



CONSULTING GROUP

ICF Incorporated
9300 Lee Highway
Fairfax, VA 22031-1207
703/934-3000 Fax 703/934-9740

August 25, 1995

To: Dr. Lou Bykoski, NMSS/NRC

From: Matt Borick and John Collier, ICF Incorporated

Subject: Review of Parent Company Guarantee/Financial Test Submitted by Merrell Dow Pharmaceuticals Inc.

Merrell Dow Pharmaceuticals Inc. (MDPI) in Cincinnati, Ohio, submitted a demonstration of financial assurance for one of its operating units, Marion Merrell Dow Research Institute (MMDRI), using a parent company guarantee/financial test from Marion Merrell Dow Inc. The submission assures decommissioning costs in the amount of \$750,000 for license 34-03643-01 issued under 10 CFR Part 30.¹

Upon review of the submission, ICF recommends that NRC require the licensee to modify the submission in the following ways:

- (1) Submit a certification statement (Regulatory Guide 3.66, page 1-5);
- (2) Demonstrate that a parent-subsidiary relationship exists between the guarantor and the licensee, or submit a different method of financial assurance (Regulatory Guide 3.66, page 3-23);
- (3) Revise the CEO letter from the licensee to indicate the tangible net worth of the licensee (Regulatory Guide 3.66, page 4-33);
- (4) Submit the guarantor's annual financial statements and auditor's opinion (Regulatory Guide 3.66, page 3-21);
- (5) Revise recital 4 of the guarantee to correctly specify the financial test criteria (10 CFR Part 30, Appendix A, and Regulatory Guide 3.66, page 4-42);
- (6) Revise recital 13 of the guarantee to correctly identify NRC as beneficiary (Regulatory Guide 3.66, page 4-43); and

¹ ICF reviewed the licensee's previous submission and reported several recommendations to NRC in a memorandum dated October 16, 1990.

- (7) Submit a standby trust agreement and related documentation (Regulatory Guide 3.66, page 3-13).

These recommendations and other issues are discussed below.

- (1) Submit a Certification Statement (Regulatory Guide 3.66, page 1-5)

The licensee did not submit a statement of certification of financial assurance, as recommended by Regulatory Guide 3.66 "Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72" (June 1990), page 1-5. Based upon the amount of financial assurance provided by the submitted mechanism,² it appears that the licensee should have submitted a certification statement. The statement of certification, in addition to providing information that would allow NRC to verify the certification amount (e.g., the names and locations of the facilities for which financial assurance is provided, and the amount and types of materials handled), officially certifies that the licensee is in compliance with the appropriate requirements. ICF recommends that NRC require the licensee to submit a statement of certification worded as recommended in Regulatory Guide 3.66.

- (2) Demonstrate that a Parent-Subsidiary Relationship Exists Between the Guarantor and the Licensee, or Submit a Different Method of Financial Assurance (Regulatory Guide 3.66, page 3-23)

A parent-subsidiary relationship must exist between a guarantor and a licensee in order for the parent guarantee to be a valid method of financial assurance under NRC regulations. Regulatory Guide 3.66, page 3-23, requires licensees using parent company guarantees to submit evidence that the corporate parent has majority control of the licensee's voting stock.

The information in the licensee's submission does not include evidence that the corporate parent (Marion Merrell Dow Inc.) has majority control of the voting stock of the licensee (i.e., MDPI/MMDRI, as discussed in Other Issue b). ICF recommends that NRC require the licensee to provide appropriate evidence, such as incorporation agreements (i.e., copies of submissions to the appropriate State Corporation Commission), Schedule 22 from the guarantor's SEC Form 10K, or a certified corporate resolution that the licensee and its parent guarantor are separate and distinct corporate entities and that the parent controls a majority of the voting stock of the subsidiary. If a parent-subsidiary relationship cannot be demonstrated, then a parent guarantee is not permitted by the regulations and the licensee must submit another type of financial assurance mechanism.

² ICF assumes that NRC has verified that the certification amount is accurate under 10 CFR 30.35.

- (3) Revise the CEO Letter from the Licensee to Indicate the Tangible Net Worth of the Licensee (*Regulatory Guide 3.66*, page 4-35)

Section 4.7.1 of *Regulatory Guide 3.66* requires a licensee using a parent company guarantee to submit a letter from its chief executive officer (CEO). In this letter, the licensee must certify that it is a going concern, identify the amount of its tangible net worth, specify whether the firm is required to file a Form 10K with the U.S. Securities and Exchange Commission, and list the date on which the firm's fiscal year ends. The CEO letter submitted by the licensee, while acceptable in other respects, reports the tangible net worth of the guarantor rather than the licensee, as follows:

"I hereby certify that [the licensee] is... a wholly owned subsidiary of [the parent company guarantor] which, consolidated with its subsidiaries, possesses positive tangible net worth in the amount of \$1.302 billion."

To ensure that the licensee has positive tangible net worth, ICF recommends that NRC require the licensee to revise its CEO letter to indicate its own tangible net worth, as called for in *Regulatory Guide 3.66*, page 4-35.

- (4) Submit Guarantor's Annual Financial Statements and Auditor's Opinion (*Regulatory Guide 3.66*, page 3-21)

Although the submission includes a special report from the independent auditor confirming that the financial data in the letter from the chief financial officer (CFO) agree with the amounts in the audited financial statements, the submission does not include the audited financial statements or an auditor's opinion of the financial statements. *Regulatory Guide 3.66*, page 3-21, requires the guarantor to submit its financial statements, audited by an independent certified accountant, to substantiate its financial position.

Moreover, the submission includes contradictory figures which cannot be fully evaluated without the financial statements. For example, line 3 of the financial test in the CFO letter reports the guarantor's tangible net worth as \$1.296 billion. The CEO letter, however, reports the guarantor's tangible net worth as \$1.302 billion (see Recommendation 3).³

ICF recommends that NRC require the submission of the guarantor's annual financial statements, including the full text of the auditor's opinion on those statements, in order to determine whether the data used in the financial test fairly present the guarantor's financial condition.

Assuming that one of the two figures is correct, this inconsistency should not affect the guarantor's ability to pass the financial test because both amounts are adequate to pass the test.

- (5) Revise Recital 4 of the Guarantee to Correctly Specify the Financial Test Criteria (10 CFR Part 30, Appendix A, and *Regulatory Guide 3.66*, page 4-42)

The submitted parent company guarantee agreement mis-specifies one of the financial criteria that the guarantor must meet in order to qualify to provide the guarantee. Specifically, Recital 4, in Section (a)(iii), substitutes "30 percent" for 90 percent as follows:

"Assets located in the United States amounting to a[t] least 30 percent of its total assets or at least six times the current decommissioning cost (or prescribed amount if certification is used)." (emphasis added)

The 30 percent figure represents a significantly lower standard than the 90 percent figure that is specified both in 10 CFR Part 30, Appendix A, and in *Regulatory Guide 3.66*, page 4-42. To help ensure that the guarantor will continue to meet the appropriate financial test criteria, ICF recommends that NRC require the licensee to revise Recital 4 to correctly specify all financial test criteria.

- (6) Revise Recital 13 of the Guarantee to Correctly Identify NRC as Beneficiary (*Regulatory Guide 3.66*, page 4-43)

Recital 13 incorrectly cites the licensee, instead of NRC, as the beneficiary of the guarantee. Consequently, the guarantor is liable for litigation costs incurred by the licensee, but not those incurred by NRC, in any efforts necessary to enforce the guarantee. ICF recommends that NRC direct the licensee to revise recital 13 of the guarantee to correctly identify the beneficiary as NRC.

- (7) Submit a Standby Trust Agreement and Related Documentation (*Regulatory Guide 3.66*, page 3-13)

If the licensee defaults on its decommissioning obligations, the guarantor, under Recital 7, must either (1) carry out required decommissioning activities or (2) make funds available in a trust fund to allow NRC to pay for these activities. If the guarantor chooses the second option, it must establish a trust fund because funds paid directly to NRC must be deposited in the U.S. Treasury and would not be available for decommissioning costs. To avoid the possibility that a trust fund will not be readily available if and when needed, *Regulatory Guide 3.66*, page 3-13, states that a standby trust fund should be used with a parent company guarantee. Therefore, ICF recommends that NRC request the licensee to submit a standby trust fund, acknowledgement, and other related documents as recommended in *Regulatory Guide 3.66* on pages 4-18 through 4-27.

Other Issues

Apart from editorial and non-substantive changes to the standard wording provided in *Regulatory Guide 3.65*, the following modifications are noteworthy:

- (a) The submitted guarantee and financial test address only license 34-03643-01 of the Marion Merrell Dow Research Institute (MMDRI). In contrast, a guarantee that was previously submitted by the licensee assured this MMDRI license (license 34-03643-01) plus another MMDRI license (license 13-10064-01), each in the amount of \$750,000 (i.e., a total of \$1,500,000). ICF assumes that financial assurance is no longer required for license 13-10064-01 or, if financial assurance is required, that it is provided using a mechanism other than a guarantee. However, in the event a guarantee is being used for license 13-10064-01, the submitted financial test would need to be revised to reflect the sum of the additional costs assured, and the guarantee agreement would need to be revised to reflect the second license (unless a separate guarantee agreement is being used to assure the second license).
- (b) The submission is somewhat confusing because the licensee, MMDRI, is an operating unit of Merrell Dow Pharmaceuticals Inc. (MDPI), and because MMDRI and MDPI are each referenced as the licensee in different places in the submission. If MMDRI is not a legally distinct entity (i.e., a corporate subsidiary of MDPI), it is understandable why the guarantor would name the corporate entity, MDPI, rather than the operating unit, MMDRI, as the licensee for purposes of the guarantee. These confusing references should be of little concern to NRC for financial assurance purposes because the guarantee explicitly covers the specific license and facility location, and because the guarantee clearly spells out the corporate relationships.

Finally, NRC should ensure that documents submitted by the licensee are originally signed duplicates, as recommended in *Regulatory Guide 3.66*. Unless the documents have been properly signed, NRC cannot be certain that the financial mechanism is enforceable. Because ICF does not possess the original submissions, we cannot verify compliance with these requirements.

attachments

APPENDIX A
CHECKLIST FOR DECOMMISSIONING FINANCIAL ASSURANCE

NAME OF LICENSEE OR APPLICANT

Merrell Dow Pharmaceuticals Inc. (Merrell Dow Research Institute)

MAILING ADDRESS

2110 East Galbraith Road

Cincinnati, OH 45215 - 6300

A. Licensee Part (check one of the following):

- ☒ Part 30 Licensee or Applicant _____ Part 70 Licensee or Applicant
_____ Part 40 Licensee or Applicant _____ Part 72 Licensee or Applicant

B. Check appropriate item in each category (if applicable)

1. ^{Received by NRC} on March 30, 1995 Date of Financial Assurance Submission ^(Letter from parent dated March 30, 1995)
2. _____ Public Entity ^{Effective date = March 31, 19}
☒ Private Entity
3. ☒ Certification of Financial Assurance \$750,000 ^{No certification statement included}
_____ Decommissioning Funding Plan
4. (a) _____ Prepayment Option (See Appendix B)
 _____ Trust Fund
 _____ Escrow Account
 _____ Certificate of Deposit
 _____ Government Fund
 _____ Deposit of Government Securities
- (b) ☒ Surety/Insurance/Other Guarantee (See Appendix C)
 _____ Surety bond
 _____ Letter of Credit
 _____ Line of Credit
 ☒ Parent Company Guarantee/Financial Test* \$750,000
- (c) _____ External Sinking Fund, Sinking Account and Surety/Insurance (See Appendix D)
 _____ Trust Fund
 _____ Escrow Account
 _____ Certificate of Deposit
 _____ Government Fund
 _____ Deposit of Government Securities
 _____ Surety Bond
 _____ Letter of Credit
 _____ Line of Credit
- (d) _____ Statement of Intent (public entities only)

*May not be used in combination with any other instrument.

APPENDIX C

CHECKLIST FOR SUBMISSION OF SURETY/INSURANCE/PARENT COMPANY GUARANTEE

A. Check Appropriate Form of Surety/Insurance/Guarantee

- ☐ Surety Bond
- ☐ Letter of Credit
- ☐ Line of Credit
- ☒ Parent Company Guarantee/Financial Test*
- ☐ Insurance

B. Check Documents Submitted for Surety/Insurance/Guarantee

1. Surety Bond
 - ☐ Surety Bond
 - ☐ Standby Trust Agreement
 - ☐ Acknowledgement
2. Letter of Credit
 - ☐ Letter of Credit
 - ☐ Standby Trust Agreement
 - ☐ Acknowledgement
3. Line of Credit
 - ☐ Verification
 - ☐ Standby Trust Agreement
 - ☐ Acknowledgement
4. Parent Company Guarantee
 - ☒ Letter from Chief Executive Officer of Applicant or Licensee
 - ☒ Letter from Chief Financial Officer of Parent Company
 - ☒ Financial Test: Alternative (I or II)
 - ☒ Auditor's Special Report and Attached Schedule
 - ☒ Corporate Guarantee
 - ☐ Standby Trust Agreement
 - ☐ Acknowledgement
5. Insurance
 - ☐ Certificate of Insurance
 - ☐ Standby Trust Agreement
 - ☐ Acknowledgement

May not be used in combination with any other instrument.

EXHIBIT 3-8

CHECKLIST OF CRITERIA FOR REVIEW OF PARENT COMPANY GUARANTEES

- Copy of letter from the chief executive officer of the licensee, verifying that it is a going concern* with positive tangible net worth (submitted annually at same time as parent company financial test in Sections 4.7.3 and 4.7.4 of this guide).
But doesn't specify that the licensee itself has positive tangible net worth
- Copy of corporate by-laws or other evidence indicating that parties signing the financial instrument (for the applicant) are authorized to represent the organization in the transaction.
guarantor's (Certified copy of) corporate resolutions
- Evidence that the financial instrument is an originally signed duplicate (e.g., an executed copy of the instrument).
NRL to check
- Evidence that the corporate parent has majority control of the applicant's voting stock.
*Revised 5/1/80
Submitted guarantee
No official evidence*
- Name and address of guarantor.
- Name and address of the licensee.
Some clarification needed
- Name and address of the regulatory agency.
- Recitation of the guarantor's authority to provide the guarantee, such as ownership of the licensee.
mostly standard wording
- Identification of the facilities for which the guarantee provides financial assurance and amounts guaranteed for decommissioning activities.

*A "going concern" is a firm that is expected to continue operating at least long enough for current expectations and plans to be carried out and for the reasonably foreseeable future period after that.

EXHIBIT 3-8 (Continued)

- ✓
(mostly standard wording) • Description of the primary obligation (decommissioning requirements).
- ✓
(mostly standard wording) • Unequivocal statement of guarantee.
 - a. Recitation of the consideration for the guarantee.
 - b. Liability of the guarantor.
 - a. Limitation of liability
 - b. Condition(s) of liability
 - c. Effect on liability of a change in the status of the licensee
- ✓
(mostly standard wording) • Statement that guarantor remains bound despite amendment or modification of license or decommissioning funding plan, reduction or extension of time of performance of required activities, or any other modification or alteration of an obligation of licensee.
- ✓
(mostly standard wording) • Notice requirements.
- ✓
→ • Discharge of the guarantor.
- ✓
→ • Termination and revocation.
 - 1. Termination on occurrence of contingency
 - 2. Voluntary revocation by guarantor
 - 3. Effective date of termination or revocation
- ✓ • Date.
- ✓ • Signatures.

CMD: -----

LICENSE SCREEN * - DECOMMISSIONING FINANCIAL ASSURANCE INFORMATION

DOCKET: ----- LIC: 34-03643-01 NAME: ~~MAURICE MURPHY~~ DON RESORT

PARTY ISSUING MECHANISM:

NAME: MARION MURPHY DON INC
ADDR1: 1300 WARD PARKWAY, FURN 8-30
ADDR2: -----
CITY: KANSAS CITY
STATE: MO ZIP: 64114-0480

ASSUR TYPE: CERT
MECH TYPE: PG
MECH AMOUNT: 0 750,000
APPROVED? DATE: 0
EXPIRES? DATE: 0
ACTION (A=ADD C=CHG D=DELETE)

PARTY ISSUING MECHANISM:

NAME: -----
ADDR1: -----
ADDR2: -----
CITY: -----
STATE: -- ZIP: -----

ASSUR TYPE: ? CERT
MECH TYPE: -----
MECH AMOUNT: 0
APPROVED? DATE: 0
EXPIRES? DATE: 0
ACTION (A=ADD C=CHG D=DELETE)

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LTS - FINANCIAL ASSURANCE INFORMATION

VALID MECHANISM TYPE CODES AND THEIR MEANINGS:

MECH TYPE	DESCRIPTION
TR	TRUST FUND
ES	ESCROW ACCOUNT
CD	CERTIFICATE OF DEPOSIT
GF	GOVERNMENT FUND
GS	DIPOSIT OF GOVERNMENT SECURITIES
SB	SURETY BOND
LT	LETTER OF CREDIT
LN	LINE OF CREDIT
PG	PARENT COMPANY GUARANTEE
SI	STATEMENT OF INTENT

PRESS RETURN KEY FOR FINANCIAL ASSURANCE SCREEN:

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