



CONSULTING GROUP

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February 28, 1995

TO: Dr. Lou Bykoski, NMSS/NRC

FROM: John Collier, Craig Dean, and Paul Bailey, ICF Incorporated

SUBJECT: Review of Amended Letter of Credit and Revised Standby Trust Agreement Submitted by Advanced Medical Systems, Inc.

Advanced Medical Systems, Inc. in Cleveland, Ohio, submitted a decommissioning funding plan using an amended letter of credit in the amount of \$1,800,000 and a revised standby trust agreement.¹ The submission assures decommissioning costs for license 34-19089-01. ICF has not been asked to review the licensee's cost estimate. Upon review of the licensee's financial assurance mechanisms, ICF recommends that NRC Region III require the licensee to modify the submission in the following ways:

- (1) Revise Exhibit A to the standby trust agreement to reflect all costs assured (Regulatory Guide 3.66, page 4-26);
- (2) Revise the standby trust agreement as needed to correctly identify the address of the licensed facility; and
- (3) Submit evidence indicating that the party signing the standby trust agreement for the licensee is authorized to represent the company (Regulatory Guide 3.66, page 3-14).

These recommendations and other issues are discussed below.

- (1) **Revise Exhibit A to the Standby Trust Agreement to Reflect All Costs Assured (Regulatory Guide 3.66, page 4-26)**

Exhibit A to the licensee's standby trust agreement has not been revised to reflect the increase in the amount of financial assurance from \$750,000 to \$1,800,000. As a result, the standby trust allows the trustee to make payments of only \$750,000, rather than \$1,800,000, towards the decommissioning of the facility. 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 4-26, recommends that Schedule A (which corresponds to the submitted Exhibit A) list the amount of financial assurance

¹ ICF reviewed two previous submissions from the licensee and reported several recommendations to NRC in memoranda dated November 12, 1990, and August 3, 1992.

demonstrated by the standby trust agreement. To ensure that the standby trust provides adequate financial assurance to NRC, ICF recommends that NRC require the licensee to revise Exhibit A to reflect the full amount of the current cost estimate.

- (2) **Revise the Standby Trust Agreement as Needed to Correctly Identify the Address of the Licensed Facility**

Section 2 of the revised standby trust agreement states that the agreement pertains to the costs "... for the facility identified on Exhibits 'A' and 'A-1.'" The two exhibits appear to reference different facilities, however. Exhibit A identifies the address of the licensee as 1020 London Road, whereas Exhibit A-1 defines the facility as the plant located at 1120 London Road. To ensure that the trustee has the information needed to administer the standby trust, ICF recommends that NRC require the licensee to revise the standby trust agreement as needed to correctly identify the address of the licensed facility.

- (3) **Submit Evidence Indicating that the Party Signing the Standby Trust Agreement for the Licensee is Authorized to Represent the Company (Regulatory Guide 3.66, page 3-14)**

The submission does not provide any evidence indicating that the party signing the mechanism is authorized to enter into a standby trust agreement for the licensee, as recommended in Regulatory Guide 3.66, page 3-14. Evidence of authority to represent the licensee is necessary to ensure the validity and enforceability of the mechanism. Therefore, ICF recommends that NRC require the licensee to submit a copy of the corporate by-laws or other evidence indicating that the party signing the standby trust agreement is authorized to do so.

Other Issues

Apart from editorial and non-substantive changes to the standard wording provided in Regulatory Guide 3.66, the following modifications are noteworthy:

- (a) The submission includes a certification statement indicating that the licensee is required to obtain, and has obtained, financial assurance in the amount of \$750,000. Because the licensee has submitted a cost estimate and a letter of credit in the amount of \$1,800,000, the certification statement appears to be outdated. The cost estimate (which is being reviewed by NRC) would appear to supersede the certification statement.
- (b) Paragraph 1, subparagraph 2 of the submitted letter of credit reads as follows: "Your signed statement by a purported authorized representative...." The underlined phrase was added to the recommended language of Regulatory Guide 3.66, probably so that the issuing institution would

not be responsible for determining the authenticity of the NRC representative who signs the mechanism. NRC remains protected from fraudulent withdrawals on the mechanism, however, because the funds must be deposited into a standby trust fund controlled by NRC.

- (c) The submitted letter of credit added the following paragraph to the recommended language of Regulatory Guide 3.66, pages 4-33 and 4-34:

"This letter of credit sets forth in full the terms of our obligation to you, and such undertaking shall not in any way be modified or amplified by an agreement in which this letter of credit refers to or to which this letter of credit relates, and any such reference shall not be deemed to incorporate herein by reference to any agreement."

This additional paragraph does not allow any modifications through other documents to the letter of credit subsequent to its execution. Although this paragraph may prohibit NRC requirements from serving as a basis for interpreting the credit, the letter nevertheless provides reasonable assurance to NRC.

- (d) Paragraph 1 of the standby trust agreement does not identify the full address of the trustee, as is recommended in Regulatory Guide 3.66. The trustee's full name and address is important in ensuring that NRC will be able to communicate readily with the trustee (e.g., to order payment for required decommissioning activities). However, because the full name and address of the trustee are stated elsewhere in the submission (in the specimen certificate of events), the standby trust agreement does not need to be revised to include the trustee's address in this case.
- (e) The words "or _____ dollars, whichever is greater," have been omitted from Section 5 of the standby trust agreement. Nevertheless, Section 5 appropriately limits withdrawals from the trust to no more than 10 percent of the trust's value, unless NRC's approval has been attached to the withdrawal request.
- (f) Section 5 of Regulatory Guide 3.66's recommended wording for standby trust agreements directs the trustee to make payments "In the event of the Grantor's default or inability to direct decommissioning activities...." The revised standby trust submitted by the licensee, however, directs* payments "In the event the Grantor breaches the requirements of 10 CFR Part 30 or has the inability to direct decommissioning activities...." This modification to the

recommended wording is acceptable because it is equivalent to the recommended wording.

- (g) NRC's *Regulatory Guide 3.66*, page 4-22, recommends that Section 12 of the standby trust agreement read as follows:

Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing with the Grantor. (See Schedule C.)

The suggested format for Schedule C in *Regulatory Guide 3.66* indicates that the schedule should explicitly identify applicable fees.

Section 12 of the submitted standby trust agreement states that the trustee's compensation will be as stipulated in the trustee's "regularly published schedules of compensation in effect and applicable at the time such compensation shall become payable." Exhibit F to the agreement includes a copy of the current fee schedule. Section 12 further states that "Once the Trust is funded, changes in the current fee schedule will be sent to the NRC Region III office." Among the provisions included in Exhibit F is the following:

"At the time of distribution of principal to anyone other than the Grantor, a deferred charge is made equal to 1% of the fair value of the trust assets distributed."

This provision applies only when monies in the trust are paid to someone other than the licensee, and potentially reduces the amount of money available to pay for decommissioning to 99 percent of the value of the fund.² Although this provision poses a risk to NRC, funding in the trust will be adequate to pay for decommissioning if the value of the trust is slightly higher than the cost estimate. This is likely to be the case, assuming the trust is earning income. Moreover, ICF believes this risk is consistent with the investment risk already inherent in the

² Thus, if the trust contained exactly 100 percent of the funds needed to pay for decommissioning, and if NRC needed to direct the decommissioning (e.g., due to the bankruptcy of the licensee), then the available funds would be insufficient by one percent. Based on the \$1,800,000 amount of the licensee's letter of credit, this one percent shortfall would amount to \$18,000.

standby trust agreement.³ The 25 percent contingency factor that must be incorporated by licensees into their decommissioning cost estimates should help to protect NRC from this risk (although the contingency factor also guards against other types of risks as well).

- (h) Section 14 ("Instructions to the Trustee") of the submitted standby trust agreement adds a phrase, underlined below, to the wording recommended in Regulatory Guide 3.66:

If the NRC is required to direct decommissioning as per Section 5 hereof, the NRC shall issue orders, requests, or instructions to the Trustee these shall be in writing, signed by the NRC, or its designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions.
(emphasis added)

Although the added phrase restricts NRC's issuance of orders, requests, and instructions to the trustee to activities related to Section 5 ("Payment for Required Activities Specified in the Plan"), Section 5 is the only section in the agreement that calls for NRC to issue orders, requests, and instructions. Consequently, the added phrase clarifies the intent of Section 14.

- (i) The licensee added the following paragraph to Section 17 ("Immunity and Indemnification") of the standby trust agreement:

In the event this Trust is or becomes subject to specific regulatory requirements of any governmental or quasi-governmental agency relating to hot cell operation or decommissioning, funding, administration, distribution of funds, or termination of this Trust, the Grantor accepts full responsibility for compliance with such rules, regulations or requirements.

This paragraph is intended to relieve the trustee from any regulatory responsibility related to the underlying purpose of the standby trust. The paragraph is acceptable because the trustee remains responsible for upholding all terms of the standby trust agreement.

³ Even if the fund is invested relatively conservatively (e.g., in Treasury bonds), the value of the fund could fall below the required level of financial assurance by one percent or more.

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 assurance 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

MAILING ADDRESS Advanced Medical Systems, Inc.

121 N. Eagle St.

Geneva, OH 44041

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. July 8, 1992 Date of Financial Assurance Submission Amended: 11/16/92
2. ☐ Public Entity
☒ Private Entity
Expires: 2/1/96
1/27/95
3. ☒ Certification of Financial Assurance \$750,000 - 11/13/92
(LOC increased to \$1.8M - 1/27/95)
☐ 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 \$750,000; Increased to \$1.8M on 1/27/95
☐ Line of Credit
☐ Parent Company Guarantee/Financial Test*
(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 3-7

CHECKLIST OF CRITERIA FOR REVIEW OF LETTERS OF CREDIT

N.A.

- 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.

Region to
check

- Evidence that the financial instrument is an originally signed duplicate (e.g., an executed copy of the instrument).

- ✓ • Evidence that the financial institution is regulated by Federal or State agency (e.g., member of FDIC, Federal Reserve System, etc.).

- ✓ • The instrument must be entitled a letter of credit.
(Irrevocable Standby Letter of Credit)

- ✓ • The letter should be limited in amount.

- ✓ • The letter of credit must contain a specified expiration date or be written for a definite term.

- ✓ • The issuer's obligation to pay the beneficiary should arise only upon presentation of a draft or other documents specified in the letter of credit.

- ✓ • The bank must not be called upon to determine a question of fact or law at issue between the licensee and the Commission or State regulatory agency.

- ✓ • The licensee should have an unqualified obligation to reimburse the issuer for payments made under the letter of credit.

EXHIBIT 3-5

CHECKLIST OF CRITERIA FOR REVIEW OF TRUST AGREEMENTS^a

- 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.
- Region will check • Evidence that the financial instrument is an originally signed duplicate (e.g., an executed copy of the instrument).
- See ✓
FDIC List #3 • Evidence that the financial institution has authority to act as a trustee.
- ✓ • Purpose of trust ("whereas" clauses).
 - 1. Description
- ✓ • Grantor or grantors (introductory paragraph).
 - ✓ 1. Names
 - 2. Addresses
- ✓ • Trustee or trustees.
 - 1. Names and addresses
 - ✓ 2. Bank or corporate trustee (introductory paragraph)
- ✓ • Identification of facilities and cost estimates (Section 2).^b

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^aAdapted from 17A Am Jur Legal Forms 2d (Rev) §251.94.

^bReferences are to recommended wording for trust agreements provided in Section 4.

EXHIBIT 3-5 (continued)

- ✓ • Words of transfer, conveyance, and delivery in trust (Section 3).
- ✓ • Payments constituting the trust fund (Section 4).
- ✓ • Duration of trust. (Section 16)
- ✓ • Description of trust property.
 - ✓ 1. Property described in attached schedule (Schedule B)
 - ✓ 2. Cash
 - ✓ 3. Stock and other securities
- ✓ • Additions to trust. (Section 15)
- ✓ • Distribution of trust principal (Section 5).
 - ✓ 1. Disbursement to licensee upon proper certification
 - ✓ 2. Payment for activities at NRC's direction in writing
 - ✓ 3. Refund to grantor at NRC's specification in writing after completion of decommissioning activities
- ✓ • Trust management (Sections 6-8).
 - ✓ 1. Discretionary powers
 - ✓ 2. Fiduciary duty
 - ✓ 3. Commingling and investment
 - ✓ 4. Sale or exchange of trust property
 - ✓ 5. Scope of investments
 - ✓ 6. Express powers of trustee
 - ✓ 7. Borrowing money and encumbering trust assets
- (Optional provisions)

EXHIBIT 3-5 (continued)

- 8. Insurance
- ✓ 9. Operation of business
- ✓ 10. Compromise of claims

- ✓ • Taxes and expenses (Section 9).
- ✓ • Annual valuation (Section 10).
- ✓ • Advice of counsel (Section 11).
- ✓ • Authority, compensation, and tenure of trustees (Sections 12-14).
 - ✓ 1. Trustee compensation — *deferred charge*
 - ✓ 2. Successor trustee
 - ✓ 3. Instructions to trustee
- ✓ • Amendment of agreement (Section 15).
- ✓ • Irrevocability and termination (Section 16).
- ✓ • Immunity and indemnification (Section 17).
- ✓ • Law to govern construction and operation of trust (Section 18).
- ✓ • Interpretation and severability (Section 19).
- ✓ • Date (signature block).
- ✓ • Signatures (signature block).
- ✓ • Acknowledgements, seals or attestations, if necessary or desired (witness by notary public).
- ✓ • Acceptance of trust by trustee or trustees (acknowledgment).

CMD: -----

LICENSE SCREEN * 6 - DECOMMISSIONING FINANCIAL ASSURANCE INFORMATION

DOCKET: 030-16055 LIC: 34-19089-01 NAME: Advanced Medical Systems, Inc.

PARTY ISSUING MECHANISM:

NAME: Bank One, CLEVELAND, OH
ADDR1: INTERNATIONAL OPERATIONS
ADDR2: 600 SUPERIOR AVENUE
CITY: CLEVELAND
STATE: OH ZIP: 44114

ASSUR TYPE: ? CERT
MECH TYPE: LT
MECH AMOUNT: 081,800,000
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	DEPOSIT 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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