax and accountancy analysis has driven the development of the operator's proposed FDP.
- 2c.6 The remainder of this part of the Guidance provides further information to assist operators in preparing and submitting the FAP component of the FDP for approval.

Creation of the Fund

- 2c.7 Further to the Objective set out in Part 1, the Secretary of State will expect that, prior to the moment when any reactor core of the nuclear power station to which the FDP relates is taken critical for the first time, the operator will have created the Fund to accumulate, invest and manage payments received to meet the costs of the designated technical matters.

Structure of the Fund

- 2c.8 In order to gain approval for its FDP the operator will be expected to propose a structure for the Fund which meets the Objective and which complies with the Guiding Factors.
- 2c.9 Any structure proposed must be demonstrably capable of accumulating and receiving sufficient funds to meet the plans as set out in the DWMP for the designated technical matters.
- 2c.10 Any structure proposed must ensure at all times the independence of the Fund (as defined in the paragraph 1.20 (Independence of Fund) in Part 1 of this Guidance) from the operator and protection from claims by the operator, other than in accordance with the FDP.
- 2c.11 The Fund and the Fund Assets must also be protected from the operator's creditors in the event of the operator's insolvency or the insolvency of an associated company of the operator. Ensuring that the Fund is a legally separate entity from the operator or from an associated company of the operator and that the Fund does not owe any obligations directly to any creditors of the operator would assist in meeting the principle in relation to insolvency remoteness.
- 2c.12 The Fund must also itself be insolvency remote such that it is protected from claims against the Fund Assets on its insolvency (see further paragraph 2c.20 below as to the factors which would assist in establishing the Fund as insolvency remote). [\[Establishing the Fund within the jurisdiction of the Act would assist in meeting the principle in relation to insolvency remoteness of the Fund. Establishing the Fund elsewhere could reduce insolvency remoteness by making the Fund vulnerable to changes in local insolvency law as well as depriving the Fund of the protection conferred on it under section 56 of the Energy Act. Further, since certain forms of fund structure \(such as trusts\) are not widely recognised in civil law jurisdictions outside the UK, there are also risks that these kinds of](#)

structures could in future be re-characterised such that they would no longer be insolvency remote.¹ *[NNB Note: NNB agrees with the bracketed wording. It expresses one of the key disadvantages of a Scottish Law public purpose trust as a Fund vehicle for the FDP].*

- 2c.13 An operator may decide to create a single Fund, or establish separate Funds for (a) the operator's decommissioning and waste management costs and (b) the operator's waste disposal costs. In either scenario, there must be transparency, and separate accounting and reporting of the two sets of liabilities (decommissioning and waste management on the one hand and waste disposal on the other).
- 2c.14 A Fund may be set up for each new nuclear power station or for a fleet of stations where they are under the same ownership. Where a Fund is set up for a fleet of stations, separate and transparent accounting of the liabilities and, if appropriate, the apportionment of assets for each site will be necessary. Any such arrangements would also have to meet the Objective and the Guiding Factors.
- 2c.15 Alternatively, an operator or a number of operators may set up a joint Fund arrangement in order to share administrative costs provided that such arrangement meets the Objective and complies with the Guiding Factors. If a joint Fund arrangement is used to meet the Objective for a number of stations or operators, then the individual Fund Assets must be accounted for separately.

The Role of the Fund

- 2c.16 Whilst the operator is ultimately responsible for discharging its own liabilities, the Fund should be established with the primary Objective of accumulating sufficient assets to meet the plans as set out in the DWMP for the designated technical matters.

[NNB Note: NNB notes that the primary objective of the FDP (as set out in paragraph 1.5) is 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 Fund is part of the mechanism to ensure this objective is met but the obligation to ensure there are sufficient assets rests with the operator.]

- 2c.17 The FAP should set out the respective roles and responsibilities of the operator and the Fund and confer on those persons responsible for governance of the Fund powers and duties that are appropriate to the role. In particular, the FAP should set out the powers and duties of the relevant parties in relation to (but not limited to):
- setting the rate of contributions to be made by the operator to the Fund;
 - investing, accumulating and managing Fund assets;
 - reporting to the operator and to the Secretary of State on the performance and sufficiency of the Fund (in accordance with the proposed Regulations and also having regard to the Guidance (see section on "Annual report and quinquennial report" in Part 2a of this Guidance)); and
 - disbursement of assets.
- 2c.18 The constitutional documents of the Fund should set out the powers, duties of and restrictions on the Fund in a manner such that these aspects cannot be revised, except with the approval of the Secretary of State through the submission of a modification to the FDP.

- 2c.19 The Secretary of State will also expect to see the Fund's activities ring-fenced from the operator and its creditors and thereby insulated from liabilities and obligations owed to third parties by the operator.
- 2c.20 Under its constitutional documents restrictions applicable to the Fund will be expected to include requirements to:
- ensure Fund Assets are only applied for the purposes set out in the FDP;
 - impose duties on the Fund to ensure the Fund Assets accumulate to meet the Objective; *[NNB Note: See comments in relation to paragraph 2c.16, above]*
 - limit the activities of the Fund to the implementation of the FDP arrangements;
 - control change to the permitted purpose and activities;
 - maintain the Fund's own legal identity, including to maintain the Fund's own separate books, records, financial statements and accounts;
 - not guarantee or otherwise be obliged for the debts of others;
 - not pledge the Fund's credit for the benefit of others;
 - prohibit or restrict the Fund from [borrowing money] or issuing securities; *[NNB Note: NNB notes that whilst it would be appropriate to restrict the Fund from borrowing money to make investments or cover a shortfall, short term borrowing may be required to participate in ordinary course trading.]*
 - not make loans or advances or pledge (or provide security in respect of) its assets other than to the Government as security for its FDP;
 - avoid entering into agreements (including employment contracts) under which the Fund may become liable to third parties, without an indemnity from the operator for liabilities arising out of such agreements; and
 - ensure any relationship with others is on bona fide, arm's length terms.
- 2c.21 The operator will be expected to calculate the estimated costs of carrying out the plans as set out in the DWMP for the designated technical matters. The Fund will be expected to satisfy itself at least as to whether:
- the estimated costs of the plans set out in the DWMP for the designated technical matters have been appropriately verified; and
 - the contributions, given the proposed Investment Strategy and likely investment returns, are likely to accumulate sufficient assets to meet the cost estimates.

Ownership of the Fund

- 2c.22 The ownership of the Fund should be independent of the operator and its associated companies as set out in Part 1 of this Guidance. If an element of operator ownership of the Fund is proposed, the Fund structure should ensure consistency with the Objective and Guiding Factors set out in Part 1 to this Guidance.

- 2c.23 The Fund must be insolvency remote and any entity within the overall structure (including any with ownership/membership interests in the Fund) should itself be established as insolvency remote from the Fund.

Governance of the Fund

- 2c.24 The Secretary of State will need to be satisfied that suitable arrangements are in place for the governance of the Fund. This includes not only such arrangements for the Fund itself (i.e. the body responsible for investing, accumulating and managing assets received) but also for any entity (such as a trust) with ownership or membership interests in, or control of, the Fund.
- 2c.25 The arrangements that the Secretary of State will expect to see included in the constitutional arrangements or structure of the Fund as regards to those responsible for the governance of the Fund will include:
- a properly constituted board or equivalent;
 - a clear delineation of respective duties;
 - appropriate restrictions on powers; and
 - provisions to ensure that those with governance responsibilities for the Fund act with the appropriate level of skill and care in the performance of their functions.
- 2c.26 The governance arrangements will depend on the Fund structure adopted. Those responsible for the governance of the Fund should, however, be competent to perform that role, and the clear majority of them must be independent of the operator. Governance of the Fund should also be independent of the Government. The Secretary of State would therefore not expect to have any role in the appointment process of those responsible for Fund governance beyond being satisfied that both the appointment criteria and the continuing obligations of those responsible for Fund governance (both of which operators should include in the FAP) deliver the expected level of independence and competence.
- 2c.27 The operator must not have either direct or indirect control of the Fund. The Secretary of State is therefore unlikely to be satisfied by funding arrangements which leave control of the Fund in the hands of the operator or a majority of persons who are not independent of the operator. If the operator appoints non-independent persons to a governance role, then they must be in a minority.

[NNB Note: Whilst NNB agrees that there will always be a majority of independent persons in the Fund, all persons must act in accordance with the approved FDP.]

- 2c.28 In all cases, those persons appointed to a governance role would be expected to affirm their competence and (with the exception of those appointed in a non-independent role) independence before accepting that appointment, and should be subject to a requirement to maintain their independence for the duration of the appointment. If during the appointment a person can no longer demonstrate independence and competence, they should not continue in the role.
- 2c.29 Maintaining independence will include requiring those persons to avoid any situation (except in the case of non independent directors) in which that person has, or could have, a direct or indirect interest that materially conflicts, or may conflict, with their duties to the Fund. In the case of individuals, the Secretary of State would expect the individual to be

independent of the operator according to principles at least as stringent as those set out in Independence Principles¹ of the UK Corporate Governance Code. Without prejudice to the foregoing, and with the exception of those appointed to a non-independent role, neither an individual (together with his close relatives and family trusts) nor a corporate body (together with its associates) should hold (directly or indirectly) any investment in the operator or any of its associated companies which gives rise, or could reasonably be perceived to give rise, to an actual or potential conflict of interest.

- 2c.30 Competence can also be demonstrated in a number of ways. Appointees should be demonstrably fit and proper persons with the necessary education, experience and skills to hold the position. In the case of the appointment of a corporate body to govern the Fund, the Secretary of State would expect that the operator could demonstrate that the board of the corporate body has the requisite level of experience and resources (including individuals who demonstrate the same qualities described above) to manage the role of the UK Corporate Governance Code. Without prejudice to the foregoing, and with the exception of those appointed to a non-independent role, neither an individual (together with his close relatives and family trusts) nor a corporate body (together with its associates) should hold (directly or indirectly) any investment in the operator or any of its associated companies which gives rise, or could reasonably be perceived to give rise, to an actual or potential conflict of interest.
- 2c.31 The arrangements under which the Fund is established should set out measures to ensure its longevity and continuance for the purpose for which it has been established including appropriate checks and balances as regards the succession of directors, members and trustees (as applicable) within the Fund structure. The following would assist in demonstrating independence:
- fixed term contracts which are renewable for a maximum number of terms;
 - absence of control by the operator over board member succession;
 - staggered appointment terms; and
 - provision for the removal of a director for a breach by it of the FDP or a breach of the independence requirements.

Target value for the Fund Assets and contributions to the Fund

Target value for the Fund

- 2c.32 The Secretary of State would expect the operator to set out in the FDP how it would make good any shortfall or risk of shortfall in the accumulated assets held by the Fund.
- 2c.33 For liabilities in respect of decommissioning and waste management, to minimise the risk that the funds accumulated are insufficient, the Fund Assets will be expected to be based on prudent assumptions, to accumulate at least 100 per cent of the estimated costs of carrying out the plans as set out in the DWMP for the designated technical matters.

¹ The relevant principles are currently contained section B.1.1 of the UK Combined Code http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf

- 2c.34 The Secretary of State will expect the Target Value for the Fund Assets to include a [prudent risk-based contingency] which the Fund would be expected to reassess periodically. *[NNB Note: See NNB note at paragraph 1.22 regarding 'prudent risk-based contingency', above.]*
- 2c.35 The target amount for the Fund to meet the costs of waste disposal will be based on the Waste Transfer Price and the agreed schedule according to which payments must be made.
- 2c.36 The Secretary of State will expect the first payment to be made to the Fund no later than the date on which the reactor core is taken critical for the first time.
- 2c.37 The operator should set out, by way of the FAP, its proposals to ensure that in reasonable time before the date on which the station is expected to permanently cease electricity generation, there are assets in the Fund which, having regard to the expected investment performance of the Fund, will be sufficient to meet the estimated costs of carrying out the plans as set out in the DWMP for the designated technical matters.

Contributions to the Fund

- 2c.38 Payments to the Fund should be viewed as an essential matter during operation which must be serviced before debt and/or [other costs] as appropriate. *[NNB Note: It is essential that the operating costs for running the nuclear plants are prioritised as a matter of public safety and such costs must therefore always be paid in priority to the FDP. However, subject to this, NNB is comfortable with the concept of prioritising FDP contributions in this way (on an annual basis). The Guidance would benefit from clarification on this point.]*
- 2c.39 To satisfy the Secretary of State that the operator will be capable of meeting the Objective, the FAP should set out the level of and schedule for contributions which the operator will make to the Fund and the basis on which modifications to the contribution schedule will be determined. The Secretary of State will expect the Fund to set or approve the contribution schedule with reference to the approved Investment Strategy (see section on "Investment Strategy" in this part of the Guidance).
- 2c.40 Operators will need to ensure that the FAP takes account of both direct or indirect taxes. That will include corporation tax, income tax and/or capital gains tax on income and gains of the Fund, and the incidence of VAT on the acquisition of goods and services for the purposes of, and otherwise funded by, the Fund as well as (in appropriate cases) the incidence of VAT on supplies made by the FDP itself. Operators will also wish to consider the tax consequences of contributions made to the Fund and any payment received from the Fund, as well as the incidence of VAT of supplies of goods made to, or received from, the FDP.
- 2c.41 The FAP may set out the circumstances in which contributions to the Fund may be revised downwards, or surplus assets withdrawn from the Fund (see section on "Payment and disbursement policy" in this part of the Guidance).
- 2c.42 The Secretary of State anticipates that the preparation, revision and approval of FDPs will be a multi-stage process in which operators will have to satisfy him² on a number of constituent parts of an FDP consecutively. It will be clear from what is set out above that

² The Secretary of State will call on the advice of the NLFAB in assessing the constituent parts of an FDP.

the Investment Strategy (for example) and the Target Value of the Fund will need to be drawn up before the contribution schedule can be formulated.

- 2c.43 The Secretary of State will also expect to be provided with the views of the Fund on the arrangements set out in the FDP prior to approval of the FDP. He will therefore expect at least some of those persons responsible for managing the Fund to be identified or appointed before proposals on the Investment Strategy and contribution schedule are made. The Secretary of State will expect operators to make proposals as to how far in advance of the commencement of electricity generation those persons will need to be appointed or identified.

Dispute Resolution

- 2c.44 The terms setting out the relationship between the operator and the Fund should recognise that it will be for the Fund to set or approve the contribution schedule based upon the Investment Strategy put forward by the operator and approved in the FAP. The Secretary of State recognises the possibility of disputes arising between the operator and the Fund, particularly given the nature of the liabilities and costs involved and the length of time before those liabilities are expected to crystallise.
- 2c.45 The FAP should therefore include a fully scoped dispute resolution procedure to facilitate the timely and cost-effective resolution of disputes between persons with obligations under the FDP in respect of those matters.
- 2c.46 Whatever form (or forms) of dispute resolution are chosen the FDP should make clear whether the procedure and outcome is binding; the scope of the procedure (i.e. the disputes to which it relates if it does not relate to all disputes); and the time scales within which relevant steps have to be taken by the parties.

Investment Strategy

[NNB Note: NNB considers the investment strategy requirements set out below to be over-prescriptive. There should be a clear distinction between the high level investment assumptions which it is appropriate to fix on approval and the lower level strategy which would be amended pursuant to the FDP to optimise investment management within the confines of the approved investment strategy without frequent reversion to the SoS.]

- 2c.47 The Secretary of State will expect the FAP to set out an Investment Strategy in an appropriate degree of detail. The Investment Strategy should be designed to ensure that the assets which the Fund receives from the operator will be appropriately invested to generate the sums necessary to meet the estimated costs of carrying out the plans as set out in the DWMP for the designated technical matters.
- 2c.48 The Investment Strategy will be set by the operator in consultation with the Fund and will be included in the FDP, by way of the FAP, for approval by the Secretary of State; the Secretary of State would expect to be informed of the views of the Fund as part of his decision making process. As a minimum, the Secretary of State would expect the Investment Strategy to include the Fund's:
- investment objectives;
 - risk exposure limits and principles for the definition, measurement, mitigation and monitoring of risk;

- high-level asset allocation strategy for the lifecycle of the nuclear power station;
- permitted and prohibited asset (or class of assets) types and projected investment returns on each asset class. The FAP should set out the basis for the asset allocation strategy and include an economic and/or statistical justification for the projected investment returns;
- decision-making authorities, processes and procedures regarding investment decisions;
- performance measurement criteria and benchmarks;
- policy on realising investments;
- policy on exercising rights (including voting rights) attached to investments;
- policy on the extent to which social, environmental or ethical considerations are taken into account in investment decisions;
- mandates to all advisers and managers and associated fee and liability structures; and
- reporting requirements.

2c.49 The Investment Strategy must *[NNB Note: Non prescriptive language should be used]* recognise and address associated risks, including:

- the likelihood of the strategy failing to achieve the target return;
- the risk of failing to meet its overall objectives on an ongoing basis;
- sponsor covenant risk/country risk;
- operator covenant risk;
- risk of inadequate diversification or inappropriate investment (concentration risk);
- issuer risk;
- currency and interest rate risk;
- liquidity risk;
- inflation risk;
- custodian risk; and
- organisational risk of the managers and advisers.

2c.50 In making or approving investment decisions, the Fund should act prudently having obtained appropriate professional advice and with due regard to the Investment Strategy. The Fund will not be restricted from delegating investment decisions to those with the skills, information and resources to take them effectively but will remain responsible for ensuring that investments are made according to the approved Investment Strategy.

[NNB Note: The Guidance should also allow for the situation in which the operator would be proposing the detailed investment strategy subject to the approval of the Fund that the proposed detailed investment strategy is consistent with the approved FDP.]

- 2c.51 The Fund should take account of the suitability of investments having regard to:
- the nature of the operator's future liabilities (especially the influence of inflation);
 - the expected due date for disbursements by the Fund;
 - the fact that the operator's liabilities are expected to be in Sterling;
 - the certainty of expected future disbursements from the Fund; and
 - the frequency and level of contributions to the Fund.
- 2c.52 It will also be necessary for operators to explain the rationale for the proposed Investment Strategy and to justify the assumptions that have been made about returns on investments made by the Fund as prudent.
- 2c.53 The operator, in consultation with the Fund, should review the Investment Strategy on a regular basis to ensure the continued appropriateness of the investment arrangements. The FAP should detail responsibilities and processes for reviews of the Investment Strategy. Changes to the Investment Strategy will be a modification to the FDP which will require approval by the Secretary of State under section 49 of the Energy Act.

Payment and disbursement policy

Decommissioning and Waste Management liabilities

- 2c.54 The disbursements policy of the Fund must be consistent with the section on 'Restrictions on use of Fund Assets' in Part 1 of this Guidance.
- 2c.55 Even with a contingency for risk and uncertainty built in, it is important that appropriate governance is exercised by the Fund in making disbursements from the Fund. The FAP should set out the disbursement policy for the Fund, including:
- the governance arrangements under which assets would be disbursed by the Fund in line with the approved FDP;
 - the persons to whom payment will be made; and
 - the mechanism for making and auditing payments.
- 2c.56 The FAP should address when and on what basis assets may be disbursed. Safeguards must be in place to ensure that assets are disbursed only in accordance with the FDP and that such payments are auditable and confirmed as appropriate.
- 2c.57 The FAP should set out the Fund's governance arrangements for overseeing the disbursement of Fund Assets. The Fund will be expected to review progress against the DWMP as set out in the FDP and, to the extent that a shortfall in funding is anticipated, the operator will be expected to fund the deficit.

- 2c.58 The operator will be expected to demonstrate to the Fund that it has appropriate procedures in place for checking that Fund Assets disbursed by the Fund are being applied against allowable DWMP costs and that milestones for achieving the DWMP are being met.
- 2c.59 The obligation on operators to provide [annual] reports will continue when assets are being disbursed against allowable DWMP costs. *[NNB Note: In NNB's view, triennial reporting during this period would be adequate and proportionate rather than the proposed annual reporting.]* In such circumstances, changes recorded in the annual report must capture the differences between the payments from the Fund and the reduction in the operator's liabilities, as these involve changes to the cost estimates and changes to the security provided to meet such costs. The annual report may also set out the difference between the actual costs paid and the budgeted costs. The annual report should be prepared in consultation with the Fund so that they can provide input in relation to the changes to the security provided to meet the estimates of costs and the adequacy and accuracy of the information provided in the report in this respect.
- 2c.60 In circumstances where an operator's expenditure does not reduce the operator's liabilities by the required amount, it would be advisable for the annual report to set out how the operator intends to mitigate this use of additional funding and it should propose, if appropriate, a modification to the DWMP.
- 2c.61 Once all the operator's liabilities relating to the designated technical matters have been fully discharged and the operator or any other person with obligations under the FDP have been released from their obligations in accordance with section 64 of the Energy Act, the Fund can be wound up in accordance with the section on "Winding up of the Fund" in this part of the Guidance.
- 2c.62 The FAP may set out the circumstances in which contributions to the Fund may be revised downwards, or surplus assets withdrawn from the Fund where the actuarially assessed value of the Fund is significantly greater than its Target Value at that point in time. These circumstances may include where the Fund's growth has significantly outperformed expectations and/or the technical solutions available for decommissioning reduce the anticipated costs substantially. The FAP should set out the extent to which the Fund will be required to consider whether a reduction in the contribution rate or withdrawal of surplus assets would be prudent, and what protections are in place if the Fund is not required to do so.

Change in ownership or control of the nuclear power station operator

- 2c.63 The FAP must be robust where there is a change of control or ownership of the operator or the Fund and, in particular, must set out safeguards to ensure that assets are not improperly disbursed by the Fund in this event.

Sufficiency of Fund

- 2c.64 The FDP, by way of the FAP, must set out the mechanisms it proposes to utilise and the Investment Strategy it intends to adopt to ensure that sufficient assets will be available in the Fund to meet in full the costs of the designated technical matters, including mechanisms to enable liabilities to be met in full and on their due date in the event of an insolvency of the operator or an associated company.

[NNB Note: NNB welcomes the recognition that liabilities are met on their 'due date' rather than 'at any date'.]

- 2c.65 The Secretary of State will expect mechanisms to be put in place to mitigate against the risk of the Fund Assets being insufficient, including for example, where the Fund Assets are:
- insufficient against the Target Value [at any date] during the generating lifetime of the station; *[NNB Note: This requirement potentially conflicts with the statement in 2c.64 which recognises that liabilities should be met on their due date.]*
 - insufficient against the Target Value at the date the station reaches the end of its generating life; and/or
 - inadequate to meet the operator's liabilities during decommissioning and until all liabilities have been fully satisfied.
- 2c.66 Insufficiency [at any time] *[NNB note: See comments immediately above]* might arise because, for example:
- the power station has to be permanently closed and decommissioned early for technical reasons; or
 - where there is a shortfall in the Fund as a result of either a re-assessment of the operator's liabilities or a reduction in the value of the Fund Assets; or
 - lower than anticipated investment returns are achieved so that contributions have been insufficient.

Protection against an insufficient Fund

- 2c.67 As noted above, under the existing law an operator is responsible for all the liabilities in respect of decommissioning, waste management and waste disposal that arise from the operation of its nuclear power station.
- 2c.68 Under the provisions of the Energy Act, the Secretary of State may, under certain circumstances, seek to impose obligations on associated companies (such as a parent company), by proposing a modification to the FDP. This could happen if the operator fails to comply with its funding obligations under the FDP. Furthermore, under section 64 of the Energy Act the obligations on an operator (or former operator) under an FDP remain until the Secretary of State explicitly releases the operator from its obligations, even if it no longer holds a site licence. The Secretary of State would expect to use these powers with the aim of addressing the risk of insufficiency of the Fund, for example, in a case where the operator was a member of a group of companies or a joint venture company and it alone was not capable of addressing such risk to the Secretary of State's satisfaction.
- [NNB Note: NNB notes that as set out in paragraph 7, Government is considering amending the Secretary of State's power under the Energy Act 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 exercised.]*
- 2c.69 In addition, the operator must satisfy the Secretary of State that effective and transparent arrangements are in place, no later than when the reactor core is taken critical for the first time, as part of the approved FDP to ensure that the operator will meet its obligations to discharge its liabilities in full. In the FAP an operator must set out how it will manage and

mitigate the risk that there are insufficient funds. An operator's proposals will be assessed by the Secretary of State on a case by case basis, by reference to the Objective and the Guiding Factors set out in Part 1 of this Guidance, to ensure that the risk of any recourse to public funds whatsoever remains remote at all times.

- 2c.70 The operator must make provision to manage and mitigate the risk of the Fund being insufficient (as set out in the section on "Sufficiency of Fund" in this part of the Guidance). Security against such risk could take the form of a material upfront endowment to the Fund (no later than when the reactor core is taken critical for the first time) together with a provision to front load contributions to the Fund during the early years of the power station's generating life. This may be an acceptable form of security against such risks where it is one amongst several elements of a proposal in this regard and provided it is structured on appropriate terms.
- 2c.71 Alternative forms of security, such as insurance or financial instruments (from an appropriate financial institution) or [security over cash flows from the site] may be acceptable to the Secretary of State to make up a shortfall in the assets held by a Fund, where it is one amongst several elements of a proposal. *[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.]*
- 2c.72 Parent company guarantees, on their own, may not be an acceptable form of security as protection against an insufficient Fund. The Secretary of State might find a parent company guarantee acceptable where it was one amongst several elements of a proposal in this regard. It would be essential for the parent company to have an acceptable credit rating at the time the FDP was first approved; that arrangements are in place to monitor the credit worthiness of the parent company; and if the parent company's credit rating should fall to an unacceptable level, the operator must immediately notify the Secretary of State and ensure supplemental arrangements, which are acceptable to the Secretary of State, are in place.

Winding up of the Fund

- 2c.73 An Operator will be required to set out in the FDP when and by what means the Fund will be wound up.
- 2c.74 The Secretary of State would expect the Fund to be wound up when:
- the operator and all other persons with obligations under the FDP have been released from their obligations in accordance with section 64 of the Energy Act;
 - all liabilities which it was established to satisfy have been fully paid and discharged and there is no risk of contingent liabilities arising, or alternative arrangements to meet those liabilities, which are acceptable to the regulators and the Secretary of State, have been put in place; and
 - any surplus assets have been disbursed as set out below.

- 2c.75 Further to the preceding paragraph, the Fund may also be wound up if the FDP arrangements are modified (as approved by the Secretary of State) so as to use a different Fund vehicle. For example, migration of the FDP structure from one form to another because of changes to insolvency law (such that the Objective in Part 1 of this Guidance is no longer met) which necessitates the winding up of the Fund and the creation of another.
- 2c.76 It is expected that any surplus assets held by the Fund once decommissioning is complete and all liabilities in respect of the designated technical matters have been discharged will be disbursed to the operator or as otherwise set out in the FDP.
- 2c.77 As set out in the section on Target Value of the Fund any shortfall in the Fund must be made good by the operator. *[NNB Note: NNB does not understand the relevance of this paragraph 2c.77 to the winding up of the Fund. Is this paragraph in the right section?]*