

## **Part 2: Guidance under section 54(5) of the Energy Act 2008**

### **Part 2a: Guidance relating to the Funded Decommissioning Programme as a whole**

#### **Introduction**

- 2a.1 To assist operators in the development of an FDP under section 54(5) of the Energy Act 2008 the Secretary of State may publish Guidance about the preparation, content, modification and implementation of an FDP. This section of the Guidance is applicable to the Decommissioning and Waste Management Plan (the DWMP), which is covered in more detail in Part 2b of this Guidance, and the Funding Arrangement Plan (the FAP), which is covered in Part 2c of this Guidance.

#### **Publication of the FDP and reports**

- 2a.2 The Secretary of State, mindful of the public interest in such arrangements, would expect the operator to publish as much of the FDP as possible except for material of a sensitive nature. The operator should, therefore, set out in the FDP proposals regarding publication, clearly identifying those issues that are commercially confidential or may have security sensitivities.
- 2a.3 The Secretary of State also expects annual and quinquennial reports to be published by the operator taking into account, as appropriate, commercial confidentiality and security considerations. The operator should set out in the FDP proposals regarding publication. The Secretary of State expects that other relevant documents will also be made public where possible. It should be noted that the entire FDP and documents related to it will be subject to the Freedom of Information Act 2000 should requests for information be made in relation to them.

#### **Record keeping**

- 2a.4 The operator should demonstrate to the Secretary of State that, as part of its record keeping processes, it will maintain an accurate record of the design of the nuclear island(s) and any other aspect of the site which gives rise to liabilities to be included in the DWMP. Such records should be kept up-to-date, taking into account plant modifications and other relevant technical and operational changes. These processes may be based, where appropriate, on the record keeping processes undertaken to ensure compliance with site licence and environmental permitting obligations. However, where such processes do not adequately record changes to the waste inventory, or liabilities in respect of decommissioning and waste management, separate processes will be required. *[NNB Note: The second part of paragraph 2a.4 is not necessary as the Nuclear Site Licence record keeping requirements are comprehensive. Further, NNB would not expect the Secretary of State to want to form his own judgments about the adequacy of record keeping nor for the FDP to have standards that were different than required for a Nuclear Site Licence. Otherwise this risks dual regulation.]*
- 2a.5 Such systems will assist the operator in demonstrating that it has in place comprehensive, transparent and effective arrangements for monitoring and capturing operational and technical changes that may trigger changes to the DWMP.

## Annual report and quinquennial report

- 2a.6 The operator must compile annual and quinquennial reports which are compliant with the Regulations made under the Act<sup>1</sup>. *[NNB Note: NNB does not consider that the FDP Regulations are currently practicable from a timings perspective. In NNB's view, the timescales do not allow sufficient time/flexibility to suspend deadlines for appropriate consideration and verification of the reports, especially if there are any issues of disagreement between the parties. Furthermore, the Fund will be consolidated with operators' accounts (whatever the structure) and therefore all financial information (including the information required for submission in the annual/quinquennial review) will be prepared on the basis of an operator's financial year. For accounting and transparency reasons, it would be sensible for annual and quinquennial reporting periods to be linked to an operator's financial year. Therefore, NNB proposes that there should be a new consultation on the FDP Regulations in order to respond to these timing issues and others raised in response to this consultation.]* The purpose of the reports is to ensure that the Objective continues to be met and that the Secretary of State is made aware of changes of scope of the FDP over the reporting period. *[NNB Note: The purpose of the reports is to ensure that "the arrangements in place continue to make prudent provision (on the basis set out in the FDP and approved by the Secretary of State as meeting the Objective)" and that the Secretary of State is made aware of changes of scope of the FDP over the reporting period, not to ensure that "the Objective continues to be met".]*
- 2a.7 It is expected that operators will consult with the Fund, as appropriate, when preparing the reports, particularly where there are any substantive differences of opinion. However, the reports are to be submitted by the operator who will be responsible for their contents. Reports should be addressed to both the Secretary of State and the Fund. The Regulations require as part of the annual and quinquennial reports the provision of a verification report on certain matters. This verification report should also be addressed to the Secretary of State and to the Fund. *[NNB Note: NNB considers that verifiers may not want to address reports to the Secretary of State. In NNB's view, paragraph 2a.7 should track the statutory language in relation to such reports (i.e. that "the Secretary of State may for the purposes of carrying out functions under Chapter 1 of Part 3 of the Energy Act rely on a verification report"). Furthermore, it is not strictly true to say that the FDP Regulations always require a verification report (see NNB notes at paragraph 2a.22 below). Paragraph 2a.9 below is correct on this point.]*

*[NNB Note: NNB considers that the quinquennial review is an appropriate interval to carry out detailed consideration of the DWMP. Given the timescales involved it is important that operators are not made to engage in onerous procedures for annual reports which will have no practical benefit. NNB therefore considers that it would be reasonable for an FDP proposal to be based on a requirement to only include those changes to cost estimates in the DWMP for the designated technical matters which exceeded a de minimis level, e.g. 1% above the approved escalation assumption (e.g. the RPI assumption for that year) for either decommissioning and waste management and/or waste disposal. This should not be something prescribed in FDP Regulations as, like many other factors, the Secretary of State's approval of an FDP is likely to depend on the overall package or measures. However, in NNB's view it would be helpful if the*

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<sup>1</sup> The Government has proposed text for the Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2010 (the proposed Regulations) and expects to lay them in the House subject to parliamentary approval in time for them to come into effect on 6 April 2011.

*Guidance recognised that in the interests of a proportionate and reasonable approach to reporting, it is acceptable for operators to propose appropriate de-minimis materiality thresholds for annual reporting.]*

## **Annual report**

- 2a.8 The purpose of the annual report is to set out and summarise [any changes] over the reporting period to the cost estimates in the DWMP for the designated technical matters and any changes to the security provided to meet those costs. In relation to the latter, the Secretary of State would expect to be provided with details of changes to the performance of such security ([which includes] details of changes to the performance of the Fund) over the course of the reporting period.

*[NNB Note: NNB believes that for practical purposes there should be a de minimis level below which changes to cost estimates in the DWMP to the designated technical matters are not required to be notified. In NNB's view this should therefore refer to the annual report setting out and summarising "material changes (if any)" rather than "any changes". The reference to changes to the performance of security including details of changes to performance of the Fund suggests that the term 'security' is being used to mean something more than the Fund value (although it is not clear what). In NNB's view, the wording "which includes" should be replaced with "i.e.".]*

- 2a.9 Where the annual report contains changes to the cost estimates, the operator must include within it a verification report in respect of such changes. The verification report should assess such changes to determine if the [estimates of costs are prudent]. *[NNB Note: NNB considers that the language should track section 45(7)(b) of the Energy Act (i.e. "estimates of the costs likely to be incurred in connection with the designated technical matters".) The current reference to "prudence" in this paragraph is undefined and not linked to the terms of the approved FDP. It therefore raises problems with regard to the scope of the verification and the verifier's mandate. NNB considers that verification should be linked to the approved terms (approved as meeting the 'Objective' by the Secretary of State).]*
- 2a.10 The annual report may also include notification of modifications made to the FDP for which, pursuant to the Regulations, the Secretary of State's approval is not required. Operators, however, need to bear in mind that in accordance with the Act the modification to the FDP in question cannot take effect earlier than when the notification is given.
- 2a.11 In the course of preparing the annual report, the operator is expected to consult the Fund in relation to any changes to the security provided to meet the estimates of costs which are reported on and the adequacy and accuracy of the information provided in the report in this respect.
- 2a.12 An annual report is not required in the year that a quinquennial report is due.

## **Quinquennial report**

- 2a.13 The purpose of the quinquennial report, which is a detailed and comprehensive analysis, is to ensure that the FDP is up to date. For the DWMP this is to ensure that the plans for the decommissioning of the site and for the management and disposal of waste arisings are realistic, clearly defined and achievable and that the corresponding cost estimates are robust (set out in Part 1 of this Guidance). For the FAP, the purpose is to ensure that the

arrangements in place continue to make prudent provision [and so ensure that the Objective set out in Part 1 of this Guidance continues to be met].

*[NNB Note: NNB agrees that the purpose of the FAP is to ensure that the arrangements in place continue to make prudent provision, but NNB believes that this should be on the basis of the terms of the FDP approved by the SoS. In NNB's view, the final clause of this paragraph should refer to "prudent provision on the basis set out in the FDP and approved by the Secretary of State as meeting the Objective."]*

- 2a.14 The operator is also required to provide a report on changes to the FDP over the reporting period. The report must provide details of changes to the operator's plans for the decommissioning of the site and for the management and disposal of waste arisings. The report must also contain changes to the cost estimates for the designated technical matters. The report must also contain details of changes to the security provided to meet the cost estimates and this will include details of the performance of this security to date and any changes in future projections for this security.
- 2a.15 Where the quinquennial report contains changes to the cost estimates and any changes to security provided to meet those costs, the operator must include within the quinquennial report a verification report in respect of those changes and which assesses those changes to determine if the estimates of costs and financial provision are prudent.
- 2a.16 The quinquennial report may also include notification of modifications made to the FDP in relation to which, pursuant to the Regulations, the approval of the Secretary of State is not required. Operators need to bear in mind that, in accordance with section 51 of the Act, the modification to the FDP in question cannot take effect earlier than when the notification is given.
- 2a.17 As with the annual report, when preparing the quinquennial report the operator is expected to consult with the Fund in relation to any changes to the security provided to meet the estimates of costs which are reported on and the adequacy and accuracy of the information provided in the report in this respect. The Fund should in particular provide input in relation to the performance of the security to date and the anticipated ability of the security to meet the estimates of costs over the relevant reporting period(s).
- 2a.18 As a quinquennial report will require detailed analysis an operator may decide that, following an appraisal of the reported changes, its FDP needs to be modified in a manner which requires the approval of the Secretary of State. In this case, an operator may consider it appropriate to propose such a modification alongside its submission of the quinquennial report. [This is notwithstanding the fact that there is an ongoing duty to ensure the FDP is up to date.] *[NNB Note: It is unclear what this duty is. There does not appear to be a materiality threshold, however, the operator should not be expected to undertake a continuous review of the FDP, but review for annual (with a de minimis level as discussed in NNB's note at paragraph 2a.8 above) and quinquennial reporting. NNB does not consider that it is appropriate in the normal course to update cost estimates or the DWMP outside annual or quinquennial reviews. NNB does consider, however, that it may from time to time be appropriate for the operator to bring forward a quinquennial review to replace an annual review sooner than the normal five years (for example to bring another site's new FDP into line in terms of report timing or if there was a major event which could require significant work and analysis in any event). This is another flexibility that NNB consider should be built into revised FDP Regulations.]*

## Information

- 2a.19 The Secretary of State has powers to obtain in certain circumstances information from the operator and other persons with obligations under the FDP under sections 52 and 53 of the Energy Act 2008. The Secretary of State would also expect the Fund to have appropriate rights to request and receive information from the operator; these rights and any associated obligations should be set out in the FDP.

## Notification

- 2a.20 The Secretary of State would expect the FDP, by way of the FAP, to provide appropriate procedures to ensure that the operator and/or the Fund report to the Secretary of State immediately on or prior to the occurrence of any of the following events (whether or not they result in a breach of the FDP):

- Initiation or threat of insolvency proceedings against the operator, an associated company with obligations under the FDP or the Fund;
- Breach of law or breach of contractual arrangements by the operator, an associated company with obligations under the FDP or the Fund which has or is likely to have a material adverse effect on the operator or the Fund's ability to make or receive contributions to the Fund (as appropriate); or any other matter which would reasonably be considered material to the operator or the Fund's ability to make or receive contributions to the Fund (as appropriate);
- Change of control or ownership of the operator or the Fund (if the ownership structure allows) [before the change has taken place] (see section on "Change in ownership or control of the operator or site" in this part of the Guidance) *[NNB Note: One option for an FDP structure might entail independent directors holding a large majority of the shares in the Fund Company. Such shares might be issued on the appointment of a new director and redeemed on the resignation, removal or death of a director. NNB considers it would be unnecessary and unworkable always to give prior notice of such a change of ownership of the Fund (but would seek to do so where possible).];*
- Change in the credit rating of the operator, the Fund or of any entity providing a guarantee or other credit support under the FDP.

*[NNB Note: NNB would like DECC to clarify that this wording relates to guarantors only.]*

## Verification

- 2a.21 Under the Regulations, the Secretary of State may rely on a verification report commissioned by the operator. A verification report is an assessment of the costs estimates for the designated technical matters and of any security provided to meet such costs. This assessment must be carried out by a person who is independent of the operator and any other person with obligations under the FDP. *[NNB Note: It would be helpful if the requirements in respect of the independence of the technical verifier took account of the fact that there is a very small pool of suitably qualified persons that any operator could engage. Perhaps concepts similar to those used in the accounting environment should be considered.]*

2a.22 Under the proposed Regulations a verification report is required when:

- an FDP is submitted to the Secretary of State for approval;
- a proposal is made by the operator or any other person with obligations under the FDP to modify the FDP or to modify the conditions to which the FDP is subject;
- an annual report is provided to the Secretary of State;

*[NNB Note: The FDP Regulations only require a verification report if there are changes to the costs for designated technical matters or any provision for the financing of the designated technical matters. Paragraph 2a.9 above is correct on this point. However, the current FDP Regulations do not allow for the assumed (and therefore already dealt with) escalation rate for the relevant period and it is important that this is addressed through review of the FDP Regulations.]*

- a quinquennial report is provided to the Secretary of State.

*[NNB Note: Again, NNB considers that this should refer to changes to the costs or provision made for the financing of the designated technical matters.]*

*[NNB Note: As mentioned in our note at paragraph 1.29 above, NNB considers that any changes to costs in relation to the designated technical matters that have been independently verified or determined by an independent expert pursuant to the approved terms of the FDP should have section 48 of the Energy Act disapplied (i.e. no need for unfettered Secretary of State approval/veto right) and, therefore, the only modifications to an FDP which should require approval should be genuine proposed modifications to the approved terms of the FDP – i.e. not things which happen pursuant to those approved terms.]*

2a.23 The Secretary of State may refuse to rely upon a verification report commissioned by the operator unless he is satisfied that the person who has carried out the verification (the Verifier):

- has the qualifications and experience to carry out the assessment;
- is independent of the operator and any person with obligations under the FDP  
*[NNB Note: See comments in relation to the verifier independence criteria at paragraph 2a.21, above.];* and
- has made a relevant assurance in respect of the assessment made in the verification report.

2a.24 A relevant assurance [must] *[NNB Note: Non prescriptive language should be used]* summarise the verification report and also refer to the standards in accordance with which the verification has been carried out.

2a.25 It is anticipated that these standards will be set out in the terms of engagement of the Verifier by the operator, and that when considering whether:

- a) the estimates of costs of the designated technical matters are prudent; and



- b) any provision for the financing for these cost estimates is prudent,

the Verifier will consider these issues in the context of the definitions, assumptions and processes contained in the FDP itself. This is because the FDP, at the time of its approval, will have been agreed by the Secretary of State on the basis that it is prudent. [In most cases, it is anticipated that verified compliance with an FDP will result in prudent provision and the Verifier will not be expected to reach any other conclusion. However, where the mechanisms established in an FDP result in the estimates of costs not being prudent estimates (for example, the Verifier concludes that costs are significantly underestimated); or that the provision for the financing of these costs is not prudent (for example, the rate of return assumptions for the Fund are significantly over-optimistic) the Secretary of State would expect the Verifier to report accordingly and to make recommendations as to how to rectify the position.] *[NNB Note: The procedure set out above attempts to be helpful by confirming that the verification should be carried out against the terms of the approved FDP. However, the language (especially in combination with the Regulations) could still be interpreted as requiring the Verifier to challenge the terms of the FDP that the SoS has approved. NNB therefore suggests that the Regulations are amended following due consultation to give operators the required certainty for the investment case.]*

- 2a.26 The Secretary of State appreciates that a Verifier will wish to limit its liability in respect of the verification report. In this regard the Verifier may wish to set out in the verification report such limitations or alternatively it may prefer to seek the Secretary of State's acknowledgement as to the limit on its liability before providing their report.

### **Proposals for remedial action**

- 2a.27 The operator has a duty under law to meet all the liabilities in respect of decommissioning, waste management and waste disposal that arise from the operation of a new nuclear power station. In addition to the criminal sanctions provided for in Chapter 1 of Part 3 of the Energy Act and in order to limit the prospect of dispute between the operator and the Fund, the Secretary of State would encourage the operator to set out in its FDP the steps that it will take to make good breaches of the FDP (where they are capable of remedy) and over what timescales, and what steps, if any, the Fund might also take in such circumstances.
- 2a.28 The obligation to contribute to the Fund Assets must be legally binding on the operator and enforceable by the Fund. The FDP should specify the manner in which such an obligation can be enforced by the Fund. Failure to comply with an obligation imposed by an approved FDP is an offence under section 57 of the Energy Act. The FAP must set out the remedial steps to be taken if the Fund becomes, or is at risk of becoming, under-funded at any point, including the additional obligations that would arise on the operator and/or on associated companies, or other persons as specified in the FDP, and the powers of the Fund to take action against such entities (see section on "Insufficiency of the Fund" in Part 2c of this Guidance).
- 2a.29 The FDP should clearly set out how much notice would be required to be given by each party (and in what form), what action is to be taken following a breach and the time frames within which any such action would be required to be taken.
- 2a.30 Notwithstanding the existence of measures outlined above, the Secretary of State will expect the operator to promptly inform him of any breach and the proposed remedial action. If the proposals for remedial action were acceptable to the Secretary of State and were adhered to, the Secretary of State would take this into account when determining what, if any, enforcement action to take in relation to a breach.

### **Change in ownership or control of the operator or site**

- 2a.31 The Energy Act gives the Secretary of State powers to impose obligations under the FDP on associated companies of the operator, for example, the parent company or sister companies, in order to ensure that prudent provision is made for the financing of the designated technical matters.
- 2a.32 Assuming a change of ownership of the site leads to a change in the identity of the site licensee, section 45 of the Energy Act ensures that an FDP must be submitted by the new operator (and approved by the Secretary of State) prior to its starting to operate the station.
- 2a.33 The FDP should set out the consequences of a change in control of the operator or site, including a change in the group structure of the operator whereby an associated company of the operator will cease to be an associated company as defined under the Energy Act, and detail the steps to be taken to inform the Secretary of State of such change of control. This must give the Secretary of State the opportunity to approve, approve subject to modifications or conditions or reject any related modifications to the FDP in good time prior to such a change of control occurring. The FDP may, however, specify circumstances where the change of control of an associated company (which does not have obligations under the FDP) need not be notified to the Secretary of State. This may be the case, for example, where the associated company is dormant, has de minimis assets or where such company is not relevant for the purpose of securing prudent provision for the financing of the designated technical matters.

*[NNB Note: Change of control has implications for the investment case and any future financing, therefore an appropriate balance needs to be struck.]*

- 2a.34 Where the change of control means that a company with obligations under the FDP will cease to be an associated company of the operator (whether it is a parent or sister company) then the FDP should require the operator to submit for approval the required modifications to its FDP to reflect the proposed change in obligations.
- 2a.35 Where the change of control means that a company which is an associated company of the operator and which has no obligations under the FDP, ceases to be an associated company, the Secretary of State would not normally expect the operator to propose a modification to the FDP unless, given the circumstances of the change of control, a modification would be appropriate.
- 2a.36 Before approving any modifications to the FDP in relation to a change of control the Secretary of State will expect to be satisfied that the proposed revised funding arrangements will comply with the Objective, and will take into account the views of the Fund. The Secretary of State would not expect to release any party from its obligations under the FDP if such release would endanger the ability of the funding arrangements to, and/or may adversely affect the ability of the Fund to, meet the Objective.
- 2a.37 In approving the FDP and determining whether to modify the FDP and impose new obligations on certain parties (or not to release parties from obligations to which they are already subject) the Secretary of State will have regard to such matters as:
- the views of the Fund on the proposed funding arrangements;
  - the financial strength of the proposed new owner, or investors, or (where relevant) the group structure of the operator as a whole following the change of



control, and the support that the proposed new owner or investors will provide to the operator to ensure that the Fund accumulates sufficient funds to meet the operator's liabilities under the FDP;

- the current level of funding as compared with current estimates of the operator's liabilities and plans for future funding levels; and
- evidence of failure by any of the parties to adhere to their obligations under the FDP.

2a.38 Further information about the exercise of the power to modify in cases where a change of control or other relevant change occurs is set out in the section on "Modification of an FDP" in this Part of the Guidance.

2a.39 If the structure of the Fund allows for a change of control of the Fund, the FDP should set out the consequences of a change in control of the Fund and detail the steps to be taken to inform the Secretary of State of such change of control before it takes place and any other steps to be taken to mitigate the effect of that change.

### **Modification of an FDP**

2a.40 All modifications to an approved FDP (other than as set out in the Regulations) require prior approval by the Secretary of State. *[NNB Note: NNB does not consider it reasonable for 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.]* If, at any time, an event occurs which requires a change to be made to the FDP, subject to any materiality threshold to be set out in Regulations, the Secretary of State will expect the operator and/or the Fund to promptly inform him of that event, provide details of the effect on the operator's liabilities of such an event and the financial consequences of such a change on the FDP, and propose for approval by the Secretary of State a modification to the FDP to take account of that event in accordance with the procedure laid down in sections 48 and 49 of the Energy Act.

2a.41 The Regulations published on 18 November 2010 set a materiality threshold of 5% of the estimates of the costs likely to be incurred in connection with either:

- a) the disposal of ILW and spent fuel; or
- b) all other designated technical matters.

2a.42 The Secretary of State and, with the consent of the operator, any other person with obligations under the FDP, may also propose modifications to the FDP.

2a.43 Modifications may include changes to the DWMP, for example to account for technical or operational changes to the nuclear power station which have had an effect on the cost estimates for the designated technical matters. [Modifications may also include changes to the FAP, for example to reflect changes to contribution schedules in respect of the Fund to take account of changes to cost estimates set out in the DWMP or to reflect investment returns.] *[NNB Note: NNB does not consider it reasonable for 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.]*

2a.44 The Secretary of State can envisage requiring modifications in the situations set out in paragraphs 2a.45 to 2a.51 below, although this does not constitute an exhaustive list.

*[NNB Note: NNB does not consider that unfettered unilateral modification rights for the SoS in relation to the FDP are necessary or appropriate. NNB therefore welcomes DECC's statement that "Amendment to the existing powers in the Energy Act enabling the Secretary of State to modify a nuclear operator's Funded Decommissioning Programme; 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. This should give investors in new nuclear the certainty they need to finance very significant, long-term investments."]*

2a.45 Where the operator or another person with obligations under the FDP is in breach of obligations under the FDP.

- The Secretary of State may propose a modification but would not normally expect to modify an FDP in every case. In many cases it may be sufficient to ensure that the person brings itself back into compliance with the FDP and remedies the consequences of the breach where that breach is remediable. The Energy Act gives the Secretary of State varied powers (such as the power to impose a direction under section 58) to ensure this outcome.
- It may be appropriate to introduce conditions to the approval of the FDP. Breach of that condition may result in an offence under section 57 of the Energy Act if the station continues to operate.

2a.46 Where a change of control of the operator, or a change of a body corporate which is associated with the operator, is proposed. *[NNB Note: The Guidance should spell out that this only applies where such entity has obligations under the approved FDP.]*

- Guidance about what is expected from operators if there is a change of control of the operator is set out in the sections on "Change in ownership or control of the operator or site" in this Part of the Guidance. *[NNB Note: See note immediately above.]*
- The Secretary of State's primary concern in such an eventuality would be to ensure that the Objective continues to be met, irrespective of the change of control. In the case of a change of control, the Secretary of State may propose modifications to:
  - adjust the liability of the outgoing associated company under any guarantee or other support provided in relation to the operator's liabilities to take account (where relevant) of the financial circumstances of the incoming associated company;
  - release the outgoing associated company from its obligations; – impose obligations on the outgoing associated company where previously it had none;
  - adjust existing obligations or impose new obligations on existing associated companies (for example, in the case of a joint venture) to take account of the new group structure including (where relevant) the position of the incoming associated company;

- impose new obligations on incoming owners or investors;
  - adjust obligations on the operator accordingly.
- In the event of a change of control of a company with obligations under the FDP which is not an associated company, the Secretary of State would expect the FDP arrangements to take account of any potential change of control and would only expect to propose modifications in limited circumstances when the change of control meant that the financial arrangements in place were no longer sufficient to satisfy the Objective.
- 2a.47 Where a technical or operational change increases the estimates of the operator's liabilities by more than the materiality threshold.
- The Secretary of State would expect the operator to seek his approval to any modifications to the FDP (subject to, where relevant, any mechanisms set out in the FDP as per paragraph 1.29 of this Guidance). Where the operator fails to do so, the Secretary of State might propose the necessary modifications.
- [NNB Note: As discussed above (including at paragraph 1.4, 1.5 and 1.29), NNB does not think that this approach is appropriate. Changes to cost estimates can be dealt with in accordance with the approved terms of the FDP in the ordinary course of the operation of the FDP. Furthermore, by singling out one element of the FDP, all other elements of the FDP are caught up (given the interrelationships between all the other elements – eg changes to contributions), so that the operator would frequently be required to propose modifications, leading to a risk that a future SoS may seek to change the approved terms of an FDP.]*
- 2a.48 Where the operator seeks to extend the life of the station beyond the period set out in the FDP.
- A proposal to extend the life of the station would necessitate modifications to the FDP for which the Secretary of State would expect the operator to seek his approval. *[NNB Note: In NNB's view a modification for life extension is unnecessary and would risk re-opening the approved terms of the FDP. Quinquennial reviews would be flexible and robust enough to deal with plant life extension.]* Where the operator failed to do so, the Secretary of State might propose the necessary modifications.
- 2a.49 Where the Fund Assets are underperforming for a period of time.
- The Secretary of State would expect to require a modification to the Investment Strategy where the Fund Assets have been underperforming for a period of time likely to result in the Target Value not being achieved. *[NNB Note: This paragraph goes far further than is required by the Energy Act and, arguably, the FDP Regulations. NNB proposes to commit to fixed strategic investment assumptions as part of the FDP which would require Secretary of State approval to amend. However, the day to day investment strategy should not be subject to SoS control as the contributions will correct for any shortfall at quinquennial reviews.]*
- 2a.50 Where the operator wishes to follow a "fleet approach".

- The Secretary of State would expect the operator to seek his approval where there is a proposal to amend an existing FDP to reflect a proposal for a subsequent FDP as a result of the development of further sites that would necessitate modifications to the existing FDP.

Where the operator failed to do so, the Secretary of State might propose the necessary modifications.

2a.51 It is possible to envisage other circumstances which give rise to reasonable doubts about the ability of the operator or an associated company to discharge its obligations under the FDP. *[NNB Note: NNB does not consider that unfettered unilateral modification rights for the Secretary of State in relation to the FDP are necessary or appropriate.]* In such a case, the Secretary of State may consider whether to propose a modification. For example,

- the credit rating of the operator or of an associated company with obligations under the FDP or any entity providing a guarantee or credit support under the FDP may be downgraded and no appropriate alternative security be capable of being put in place or being put in place sufficiently promptly;
- there may be a significant and more than short lived reduction in the net asset value of the operator or of an associated company with obligations under the FDP; or
- insolvency proceedings may be taken in respect of, or threatened against, the operator or an associated company with obligations under the FDP.

2a.52 In all cases, the Secretary of State may only approve a modification (whether proposed by him or by another person) if he does so with the aim of meeting the Objective in ensuring that prudent provision is made for the activities regulated by section 49(7) of the Energy Act.

### **Prohibition on use of a site without an approved FDP**

2a.53 Under section 45 of the Energy Act 2008 a person who applies for a nuclear site licence to install or operate a nuclear power station must notify the Secretary of State of the application and prepare and submit an FDP for approval. Further, where an operator changes the new operator must also submit an FDP.

2a.54 A nuclear site licence is required, under the Nuclear Installations Act 1965 (NIA), to use a site for the purposes of installing or operating any nuclear reactor not comprised in a means of transport. Accordingly, a nuclear site licence is required to install such a reactor for the purpose of producing atomic energy. It is an offence to install the reactor without the necessary licence being in place.

2a.55 Under section 47 of the Energy Act 2008 it is an offence for a person to use, or permit another person to use, a site by virtue of the nuclear site licence when there is no approved FDP in place. The purpose of section 47 of the Act is to ensure that at the point when activities for which a licence is legally required are undertaken an approved FDP is in place. So, the prohibition in section 47 of the Act covers any use of the site for a purpose for which a nuclear site licence is legally required.

- 2a.56 The Health & Safety Executive (HSE), responsible for issuing nuclear site licences, has provided Guidance<sup>2</sup> in relation to the application of the NIA and the latest point by which a nuclear site licence must be granted for the installation of a new nuclear installation. In this respect current HSE Guidance is:

*'...that a nuclear site licence must be granted to a developer by HSE before they may undertake construction work which could, if inadequately conceived or executed, affect nuclear safety when the plant is operating. Based on this, HSE defines the point beyond which a licence is required as the placement of the first structural concrete for buildings with nuclear safety significance. Consequently, it may be permissible for a developer to undertake excavation of building foundations and placement of the blinding layer before a nuclear site licence is granted.'*

- 2a.57 Accordingly, under the NIA a licence is required to be in place by the point that the first structural concrete for buildings with nuclear safety significance is poured.
- 2a.58 Where a site licence has been issued, but there is no approved FDP in place, an operator will commit an offence under section 47 of the Energy Act 2008 only if they begin construction work on buildings with nuclear safety significance. This is because this is a use of the site which is considered to be by virtue of the licence.
- 2a.59 Use of a site, even after the issue of a licence, for a purpose for which a nuclear site licence is not required will not amount to an offence under section 47 of the Act. This is because such 'use of the site' would not, for the purposes of that section, be 'by virtue of' the licence.

***[NNB Note: NNB welcomes this as a helpful clarification.]***

- 2a.60 It is worth noting that a nuclear site licence may be granted by HSE prior to the point at which it is considered essential to have a nuclear site licence. HSE may also attach various conditions to such licences which are intended to control activities which could impact on nuclear safety. These conditions could apply to activities carried out on or off the licensed site. This does not affect the Secretary of State's view that it is only use of the site for which it is considered essential to have a nuclear site licence and which will amount to "use of the site by virtue of the licence" for the purposes of section 47 of the Act.

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<sup>2</sup> <http://www.hse.gov.uk/newreactors/license.htm>