
DRAFT REPORT:

Reactor Decommissioning Trust Fund Terms and Conditions

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INTRODUCTION

This report provides the initial analysis and findings from ICF Consulting's (ICF) review of the criteria in NRC's regulations and regulatory guidance for trust funds to provide financial assurance for the decommissioning of nuclear power reactors. ICF also has reviewed materials provided by the NRC, Internal Revenue Service regulations, and reports and testimony before Congress relating to the tax treatment of decommissioning trust funds. The report provides ICF's recommendations for terms and conditions for decommissioning trust funds.

Licensees for nuclear power reactors are required by 10 CFR §50.75(e) to provide financial assurance for the decommissioning of their reactors. The fundamental purpose of financial assurance for decommissioning of power reactors and nonpower reactors is "to require licensee[s] to provide reasonable assurance that adequate funds are available to ensure that decommissioning can be accomplished in a safe manner and that lack of funds does not result in delays that may cause potential health and safety problems."¹

Several alternative methods of providing such assurance are authorized by the regulations. In practice, however, one of the authorized methods, the external decommissioning trust fund, is used by virtually all nuclear power plant licensees. The regulations provide that the trust fund either may be prepaid or it may be funded through periodic payments such that the total amount of funds is sufficient to pay estimated decommissioning costs at the time termination of operations is expected. Section 50.75(e)(1)(ii) specifies that a trust fund must be "acceptable to NRC" and must be an account segregated from licensee assets and outside the licensee's administrative control.

The basic terms and conditions governing decommissioning trust funds in 10 CFR §50.75 were first promulgated in 1988 and then revised in 1998. The 1998 changes to 10 CFR §50.75 were prompted by concerns over the potential impacts of deregulation and industry restructuring. The 1998 rules affected the trust fund in three ways. First, a provision was added requiring the trust to be "acceptable to the NRC." Second, a provision was added allowing licensees to take credit for projected earnings on the external sinking funds up to a 2 percent real rate of return. Third, licensees are required to submit biennial reports on the status of their decommissioning trust funds, including a description of any "material" changes to the trust agreements.

¹ Proposed Rule, 50 FR 5602, February 11, 1985. This rationale has been maintained in subsequent rulemakings.

NRC issued Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," in August 1990, to provide guidance to applicants and licensees of nuclear power, research, and test reactors concerning methods acceptable to the NRC staff for complying with financial assurance requirements for decommissioning. Although Regulatory Guide 1.159 provides sample trust language, until recently NRC has not mandated that the provisions in the sample language or any other particular provisions must be included in the text of a decommissioning trust fund. The 1998 rule is not currently reflected in the Regulatory Guide. In the past, NRC also has not performed direct oversight of the terms and conditions of the decommissioning trusts. Such oversight by NRC was considered unnecessary, because of the role of utility rate regulators in State Public Utility Commissions (PUCs) and the Federal Energy Regulatory Commission (FERC).

In February 1999, NRC issued its "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance" (NUREG-1577) to describe the process it uses to review licensee submissions. NUREG-1577 reflects current regulations, including the 1998 rule. NRC issued Revision 1 to NUREG-1577, to include additional information, early in 2000.

Recently, as nuclear power reactors have been sold, NRC has stipulated, in connection with license transfers, that certain terms and conditions be added to decommissioning trust funds. Such sales may involve transfers of nuclear power reactors from regulated public utilities to firms that are not regulated as public utilities. Because rate regulators may, as a consequence of utility deregulation, cease to exercise direct oversight over decommissioning trusts, the Commission has directed the NRC staff to initiate a rulemaking to require that decommissioning trust agreements are in a form acceptable to the NRC.

This report is organized into the following sections.

- Section One provides a summary of what ICF understands to be the decommissioning trust fund requirements created by NRC, Internal Revenue Service, FERC, and State authorities.
- Section Two provides the results of a review of existing decommissioning trust funds performed by ICF that examined whether those trust funds satisfied the requirements described in Section One.
- Section Three outlines the issues relating to decommissioning trust funds created by deregulation of electric utilities and transfers of ownership of nuclear power reactors.
- Section Four provides the tests recommended by ICF for examining the effectiveness of financial instruments, including trust funds, used for financial assurance.

- Section Five applies the tests from Section Four to existing and potential NRC trust fund requirements and provides draft trust fund terms and conditions that ICF recommends as a potential starting point for developing amendments to 10 CFR §50.75 and/or Regulatory Guide 1.159 for decommissioning trust funds for nuclear power reactors.

1. EXISTING TERMS AND CONDITIONS AND OTHER CRITERIA FOR TRUST FUNDS

This section describes the requirements, established by the NRC, the Internal Revenue Service, the Federal Energy Regulatory Commission, and States, that currently apply to decommissioning trusts, as well as non-binding recommendations created by those agencies for such trusts.

1.1 Mandatory NRC Terms and Conditions for Reactor Trust Funds

Currently, binding terms and conditions established by NRC for reactor decommissioning trusts are stated in 10 CFR §50.75. Regulations in 10 CFR §50.75(e)(1)(i) and (e)(1)(ii) specify the following basic requirements:

- The funds must be segregated from the licensee's assets;
- The funds must be outside the licensee's administrative control; and
- The trust must be acceptable to the NRC.

1.2 Nonbinding NRC Criteria for Trust Funds in Regulatory Guide 1.159

Nonbinding NRC criteria and suggested terms and conditions for trust funds are found in Regulatory Guide 1.159. The Regulatory Guide, which was issued prior to the 1998 regulatory amendments, does not provide specific criteria for determining what is an "acceptable" trust instrument. The Regulatory Guide does specify that certain types of trusts (e.g., qualified Section 468A trusts) are acceptable.

Regulatory Guide 1.159 includes the following trust fund criteria:

- The trust fund must comply with applicable State trust law;
- The trust must be signed by individuals authorized to act for the appropriate parties;
- The trustee of a fund should be an entity that has the authority to act as a trustee and whose trust operations are regulated or examined by a State or Federal agency;
- Any trust instrument complying with Internal Revenue Code Section 468A is acceptable;
- Any trust instrument complying with approval of, or guidance from, a utility's State Public Utility Commission (PUC), from another State agency, or from FERC, is acceptable;
- Licensees that do not use decommissioning trusts established under Internal Revenue Code Section 468A or are not subject to PUC or FERC jurisdiction should limit trust

investments to “investment-grade” securities, defined as bonds and preferred stocks rated at least BBB or equivalent by a national rating service.

Sample trust fund wording supplied by NRC in Appendix B to Regulatory Guide 1.159 provides “samples of language and provisions for compliance.” Licensees may add, delete, or modify sample provisions as their circumstances warrant. ICF believes that certain Appendix B provisions are desirable features of decommissioning trusts. Such clauses include the following:

- The requirement to state the purpose of the trust and to identify the facility by license number;
- The requirement to specify that the trust fund is established for the benefit of the licensee of the facility and/or a State agency or the NRC;
- The requirement that trust management shall, at a minimum, be subject to the so-called prudent investor rule;
- The prohibition on investing in securities or other obligations of the grantor (i.e., the licensee) or any other owner or operator of the facility, or of their affiliates;
- The requirement for annual valuation; and
- The requirement that amendments of the trust must be executed in writing and signed by the grantor, the trustee, and the NRC or State agency.

1.3 Binding and Non-binding NRC Criteria for Trust Funds in Standard Review Plan NUREG-SR 1577, Rev. 1

NRC criteria and suggested terms and conditions for trust funds are found in “Standard Review Plan on Power Reactor Licensee Financial Qualification and Decommissioning Financial Assurance” (NUREG-SR 1577, Revision 1), which describes the process NRC uses to review the decommissioning financial assurance provided by power reactor licensees. Section e., “Evaluating External Sinking Fund Trust Documents,” provides the following criteria for trust funds:

- Licensees are required to submit any material revisions to trust agreements to ensure that NRC records are current. Material revisions include (1) changes in trustees; (2) provisions for payment into and out of the trust; (3) changes in trust investment management; and (4) any other changes “that would have a direct bearing on the amount, availability, and assurance of funds for decommissioning.”
- The trust must be segregated from the licensee’s assets and outside the licensee’s administrative control. The licensee should “avoid” day-to-day investment decisions.
- The trustee should be licensed to act as trustee by State or Federal authority.

- Disbursements from the trust should be restricted to decommissioning expenses or for transfer to another assurance mechanism acceptable under § 50.75(e).
- Licensees may make withdrawals from decommissioning trust funds as long as the purpose of such withdrawals meets the criteria specified in § 50.82(a)(8)(1). These criteria, which are not required to be incorporated into the text of the decommissioning trust fund, are binding as a result of their inclusion in regulations.
 - The withdrawals must be for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2;
 - The expenditure may not reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise; and
 - The withdrawals may not inhibit the ability of the licensee to complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.
- Licensees are restricted by § 50.82(a)(8)(ii) in the amounts that they may withdraw for decommissioning expenses. Only 3 percent of the generic amount specified in § 50.75 may be used for decommissioning planning. Power reactor licensees that have determined to permanently cease operations and have submitted a certification to NRC pursuant to § 50.4(b)(8) may use an additional 20 percent commencing 90 days after NRC has received the post-shutdown decommissioning activities report (PSDAR).

The Standard Review Plan also addresses the evaluation of investments in external sinking funds. The criteria for evaluating investments could serve as criteria for evaluating decommissioning trust fund terms and conditions, if the licensee incorporates investment requirements into the text of the trust fund. These criteria include the following:

- For power reactor licensees that are subject to either cost-of-service rate regulation or have access to a non-bypassable charge(s) to recover the estimated costs of decommissioning, the NRC will typically defer to State PUCs and FERC to set standards for the types of investments allowed for external sinking funds. For other power reactors, the Standard Review Plan notes, “the NRC has specified in Regulatory Guide 1.159 that external decommissioning trust fund investments should be ‘investment grade’” (i.e., corporate or municipal bonds or preferred stocks should be rated at least BBB by Moody’s or an equivalent by another major rating agency, such as Standard & Poors, Duff & Phelps, or Fitch).
- Speculative issues of common stocks should be avoided.

- Investments should not be made in the licensee's own stock or in stock of other power reactor licensees.
- Diversification is not explicitly required. However, the Standard Review Plan notes that if the fund is invested in a diversified portfolio of bonds, stocks, and other investments, "losses on any one issue should not significantly affect the overall value of the trust fund." In addition, "losses in one year may be recouped by increased amortizations in following years." Licensees should revise their amortization rates based on the current net market value of their trust investment portfolios.

1.4 Mandatory Internal Revenue Code Requirements for Section 468A Qualified Trust Funds

Section 468A of the Internal Revenue Code, establishing special rules for nuclear decommissioning costs, was initially enacted in 1984. Regulations under §468A were first adopted in 1988. The Code does not establish additional criteria for the terms and conditions of the trust instrument for that subgroup of decommissioning trusts that are set up to qualify under the provisions of §468A of the Code. No specific clauses are mandated to be included in a trust fund used as a qualified Nuclear Decommissioning Reserve Fund. Section 468A does provide that payments to a Nuclear Decommissioning Reserve Fund are deductible in the taxable year in which they are made, if the taxpayer requests, and receives, from the Internal Revenue Service a schedule of "ruling amounts" specifying the size of the payment that may be made.

Regulations under §468A do not require that a copy of the Nuclear Decommissioning Trust be submitted to the Internal Revenue Service as part of the request for a ruling amount, although the Service may request any information "that may be necessary or useful." (Regs §1.468A-3(h)(2)(xv)). The only specifications concerning the trust fund found in the IRS regulations promulgated under §468A are the following, found under Regs. §1.468A-5(a)(1), (3), (4), and (5):

- A Nuclear Decommissioning Fund "must be established and maintained at all times in the United States pursuant to an arrangement that qualifies as a trust under State law." (§1.468A-5(a)(1)(i))²
- The Fund must "be established for the exclusive purpose of providing funds for the decommissioning of one or more nuclear plants." (§1.468A-5(a)(1)(i))
- A single trust agreement may establish multiple funds. Two or more Nuclear Decommissioning Funds may be established pursuant to a single trust agreement.

² The Internal Revenue Service has not issued definitive guidance on the meaning of "in the United States." IRS staff interpret the phrase as referring to banking entities within the reach of the United State's government. In practice, this has led to the use of domestic United States trust institutions. Whether a subsidiary of a foreign bank located in the United States would be acceptable has apparently never been tested. ICF telephone contact with Mr. Peter Friedman, IRS.

One or more funds that are not qualified as a Nuclear Decommissioning Fund may be established pursuant to a trust agreement that also includes a Nuclear Decommissioning Fund. (§1.468A-5(a)(1)(i))

- Administrative costs and expenses that may be paid by a Nuclear Decommissioning Fund are defined in the regulations. (§1.468A-5(a)(3)(ii)) An implication of this provision is that administrative costs and expenses for such funds cannot be defined in a different manner in the trust agreement.
- By December 31, 1996, each qualified Nuclear Decommissioning Fund trust agreement must “provide that assets in the fund must be used as authorized by section 468A and the regulations thereunder and that the agreement may not be amended so as to violate section 468A or the regulations thereunder.” (§1.468A-5(a)(4))
- Finally, the regulations specify the types of payments that may be made out of a Nuclear Decommissioning Fund and prohibit other specified actions as “self-dealing.” (§1.468A-5(b)) An implication of this provision is that allowable payments cannot be defined in a different manner in the trust agreement.

1.5 Mandatory Federal Energy Regulatory Commission Requirements for Decommissioning Trust Funds

The Federal Energy Regulatory Commission (FERC) has established detailed accounting and records requirements for public utilities. Regulations in 18 CFR Subpart E (18 CFR §§ 35.32 and 35.33) govern nuclear plant decommissioning trust funds. These sections establish the following terms and conditions for decommissioning trusts:

- The trust must be an external trust fund in the United States;
- The trust must be established pursuant to a written agreement;
- The trust must be independent of the utility, its subsidiaries, affiliates, or associates;
- The utility may provide overall investment policy, which must be in writing, but neither the utility nor its subsidiaries, affiliates, or associates may serve as investment manager, engage in day-to-day management of the trust, or mandate individual investment decisions;
- The investment manager must exercise the standard of care of a prudent investor, as defined by the Third Restatement of the Law of Trusts, § 227;
- The trustee must have net worth of at least \$100 million. The net worth of the trustee’s parents or affiliates may be considered in calculating net worth only if they guarantee the trustee’s responsibilities to the fund;

- The trustee must keep accurate and detailed accounts of all investments, receipts, disbursements, and transactions of the fund and make them available for inspection and audit at all reasonable times;
- Trust assets may not be used for any other purpose than to fund the costs of nuclear power plant decommissioning and to pay administrative costs and other incidental expenses, including taxes, of the fund, unless expressly authorized by FERC;
- The trust may not invest in any securities of the utility for which it manages the funds or in that utility's subsidiaries, affiliates, or associates or their successors or assigns, except for investments tied to market indexes or other mutual funds;
- The trust should take maximum advantage of tax deductions and credits, when it is consistent with sound business principles to do so;
- Both qualified Section 468A and nonqualified funds may be created with respect to a particular nuclear plant; and
- The trustee must prepare an annual report that shows for the previous calendar year:
 - Fund assets and liabilities at the beginning of the period;
 - Activity of the fund during the period, including amounts received, purchases and sales of investments, gains and losses from investment activity, disbursements from the fund for decommissioning activity, and payment of fund expenses, including taxes; and
 - Fund assets and liabilities at the end of the period.

1.6 State PUC Trust Requirements

ICF did not comprehensively examine the requirements that individual State PUCs have been placing on decommissioning trusts as part of their rate regulation. ICF did review the particularly detailed rules on nuclear decommissioning trusts established by the State of Texas Public Utility Commission, as well as the Illinois Public Utility Act (§8.508.1) as examples of State PUC requirements.

The Texas rules, §25.301, require the following:

- The decommissioning trust must be "secure," must earn a "reasonable rate of return," must be an "external irrevocable trust fund," must be administered by an institutional trustee; may have an investment manager(s); and must conform to the Texas Trust Code (except that the trustee(s) need not be qualified to exercise trust powers in Texas);
- The utility is required to determine that the trustee's fee schedule is reasonable, the trustee's past administration of trusts has been reasonable, the financial stability and strength of the trustee is adequate, that the trustee complies with the trust agreement, and that the trustee is otherwise "suitable;"
- The trust agreement with the trustee cannot grant the trustee powers greater than those allowed by the Texas Trust Code and must include the following terms:
 - (A) The interest earned on the corpus of the trust becomes part of the trust corpus. A trustee owes the same duties with regard to the interest earned on the corpus as are owed with regard to the corpus of the trust;
 - (B) A trustee shall have a continuing duty to review the trust portfolio for compliance with investment guidelines and governing regulations;
 - (C) A trustee shall not lend funds from the decommissioning trust to itself, its officers, or its directors;
 - (D) A trustee shall not invest or reinvest decommissioning trust funds in instruments issued by the trustee, except for time deposits, demand deposits, or money market accounts of the trustee. However, investments of a decommissioning trust may include mutual funds that contain securities issued by the trustee if the securities of the trustee constitute no more than five percent of the fair market value of the assets of such mutual funds at the time of the investment; and
 - (E) The agreement shall comply with all applicable requirements of the Nuclear Regulatory Commission.

- Provisions similar to (A) through (E) above are required for an agreement with an investment manager, if one is appointed;
- A copy of the trust agreement, any investment management agreement, and any amendments must be filed with the Texas PUC within 30 days after execution or modification of the agreement; and
- Detailed specifications are given in the rules for trust investments, including the following:
 - Limits on fees to the trustee and investment manager to 0.7% of the entire portfolio's average annual balance;
 - Requirements for portfolio diversification;
 - Investment limits in equity securities;
 - Prohibition on investment in securities of the utility or any of its affiliates, except that an investment in a commingled fund containing no more than 5% of the fair market value of the fund's assets in securities of the utility is allowed
 - Restrictions on fixed income investments/debt securities below investment grade;
 - Requirements for at least 70% of equity investments to be quality ranked by a major rating service; and
 - Limits on commingled funds.

The Illinois statute requires utilities to set up a §468A qualified Nuclear Decommissioning Fund. In addition, the State imposes the following restrictions:

- The trustee may invest only in "secure" assets;
- All income earned by the trust shall become part of the trust's funds; and
- The trustee is required to report annually, or more frequently if ordered, the following information:
 - the trust's State and federal tax returns;
 - the trust's portfolio of investments and the return thereon;
 - the date and amount of payments received by the trust from the utility;
 - copies of all correspondence between the trust and the IRS; and

- any other information the Illinois Public Utility Commission orders the trust to provide.

1.7 State Trust Law Requirements

An independent review of State trust law requirements was beyond the scope of this effort. Instead, ICF reviewed United States Law Digests prepared and published for Martindale-Hubbell for selected States known to contain nuclear reactors,³ to investigate whether State laws were likely to place specific restrictions on trust language, impose specific and detailed limits on who can serve as a trustee, specify fiduciary obligations, or establish any other detailed requirements that could conflict with existing or proposed terms and conditions for decommissioning trust funds. ICF also considered the extent to which trust fund compliance with State trust law would protect NRC's interests with respect to the purposes of decommissioning trusts, that is, the extent to which compliance would ensure adequate funds would be available without delays that could cause potential health or safety problems.

No State trust law provisions were identified that would create significant impediments to trust terms and conditions targeted to reactor decommissioning trusts and designed to achieve NRC's goals for those trusts. State trust law, however, also did not include requirements that would give an augmented level of protection to NRC's interests.⁴

³ States included Alabama, Arizona, California, Illinois, New York, Ohio, Pennsylvania, and South Carolina. Each description included a summary of the types of trusts that may be created in the State; requirements imposed on the trustee; standards and limitations on investments; fiduciary standards; and reporting requirements, as well as the adoption by the State of particular Uniform Acts (e.g., the Uniform Common Trust Fund Act or the Uniform Fiduciaries Act). Decisions interpreting or refining State statutory requirements are not described in the summaries.

⁴ State trust laws contain special provisions concerning "charitable" trusts, one subcategory of which are so-called "governmental" trusts, which are trusts set up for community benefit. Because the beneficiaries of such trusts may be somewhat indefinite, many States provide that the State Attorney General or an equivalent official or a court can exercise supervisory powers over such trusts, including activities to terminate the trust, sell property, construe the trust instrument, or deviate from investment instructions. Although the reactor decommissioning trust will create certain public benefits, it is not a charitable trust, which means that the special protections in State trust law do not extend to it.

2. REVIEW OF THE TERMS OF EXISTING DECOMMISSIONING TRUST FUNDS

ICF obtained and reviewed a sample of decommissioning trust funds submitted to NRC in March 1999.⁵ The following topics were examined:

- Whether licensees made use of the sample trust language found in Regulatory Guide 1.159;
- If licensees did not use the sample language, whether some other model was consistently used for trust language;
- Whether licensees' trusts satisfied the criteria in 10 CFR §50.75, Regulatory Guide 1.159, §468A of the Internal Revenue Code and §1.486A of the Internal Revenue Regulations, and 18 CFR §§ 35.32 and 35.33 of the FERC regulations.

ICF reviewed over one dozen trust funds, including Master Trust Agreements setting up both qualified Nuclear Decommissioning Funds under §468A and non-qualified funds. Based on this review, the following characteristics were noted:

- None of the trust agreements that were examined appeared to be based on the sample trust language found in Regulatory Guide 1.159. Many of the trust agreements that were examined included a substantially greater level of detail than the sample language. This detailed language addressed the purposes of the trust (particularly when the trust was a master agreement creating one or more qualified Nuclear Decommissioning Funds and one or more nonqualified funds); the duties of the trustee (including in some cases the creation of a separate Investment Committee to advise the trustee); and provided instructions on acceptable investments.
- Several trust agreements had a superficial resemblance to each other, suggesting that a common model might have been used as the starting point for their preparation. However, each of the trust agreements that was examined had unique features.
- In a number of cases, trust funds administered by the same trustee organization were substantially different, indicating that the trustee organization had probably not provided the trust language.
- In several cases, when ownership of a nuclear facility was divided, the trusts pertaining to the different owners were being administered by different trustee organizations and the trust instruments themselves were substantially different.

⁵ The NRC Public Document Room identified Decommissioning Funding Status Reports, required by 10 CFR §50.75 (f)(1) to be submitted by March 31, 1999, and at least once every two years thereafter, containing full copies of trust instruments, and those documents were secured and used for this study.

- All of the trusts examined appeared to satisfy all of the criteria specified in 10 CFR §50.75 and Regulatory Guide 1.159.
- Those trust instruments that created qualified Nuclear Decommissioning Funds appeared to satisfy all of the criteria specified in §468A of the Internal Revenue Code and regulations under that section.
- All of the trusts examined appear to satisfy the FERC criteria that could be reviewed. Several FERC criteria, however, address topics that do not affect the terms of the trust instrument.

3. UTILITY DEREGULATION AND REACTOR CHANGE OF OWNERSHIP

Deregulation of the electric utility industry can potentially lead to several changes in the structure of ownership of nuclear power reactors that affect reactor decommissioning trust funds. These changes include the following:

- Relaxation or elimination of regulatory oversight by State PUCs or FERC. With utility industry deregulation, State PUCs and/or FERC may no longer have jurisdiction over electricity rates of the kind that they now exercise. Under regulation, utilities are reimbursed for their costs, including nuclear decommissioning trust fund costs, from approved rates charged ratepayers. If, under deregulation, PUCs and/or FERC no longer approve rates they will, as a consequence, also no longer have a basis for establishing stringent accounting and financial controls. Without such controls, PUCs may determine that they have no basis for specifying terms and conditions for nuclear reactor decommissioning trust funds or for monitoring such trust funds.
- Changes in ownership of nuclear generating facilities. Under deregulation, vertically integrated public utilities that generate electricity, own and manage the transmission system, and sell power to the ultimate consumers may gradually become less prevalent. Instead, generating facilities may be separated (i.e., "spun off") within a holding company structure or sold to power-producing companies that sell electricity as a commodity to other companies that service consumers. Currently, certain energy companies that are non-utility suppliers of electricity have announced their intention to acquire nuclear power plants. After such acquisitions, State PUCs and/or FERC may no longer have jurisdiction over the energy company obtaining the reactors. NRC is required to determine the suitability of transferring reactor licenses from the former licensee to a new licensee.

As part of its review of requests for license transfer in connection with the sale of nuclear power reactors, NRC staff have examined whether reasonable assurance of decommissioning funding will continue to be provided. As a condition for staff approval, certain clauses (some of which parallel criteria in Regulatory Guide 1.159 and others of which parallel FERC requirements) have been required to be included in decommissioning trust funds.⁶ These clauses create the following criteria for trust agreements:

⁶ Information supplied as of June 21, 2000, from the Office of Nuclear Reactor Regulation, Division of Regulatory Improvement Programs, Generic Issues, Environmental, Financial & Rulemaking Branch, U.S. NRC.

- The decommissioning trust agreement must be in a form acceptable to NRC;
- The decommissioning trust agreement must provide that trust fund investments are prohibited in securities or other obligations of the new reactor owner or its affiliates, successors, or assigns.
- The decommissioning trust agreement must provide that investments are prohibited in any entity owning one or more nuclear power plants, except for investments tied to market indices or non-nuclear sector mutual funds.
- The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30-days prior written notification to the Director, Office of Nuclear Reactor Regulation.
- The decommissioning trust agreement must provide that the trustee, investment advisor, or anyone else directing the investments made by the trust must adhere to a “prudent investor” standard, as specified in 18 CFR §35.32(a)(3) of the Federal Energy Regulatory Commission’s regulations.
- The decommissioning trust agreement must provide that no disbursements or payments from the trust may be made by the trustee until the trustee has first given the NRC 30-days prior written notice, and that no disbursements or payments from the trust may be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation.

4. TESTS FOR REVIEW OF TERMS AND CONDITIONS

This section presents a set of evaluative tests for assessing whether particular terms and conditions for decommissioning trust funds will help meet NRC's goals of providing "reasonable assurance that adequate funds are available," and that lack of funds will not result in delays creating health and safety problems.

The tests listed below do not address the amount of funds in the decommissioning trust, a topic that NRC dealt with in its 1998 rule. The tests do address how to assess the certainty that assured funds will be available.

Certainty can be evaluated under several basic tests:

Test (1) Is the trust fund valid and enforceable?

The trust instrument should be required to include information that helps to ensure and to demonstrate its validity. A requirement that the instrument be valid under State law, while helpful, does not identify any features of the trust that demonstrate its validity. Such features include

- The trust is in writing;
- It includes the names and signatures of the parties entering into the agreement; their titles; the dates of signing (and the effective date, if different); notarization of the signatures; a description of the basic agreement being entered into; and an affirmative statement that the trustee accepts the appointment.

An important measure of the enforceability of the trust is whether the trustee is clearly able over the period that the trust is in effect to remain financially solvent and capable of providing the necessary services. Factors that address the trustee's reliability include:

- Requirements that the trustee be qualified or licensed, and
- Requirements that the trustee demonstrate that it has a particular level of financial backing. The financial condition of an institutional trustee may be addressed in licensing of the trustee through requirements for specified levels of operating capital or reserves.

Test (2) Do the terms of the instrument ensure that funds can be used only for certain key activities — reactor decommissioning and specified administrative costs of the trust — rather than a broad range of potentially conflicting uses?

Test (3) Is the trust protected against events, such as amendment or cancellation, that could lessen NRC's ability to draw the necessary funds in a timely manner? To address this particular problem, the following features of the trust are very important:

- The trust should contain provisions describing procedures for its amendment and cancellation. NRC approval should be required for both these actions when amendment or cancellation could materially affect NRC's timely access to decommissioning funds.
- Because disagreements over interpretation of the trust could delay payment, the trust should contain rules of interpretation that specify how disagreements should be resolved. Payment should occur upon the happening of triggering events, even if differences of opinion about the trust have not been resolved.

Test (4) Do the terms of the trust ensure that NRC will receive timely notice of all important information concerning the trust?

- Trustees generally prepare annual reports and accounting summaries indicating the sums on hand, investment results, taxes due, and payments into the trust. These reports can be supplied to NRC, upon request, if NRC determines that it has a need for the information. In general, however, NRC determined in its rulemaking in 1998 that biennial reports of any material changes in the financial condition of the trust were sufficient to monitor the trust funds.

Test (5) Do the terms of the trust place appropriate limits on the investments that the trustee may make?

- NRC must specify how it defines a "prudent" investment. Furthermore, even if NRC relies upon a standard adopted by investment specialists (e.g., the Third Restatement of Trusts) it will need to track how that standard is being interpreted in practice. In the past, standards for the definition of prudent investments have evolved over time. For example, increasing use of diversified investment portfolios led to changing standards about whether each investment in a portfolio, rather than the portfolio as a whole, needed to be prudent. Similarly, increasing use of mutual funds led to relaxation of the prohibition on delegation of investment decisions by a trustee to a fund manager. Because of these and other evolving changes to the then-existing "prudent man" rule, the American Law Institute adopted a new "prudent investor" rule in the Restatement of the Law Third, Trusts in 1992 (Third Restatement). In addition, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Prudent Investor Act in 1994, and numerous States have since adopted the entire

Act or amended their State laws to reflect it. However, the rule cannot be said to be completely uniform across the country, and continued evolution can be expected.⁷

⁷ See Train, J. and Wolfe, T., Investing and Managing Trusts under the New Prudent Investor Rule, Harvard Business School Press, 1999.

5. FINDINGS AND RECOMMENDATIONS

This section presents some general conclusions and a table of existing terms and conditions for decommissioning trusts and evaluates them according to the tests in Section 4. It then provides a table of recommended regulatory terms and conditions and a table of criteria for inclusion in regulatory guidance.

Conclusions on NRC's current overall approach:

NRC currently does not include an extensive set of prescriptive requirements in its regulations for the terms and conditions of reactor decommissioning trusts. Rather, NRC requires only that the funds be segregated from the licensee's assets and outside the licensee's administrative control. A trust fund used to accomplish these purposes must be acceptable to NRC. This overall approach gives licensees great flexibility in how they set up a decommissioning trust fund, but it provides little guidance to them concerning what trust provisions NRC will find acceptable. NRC's Standard Review Plan NUREG-SR 1577, Rev. 1 contains references to recent regulatory amendments, as well as useful explanations of certain key regulatory terms, that are not found in the older Regulatory Guide 1.159. However, Regulatory Guide 1.159 contains a model trust that provides an example of the trust terms that NRC finds acceptable. Under this overall approach, Regulatory Guide 1.159 should be expanded and updated.

An alternative approach would be to specify in regulations the precise wording of the trust provisions. ICF does not believe it would be either feasible or desirable for NRC to change its overall approach by specifying mandatory wording in regulations for the entire decommissioning trust fund. Based on the wide variety of trust instruments that are currently in use for decommissioning trust funds, it appears that, at a minimum, several such trust fund templates would be needed (e.g., a model master trust fund agreement; a model for a qualified fund under §468A; and a model for a non-qualified fund). Substantial time and considerable costs, both to licensees and to NRC, would be necessary to fit the disparate trust instruments currently in use into any templates established by NRC. In addition, the requirements in 10 CFR §50.75 would become more, not less, prescriptive.

Conclusions with respect to Regulatory Guide 1.159:

Several of the trust fund criteria listed in Regulatory Guide 1.159 are useful but are not fully sufficient to protect NRC's interests, in ICF's opinion.

- Regulatory Guide 1.159 currently provides that a trust fund must comply with State law. While this is a necessary threshold consideration, ICF notes that State laws on trusts generally do not address issues of greatest importance to NRC. For example, State laws generally do not address in any way how a trust instrument controls amendments and may not address payment requirements.

- Regulatory Guide 1.159 provides that any trust instrument that complies with §468A is acceptable. ICF believes that this provision should be dropped. Section 468A requirements primarily involve the size and timing of payments into a qualified trust. The terms of the trust instrument are not specified in §468A or in regulations under that section, except that the trust must satisfy State law and the fund must be devoted to reactor decommissioning. The sanction if a trust fails to satisfy §468A is increased tax liabilities. For a licensee otherwise in financial difficulty, this sanction might not be sufficient to avoid undesirable amendments to the trust and/or use of funds for nondecommissioning purposes if NRC does not have the power to approve amendments and disbursements.

In addition, many licensees have both a qualified and a nonqualified fund in the same master trust fund. If a licensee has a qualified trust, the Regulatory Guide also apparently would approve a nonqualified trust without further review, even if the two may be substantially different. At a minimum, no automatic approval should be given to a nonqualified trust, even if the licensee also has a §468A qualified decommissioning fund.

- Regulatory Guide 1.159 provides that a trust fund complying with FERC requirements is acceptable to NRC. ICF believes that this provision should be dropped. Although the FERC requirements in 18 CFR §§ 35.32 and 35.33 are useful, they do not address how the trust instrument controls amendments or payment requirements.
- Regulatory Guide 1.159 contains non-binding investment criteria, but these criteria are limited to licensees that do not use qualified §468A trusts or are not subject to FERC or State PUC jurisdiction. Standard Review Plan NUREG-SR1577 Rev. 1 repeats and slightly expands upon these investment criteria. ICF suggests that investment criteria applicable to all licensees be adopted, as baseline standards, covering PUC or FERC regulated licensees, licensees that are not PUC or FERC regulated, and licensees that are shifting from regulated to non-regulated status.
- ICF suggests that a description of investment standards that consolidates the standards now found in Regulatory Guide 1.159, NUREG-SR 1577, Rev. 1, FERC rules, State rules, and NRC's license transfer conditions be prepared and placed in an updated Regulatory Guide. This would provide a comprehensive and easily accessed statement that would be available to all licensees, whether or not seeking license transfers. It would be necessary, in developing such standards, to avoid excessively prescriptive requirements. For example, NRC currently appears to be establishing, as conditions of license transfer, some of the investment limitations, such as the prohibition on investment in securities of the licensee's subsidiaries or affiliates, that are now included in FERC rules. ICF believes these are useful and necessary limitations. Additional detail (e.g., definitions of "subsidiaries," "affiliates," "associates," "successors," and "assigns," and a more comprehensive explanation of what is meant by investments tied to market indexes or other mutual funds) could be

provided in regulatory guidance. In addition, NRC could review detailed State investment guidelines, such as those found in Texas' rules for decommissioning trust funds, for inclusion in regulatory guidance when State PUC jurisdiction over nuclear power reactors is weakened or eliminated.

- Regulatory Guide 1.159 currently contains model trust fund language, but that language apparently is used infrequently, if at all, by licensees, although the trust funds relied upon by licensees appear to incorporate clauses addressing the same topics as the model trust fund language. The model trust fund language contains clauses that are important, but are not otherwise highlighted in Regulatory Guide 1.159, such as limitations on amendment of the trust fund and payment terms. ICF recommends that these concepts be copied from the model trust fund language and made into either regulatory terms and conditions in 10 CFR Part 50 or criteria in the Regulatory Guide, depending on their level of importance.

Conclusions with respect to Standard Review Plan NUREG-SR 1755, Rev. 1:

The Standard Review Plan contains several explanations of the meaning of terms used in 10 CFR §50.75 or in Regulatory Guide 1.159 that could usefully be incorporated into regulations or guidance.

- The meaning of the licensee's "administrative control" is explained, at least in part, as the making of day-to-day investment decisions.
- The meaning of "material revisions" to trust funds is explained as (1) changes in trustees; (2) changes in provisions for payments into or out of the trust; (3) changes in trust investment management; and (4) any other changes that would have a direct bearing on the amount, availability, and assurance of funds for decommissioning.
- Restrictions on the timing and amounts of payments out of the trust created by decommissioning requirements in 10 CFR Part 50 that are not described in Regulatory Guide 1.159 are provided in the Standard Review Plan.

The following Table 1 lists each of the terms, conditions, or other criteria for decommissioning trust funds described in Sections 1 and 3, and evaluates them using the tests in Section 4. A requirement is said to "meet" a particular test if it establishes a precise standard or goal; a requirement is said to "implement" a particular test if it establishes a standard or goal that requires additional interpretation to determine how to meet the test. Tables 2 and 3 then list ICF's recommended terms and conditions for 10 CFR Part 50 and criteria for regulatory guidance, respectively.

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
<u>10 CFR Part 50</u>			
1. The funds must be segregated from the licensee's assets	Meets Test 2	✓	
2. The funds must be outside the licensee's administrative control	Implements Test 2	✓	
3. The trust must be acceptable to the NRC	Implements Test 1	✓	
<u>Reg Guide 1.159</u>			
4. The trust fund must comply with applicable State trust law	Implements Test 1	✓	
5. The trust must be signed by individuals authorized to act for the appropriate parties	Implements Test 1	✓	
6. The trustee of a fund should be an entity that has the authority to act as a trustee and whose trust operations are regulated or examined by a State or Federal agency	Implements Test 1	✓	
7. Any trust instrument complying with Internal Revenue Code Section 468A is acceptable	Eliminate; not adequately protective		
8. Any trust instrument complying with approval of, or guidance from, a utility's State Public Utility Commission (PUC), from other State agency, or from FERC, is acceptable	Eliminate; not adequately protective		
9. Licensees that do not use decommissioning trusts established under Internal Revenue Code Section 468A or not subject to PUC or FERC jurisdiction should limit trust investments to "investment-grade" securities, defined as bonds and preferred stocks rated at least BBB or equivalent by a national rating service ^a	Implements Test 5	✓	Include in Investment Standards

^a Standard Review Plan NUREG-SR 1577 Rev. 1 expands upon this requirement by (1) noting that investments in common stocks are not prohibited, (2) identifying two common characteristics of speculative common stocks (limited operating history for the company issuing the stock and low "safety" ratings by analysts), and (3) endorsing portfolio diversification.

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
10. The requirement to state the purpose of the trust and to identify the facility by license number	Implements Test 1	✓	
11. The requirement to specify that the trust fund is established for the benefit of the licensee of the facility and/or a State agency or the NRC	Implements Test 1	✓	
12. The requirement that trust management shall, at a minimum, be subject to the prudent investor rule	Meets Test 5	✓	
13. The prohibition on investing in securities or other obligations of the grantor or any other owner or operator of the facilities, or of their affiliates ^b	Meets Test 5	✓	
14. The requirement for annual valuation ^c	Meets Test 4		
15. The requirement that amendments of the trust must be executed in writing and signed by the grantor, the trustee, and the NRC or State agency	Meets Test 3	✓	
<u>Standard Review Plan NUREG SR-1577 Rev. 1</u>			
16. Licensees are required to submit any material revisions to trust agreements to ensure that NRC records are current. Material revisions include (1) changes in trustees; (2) provisions for payment into and out of the trust; (3) changes in trust investment management; and (4) any other changes “that would have a direct bearing on the amount, availability, and assurance of funds for decommissioning”	Implements Test 4		✓
17. The trust must be segregated from the licensee’s assets and outside the licensee’s administrative control. The licensee should “avoid” day-to-day investment decisions ^d	Implements Test 2	✓	

^b Compare #24, #34, #40, #45, and #46, which create broader limits on such investments.

^c ICF notes that 1998 amendments to 10 CFR §50.75 provide for biennial reports, including statements of current value of the trust and a payment schedule for future payments.

^d Although this criterion restates a requirement in 10 CFR Part 50, it also supplies a partial explanation of it by suggesting that “administrative control” can be understood as making day-to-day investment decisions.

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
18. The trustee should be licensed to act as trustee by State or Federal authority ^e	Implements Test 1		✓
19. Disbursements from the trust should be restricted to decommissioning expenses or for transfer to another assurance mechanism acceptable under § 50.75(e)	Implements Test 2		✓
20. Licensees may make withdrawals from decommissioning trust funds as long as the purpose of such withdrawals meets the criteria specified in § 50.82(a)(8)(1)	Implements Test 2		✓
21. Licensees are restricted by § 50.82(a)(8)(ii) in the amounts that they may withdraw for decommissioning expenses	Implements Test 2		✓
22. For power reactor licensees that are subject to either cost-of-service rate regulation or have access to a non-bypassable charge(s) to recover the estimated costs of decommissioning, the NRC will typically defer to State PUCs and FERC to set standards for the types of investments allowed for external sinking funds. For other power reactors, "the NRC has specified in Regulatory Guide 1.159 that external decommissioning trust fund investments should be 'investment grade'" (i.e., corporate or municipal bonds or preferred stocks should be rated at least BBB by Moody's or an equivalent by another major rating agency, such as Standard & Poors, Duff & Phelps, or Fitch)	Implements Test 5	✓	Include in Investment Standards
23. Speculative issues of common stocks should be avoided	Implements Test 5		✓
24. Investments should not be made in the licensee's own stock or in stock of other power reactor licensees	Implements Test 5		✓

^e Compare #6 under Reg. Guide 1.159, which requires trust operations to be "regulated or examined" rather than "licensed" by a State or federal authority. The financial institutions that meet the first criterion include depository institutions such as commercial and savings banks, savings and loan associations, credit unions, branches of foreign banks in the United States, and trust companies, if they have sought and obtained approval to conduct fiduciary activities. Such institutions frequently obtain a "charter" rather than a "license."

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
25. Diversification is not explicitly required. However, the Standard Review Plan notes that if the fund is invested in a diversified portfolio of bonds, stocks, and other investments, "losses on any one issue should not significantly affect the overall value of the trust fund." In addition, "losses in one year may be recouped by increased amortizations in following years." Licensees should revise their amortization rates based on the current net market value of their trust investment portfolios	Implements Test 5		✓ Include in Investment Standards
Section 468A			
26. A Nuclear Decommissioning Fund "must be established and maintained at all times in the United States pursuant to an arrangement that qualifies as a trust under State law"	Meets Test 1		✓
27. The Fund must "be established for the exclusive purpose of providing funds for the decommissioning of one or more nuclear plants"	Meets Test 2		✓
28. A single trust agreement may establish multiple funds. Two or more Nuclear Decommissioning Funds may be established pursuant to a single trust agreement. One or more funds that are not qualified as a Nuclear Decommissioning Fund may be established pursuant to a trust agreement that also includes a Nuclear Decommissioning Fund	Implements Test 2		✓
29. Administrative costs and expenses that may be paid by a Nuclear Decommissioning Fund are defined in the regulations	Implements Test 2		✓
30. By December 31, 1996, each qualified Nuclear Decommissioning Fund trust agreement must "provide that assets in the fund must be used as authorized by section 468A and the regulations thereunder and that the agreement may not be amended so as to violate section 468A or the regulations thereunder"	Implements Tests 2 and 3		✓

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
31. The regulations specify the types of payments that may be made out of the Nuclear Decommissioning Fund, and prohibit other specified actions as “self-dealing”	Implements Tests 2 and 3		✓
<u>FERC</u>			
32. The trust must be an external trust fund in the United States	Implements Test 1	✓	
33. The trust must be established pursuant to a written agreement	Implements Test 1	✓	
34. The trust must be independent of the utility, its subsidiaries, affiliates, or associates	Meets Test 5	✓	Include in Investment Standards
35. The utility may provide overall investment policy, which must be in writing, but neither the utility nor its subsidiaries, affiliates, or associates may serve as investment manager, engage in day-to-day management of the trust, or mandate individual investment decisions	Implements Test 5		✓
36. The investment manager must exercise the standard of care of a prudent investor, as defined by the Third Restatement of the Law of Trusts, §227.	Implements Test 5		✓
37. The trustee must have net worth of at least \$100 million. The net worth of the trustee’s parents or affiliates may be considered in calculating net worth only if they guarantee the trustee’s responsibilities to the fund	Implements Test 1		Basis for \$100M not clear
38. The trustee must keep accurate and detailed accounts of all investments, receipts, disbursements, and transactions of the fund and make them available for inspection and audit at all reasonable times	Implements Test 4		✓

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
39. Trust assets may not be used for any other purpose than to fund the costs of decommissioning the nuclear power plant and to pay administrative costs and other incidental expenses, including taxes, of the fund, unless expressly authorized by FERC	Implements Test 2		✓
40. The trust may not invest in any securities of the utility for which it manages the funds or in that utility's subsidiaries, affiliates, or associates or their successors or assigns, except for investments tied to market indexes or other mutual funds	Implements Test 5		✓
41. The trust should take maximum advantage of tax deductions and credits, when it is consistent with sound business principles to do so	Implements Test 5		Include in Investment Standards
42. Both qualified Section 468A and nonqualified funds may be created with respect to a particular nuclear plant	Implements Test 2		✓
43. The trustee must prepare an annual report	Implements Test 4		✓
<u>NRC License Transfer Conditions</u>			
44. The decommissioning trust agreement must be in a form acceptable to NRC	Already in 10 CFR Part 50	✓	
45. The decommissioning trust agreement must provide that trust fund investments are prohibited in securities or other obligations of the new reactor owner or its affiliates, successors, or assigns	Implements Test 5		Include in Investment Standards
46. The decommissioning trust agreement must provide that investments are prohibited in any entity owning one or more nuclear power plants, except for investments tied to market indices or non-nuclear sector mutual funds	Implements Test 5		

**Table 1: ICF Evaluation of Trust Terms,
Conditions, and Other Criteria
(continued)**

Trust Requirement	Evaluation	Include in 10 CFR	Include in Reg Guide
47. The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30-days prior written notification to the Director, Office of Nuclear Reactor Regulation	Implements Test 3 ^f	✓	
48. The decommissioning trust agreement must provide that the trustee, investment advisor, or anyone else directing the investments made by the trust must adhere to a "prudent investor" standard, as specified in 18 CFR §35.32(a)(3) of the Federal Energy Regulatory Commission's regulations	Implements Test 5		Include in Investment Standards
49. The decommissioning trust agreement must provide that no disbursements or payments from the trust may be made by the trustee until the trustee has first given the NRC 30-days prior written notice, and that no disbursements or payments from the trust may be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation	Implements Test 3	✓	

^f Current license conditions on amendments do not require NRC approval of the amendment, only notice to NRC that the trust is being amended. In contrast, NRC must be informed of and approve payments from the trust.

Table 2: ICF Recommended Terms and Conditions in 10 CFR Part 50

The following terms and conditions are recommended for inclusion in 10 CFR Part 50. If, however, NRC wishes to limit the number of prescriptive regulatory requirements in Part 50, each should at a minimum be stated in regulatory guidance as a criterion NRC will use to determine if a trust fund is acceptable.

- The funds must be segregated from the licensee's assets
- The funds must be outside the licensee's administrative control
- The trust must be acceptable to the NRC
- The trust fund must be an external trust fund in the United States that complies with applicable State trust law
- The trust must be established pursuant to a written agreement and signed by individuals authorized to act for the appropriate parties
- The trustee of the fund should be an entity that has the authority to act as a trustee and whose trust operations are regulated or examined by a State or Federal agency
- The trust instrument should state the purpose of the trust and identify the facility by license number
- The trust instrument should specify that the trust fund is established for the benefit of the licensee of the facility and/or a State agency or the NRC
- The trust instrument must require that trust management shall, at a minimum, be subject to the prudent investor rule as stated in the current Restatement of the Law of Trusts
- The trust instrument must prohibit investing in securities or other obligations of the grantor or any other owner or operator of the facilities, or of their subsidiaries, affiliates, associates, successors, or assigns, with appropriate de minimis exceptions for mutual funds, etc.
- The trust instrument must prohibit investment in stock of other power reactor licensees.
- The trustee should be required to prepare an annual statement of the value of the fund and to have it available for inspection
- The trust instrument must require that amendments of the trust must be executed in writing and signed by the grantor and the trustee. The trust instrument must provide that the agreement cannot be amended in any material respect without 30-days prior written notification to the Director, Office of Nuclear Reactor Regulation and that no amendment may be effective if the trustee and licensee receive written notice of objection from the Director, Office of Nuclear Reactor Regulation
- The trust instrument must provide that no disbursements or payments from the trust may be made by the trustee until the trustee has first given the NRC 30-days prior written notice, and that no disbursements or payments from the trust may be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation

Table 3: ICF Recommended Additions to Criteria in Regulatory Guidance

The following terms and conditions are not currently included in Regulatory Guide 1.159 but are desirable additions to guide licensees.

- A single trust agreement may establish multiple funds. Two or more Nuclear Decommissioning Funds may be established pursuant to a single trust agreement. One or more funds that are not qualified as a Nuclear Decommissioning Fund may be established pursuant to a trust agreement that also includes a Nuclear Decommissioning Fund
- The utility may provide overall investment policy, which must be in writing, but neither the utility nor its subsidiaries, affiliates, or associates may serve as investment manager, engage in day-to-day management of the trust, or mandate individual investment decisions
- The investment manager must exercise the standard of care of a prudent investor, as defined by the currently effective Restatement of the Law of Trusts (with description of the Third Restatement, §227)
- The trustee must keep accurate and detailed accounts of all investments, receipts, disbursements, and transactions of the fund and make them available for inspection and audit at all reasonable times
- The trust may not invest in any securities of the utility for which it manages the funds or in that utility's subsidiaries, affiliates, or associates or their successors or assigns, except for investments tied to market indexes or non-nuclear sector mutual funds (with definitions of these concepts)
- The licensee's administrative control is defined as engaging in day-to-day management of the trust and/or mandating individual investment decisions.
- Material revisions to the trust are defined as (1) changes in trustees, (2) changes in provisions for payment into and out of the trust, (3) changes in trust investment management, and (4) any other changes that would have a direct bearing on the amount, availability, and assurance of funds for decommissioning.