

SECOND SUPPLEMENTAL AGREEMENT TO THE COOPERATIVE AGREEMENT
BETWEEN
THE UNITED STATES DEPARTMENT OF ENERGY
AND THE
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY
SETTING FORTH SPECIAL PROVISIONS
FOR THE IDENTIFICATION, IMPLEMENTATION AND MANAGEMENT
OF THE PHASE 1 STUDIES
FOR THE
DECOMMISSIONING AND/OR LONG-TERM STEWARDSHIP
AT THE
WEST VALLEY DEMONSTRATION PROJECT
AND
WESTERN NEW YORK NUCLEAR SERVICE CENTER

THIS SECOND SUPPLEMENTAL AGREEMENT is entered into by the UNITED STATES DEPARTMENT OF ENERGY (DOE) and the NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (NYSERDA), a public benefit corporation organized and existing under the Laws of the State of New York, as a second supplement to the Cooperative Agreement between DOE and NYSERDA, entered into in accordance with Pub. L. 96-368.

WITNESSETH:

WHEREAS the West Valley Demonstration Project Act of 1980, Pub. L. 96-368, provides for DOE to carry out a high level radioactive waste management demonstration project at the Western New York Nuclear Service Center (Center), in West Valley, New York; and

WHEREAS pursuant to Section 1856 of the Public Authorities Law of the State of New York, NYSERDA has assumed jurisdiction over the Center and holds title to the Center on behalf of the State of New York; and

WHEREAS Section 1854(6) of the Public Authorities Law of the State of New York authorizes NYSERDA to take such actions as it deems necessary or appropriate with respect to the Center in order to protect public health, safety and the environment; and

WHEREAS DOE and NYSERDA have entered into a Cooperative Agreement, effective October 1, 1980, (amended September 18, 1981), in accordance with Pub. L. 96-368 for the purpose of implementing the West Valley Demonstration Project (WVDP or Project); and

WHEREAS the Cooperative Agreement granted DOE exclusive use and possession of certain Project Premises and Project Facilities at the Center, including a Process Plant, for the limited purpose of carrying out the work of the WVDP; and

WHEREAS DOE and NYSERDA entered into a Supplemental Agreement, effective October 1, 1990, setting forth the procedures and responsibilities associated with preparation of a Joint Environmental Impact Statement, including cost participation by each agency, support services contractor selection and contract administration; and

WHEREAS DOE and NYSERDA, as joint lead agencies, developed and completed an environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. §4321 et seq. (NEPA), and the New York State Environmental Quality Review Act, New York State Environmental Conservation Law §§ 3-0301(1)(b), 3-0301(2)(m)(SEQRA), and 6 New York Code of Rules and Regulations Part 617 (collectively, the “NEPA/SEQRA Process”); and

WHEREAS, as part of the NEPA/SEQRA Process, on January 21, 2010, DOE and NYSERDA issued a Final EIS entitled, “Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Nuclear Service Center.” The Preferred Alternative in the Final EIS was Phased Decisionmaking. Under the Phased Decisionmaking Alternative decommissioning would be completed in two phases. The first phase would take approximately ten (10) years to complete. During Phase 1, approximately \$1 billion will be spent to remove a number of highly contaminated facilities from the Center. While this work proceeds, DOE and NYSERDA intend to conduct additional scientific studies in order to facilitate interagency consensus

to complete decommissioning of the remaining facilities (hereafter “Phase 1 Studies”);
and

WHEREAS, on April 14, 2010, DOE issued its Record of Decision (ROD), pursuant to NEPA, selecting the Phased Decisionmaking Alternative for the decommissioning of the WVDP; and

WHEREAS, on May 12, 2010, NYSERDA issued its Findings Statement, pursuant to SEQRA, also selecting the Phased Decisionmaking Alternative for its decisions on the State-Licensed Disposal Area and the balance of the Center; and

WHEREAS, completion of the Joint Environmental Impact Statement, ROD and Findings Statement, fulfilled the purpose and intent of the original Supplemental Agreement; and

WHEREAS, DOE and NYSERDA wish to memorialize the procedures and responsibilities associated with conducting the Phase 1 Studies; and

WHEREAS, on July 1, 2010, DOE and the State of New York filed motions with the United States District Court for the Western District of New York to approve and enter a Consent Decree resolving certain claims asserted by the State of New York in an action entitled State of New York et. al v. United States, et. al, Civil Action No. 06-CV-0810, and allocating 100% of the costs of future remediation for specified facilities and areas on the Center between the United States and the State of New York. The Consent Decree does not determine which cleanup measures will be selected, only the agreed-upon allocation of costs for certain Remedy Actions as defined in the Consent Decree;
and

WHEREAS the United States District Court for the Western District of New York approved the Consent Decree on August 17, 2010.

NOW, THEREFORE, in consideration of the above and other provisions of this Second Supplemental Agreement, DOE and NYSERDA hereby agree as follows:

ARTICLE I. DEFINITIONS

Section 1.1 For purposes of this Second Supplemental Agreement:

- (a) "Consent Decree" means the Consent Decree in an action entitled State of New York et. al v. United States, et. al, Civil Action No. 06-CV-0810, approved by the United States District Court for the Western District of New York on August 17, 2010, which resolves certain claims raised by the State of New York and allocates 100% of the costs between the United States and New York for the future remediation for specified facilities and areas on the Center.
- (b) "Cooperative Agreement" means the Cooperative Agreement between DOE and NYSERDA, effective October 1, 1980, as amended September 18, 1981, for implementing the WVDP pursuant to Pub. L. 96-368. When used in this Second Supplemental Agreement, the terms defined in the Cooperative Agreement have the meanings set forth in the Cooperative Agreement.
- (c) "DOE" means the United States Department of Energy.
- (d) "Findings Statement" means the document issued by NYSERDA on May 12, 2010, pursuant to SEQRA, selecting the Phased Decisionmaking Alternative for its decisions on the State-Licensed Disposal Area and the balance of the Center.

- (e) "Joint Environmental Impact Statement" (or "Joint EIS") means the EIS entitled "Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and the Western New York Nuclear Service Center," as issued by DOE and NYSERDA on January 21, 2010, evaluating the completion of the WVDP and closure of the Center. The Joint EIS satisfies the requirements of Section 102(2)(C) of NEPA and Section 8-0109 of the New York State Environmental Conservation Law, 40 CFR 1506.2, 6 NYCRR Part 617, and other applicable Federal and State regulations.
- (f) "NEPA" means the National Environmental Policy Act, 42 U.S.C. 4321 et. seq.
- (g) "NYSERDA" means the New York State Energy Research and Development Authority.
- (h) "Phase 1 Studies" means the additional scientific studies identified, implemented and managed by DOE and NYSERDA during Phase 1 of the Phased Decisionmaking Alternative in order to facilitate interagency consensus to complete decommissioning of the remaining facilities. According to DOE's Record of Decision (ROD), the Phase 1 Studies may address uncertainties associated with the long-term performance models, the viability and cost of exhuming buried waste and tanks, the availability of waste disposal sites, and technologies for in-place containment. NYSERDA's Findings Statement indicates that the studies should include, but not be limited

to, analysis of soil erosion, groundwater flow and contaminant transport, engineered barriers, and uncertainty.

- (i) "Phased Decisionmaking" means the Preferred Alternative from the Joint EIS under which decommissioning would be completed in two phases. Both DOE and NYSERDA selected this alternative at the conclusion of their respective NEPA/SEQRA processes. This alternative involves the undertaking of substantial removal actions in the first phase, and provides for additional scientific studies in order to facilitate interagency consensus to complete decommissioning of the remaining facilities.
- (j) "Record of Decision" means DOE's formal announcement and issuance on April 14, 2010, of its decision pursuant to NEPA selecting the Phased Decisionmaking alternative for the decommissioning of the WVDP.
- (k) "Records" (or "documents") means not only written material or printed information but also information recorded or encoded on other media or in any other physical form, including but not limited to microfilm, tape, or computer disks.
- (l) "SEQRA" means the State Environmental Quality Review Act, comprising Article 8 of the Environmental Conservation Law of the State of New York.
- (m) "State" means the State of New York.
- (n) "Supplemental Agreement" means the Supplemental Agreement, effective October 1, 1990, which set forth the procedures and responsibilities associated with preparation of the Joint EIS, including cost participation by each agency, support services contractor selection and subsequent contract administration.

The terms and provisions of the Supplemental Agreement have been fulfilled by the completion of the Joint EIS, ROD and Findings Statement.

(o) "WVDP" or "Project" means the West Valley Demonstration Project, being carried out at the Center pursuant to the provisions of Public Law 96-368.

ARTICLE II. SCOPE

Section 2.1. Phase 1 Studies are expected to take approximately 8 years to complete, allowing for Phase 2 decisions within 10 years of DOE's Record of Decision. DOE and NYSERDA will assess the results of the site specific studies as they become available.

Section 2.2. The scope of this Second Supplemental Agreement covers only the relationship, procedures, cost responsibilities, rights and obligations as between NYSERDA and DOE for identification, implementation and management of the Phase 1 Studies. This Second Supplemental Agreement does not address costs or responsibility for any other activity, including: cleanup, remedial actions, or any activities for Decommissioning and/or Long-Term Stewardship at the WVDP or of the Center resulting from or discussed in the Joint EIS, ROD or Findings Statement; or the respective cost allocation and responsibility of each party as detailed in the Consent Decree.

Section 2.3. (a) Except as expressly set forth in this Second Supplemental Agreement, the provisions of this Second Supplemental Agreement shall not impair or diminish or otherwise adversely affect the respective rights and responsibilities of NYSERDA and DOE pursuant to the Cooperative Agreement or the Consent Decree. Additionally, nothing in this Second Supplemental Agreement, or any action or omission pursuant to it, is intended to affect the respective obligations of DOE and NYSERDA to pay the various

cost allocations agreed to by both parties in the Consent Decree. The provisions of the Second Supplemental Agreement shall not impair or diminish or otherwise adversely affect the respective rights and responsibilities of NYSERDA and DOE pursuant to any other agreement to which both NYSERDA and DOE are parties, with the exception of the original Supplemental Agreement.

(b) Nothing in this Second Supplemental Agreement shall have the effect, or be construed or used as evidence by either party as having the effect, of transferring to the other party (or its contractors) title to any waste at the Center or to the Center or any portion of the Center.

(c) Nothing in this Second Supplemental Agreement shall be deemed to constitute a waiver of sovereign immunity by either DOE or NYSERDA, nor shall it otherwise affect the respective rights of DOE, as an instrumentality of the United States, or of NYSERDA, as an instrumentality of the State, under the United States Constitution or the Constitution of the State of New York.

(d) Nothing in this Second Supplemental Agreement shall be enforceable by or grant a cause of action to any person, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, municipality, commission, political subdivision of a state, or interstate body not a party to this Second Supplemental Agreement, except as may be expressly provided herein.

Section 2.4. The respective undertakings of DOE and NYSERDA under this Second Supplemental Agreement are conditioned upon the availability of appropriated funds.

ARTICLE III. PHASE 1 STUDIES

Section 3.1. DOE and NYSERDA intend to develop and conduct the Phase 1 Studies in accordance with the following guiding principles:

(a) Core Values. DOE and NYSERDA staff will strive to conduct themselves as follows:

- (1) Individuals will be treated with trust and respect regardless of affiliation or position.
- (2) Where differences of opinion exist, each agency will strive to understand the other person's or agency's position.
- (3) Each agency shall respect the other agency's position.
- (4) Individuals shall engage in honest discourse.
- (5) Individuals will strive to put sound science and the needs of the site ahead of the agency's needs.
- (6) Individuals will act with integrity and transparency.

(b) The studies will be of sufficient scope to address the issues associated with facilitating interagency decisionmaking.

(c) The studies will be scoped such that the study findings will be available within 8 years of the Phase 1 decisions, allowing for Phase 2 decisions within 10 years of DOE's Record of Decision.

Section 3.2. The following list identifies potential areas of study. The list may be refined and specific Phase 1 Studies identified as necessary to facilitate interagency consensus. The potential study areas and individual studies may be modified, as necessary, based upon input from any technical experts employed by DOE and NYSERDA, the regulatory

agencies and the public. However, the intent is for DOE and NYSERDA to identify all potential areas of study early in the process to ensure adequate schedule and funding to perform the studies.

- (a) Soil erosion
- (b) Groundwater flow and contaminant transport
- (c) Catastrophic release of contamination and impact on Lake Erie
- (d) Slope stability and slope failure
- (e) Seismic hazard
- (f) Probabilistic vs. deterministic dose and risk analysis
- (g) Alternative approaches to and cost of complete waste and tank exhumation
- (h) Exhumation uncertainties and benefit of pilot exhumation activities
- (i) In-place closure containment technologies
- (j) Engineered barrier performance
- (k) Additional characterization needs
- (l) Cost discounting and cost benefit analysis over long time periods.

Section 3.3. DOE and NYSERDA are committed to conducting Phase 1 Studies through a process that involves input from technical experts, the regulatory agencies and the public.

Section 3.4. Expert Support and Facilitation

DOE and NYSERDA may opt to employ technical experts to assist in assessing study topic areas and developing and reviewing study plans and activities. DOE and NYSERDA will also secure professional facilitation services to assist the agencies in successfully completing the Phase 1 Studies. These services will include facilitation of

agency and public meetings, integration of various participant inputs into the process, mediation of agency disagreements, fostering an open process of dialogue and deliberation, and working collaboratively with all participants in the Phase 1 Studies process.

Section 3. 5. Regulatory and Public Participation

DOE and NYSERDA will meet with the regulatory agencies (the Nuclear Regulatory Commission, United States Environmental Protection Agency, the New York State Department of Environmental Conservation, and the New York State Department of Health) and with the public (including the Citizens Task Force, local environmental groups and other interested parties) throughout the Phase 1 Study process, and will (1) discuss preliminary results when studies reach interim milestones, or other reasonable points in the study as determined by DOE and NYSERDA, and (2) provide final and validated study results, reports, interpretations and recommendations of the technical experts. DOE and NYSERDA will consider input from both the regulatory agencies and the public, and will respond to comments.

Section 3.6. Guidance

DOE and NYSERDA have developed a more detailed Guidance Document for identifying and conducting Phase 1 Studies, and shall revise that document as needed.

Section 3.7. Investigative Plans

DOE and NYSERDA will finalize Investigative Plans for all mutually accepted Phase 1 Study recommendations. The Investigative Plans will identify the necessary steps in order to perform the mutually accepted Phase 1 Studies.

Section 3.8. Implementation of Phase 1 Studies

DOE and NYSERDA will contract with the appropriate entities to conduct specific study activities for each study area agreed upon by NYSERDA and DOE.

Section 3.9. Option to Proceed in the Event of Continued Disagreement

If DOE and NYSERDA cannot agree to conduct one or more particular studies, either agency may conduct the study or studies unilaterally at its own cost.

ARTICLE IV. CONTRACT ADMINISTRATION

Section 4.1. DOE and NYSERDA propose to utilize a directed small business contract pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). The selected contractor will perform various tasks associated with Phase 1 Studies, including but not limited to provision of process facilitation, expert analysis and review, data collection and analysis, and report preparation. The contractor will utilize the services of subcontractors where appropriate.

Section 4.2. DOE and NYSERDA will jointly participate in identifying prospective Section 8(a) small business firms to provide individual capability briefings to DOE and NYSERDA for consideration.

Section 4.3. DOE and NYSERDA will jointly observe and evaluate each of the capabilities briefings provided by prospective Section 8(a) firms.

Section 4.4. Based upon the evaluation of the capability briefings provided by the prospective Section 8(a) firms, DOE and NYSERDA will jointly select the Section 8(a) firm to perform the required task.

Section 4.5. A tripartite contract will be entered into with the agreed upon Section 8(a) firm and both DOE and NYSERDA.

Section 4.6. Provisions will be added into the tripartite contract to ensure that both DOE and NYSERDA have equal authority and responsibility.

Section 4.7. Funding for the required task will come from both DOE and NYSERDA as described in Article V.

Section 4.8. DOE and NYSERDA will coordinate with the agreed upon Section 8(a) firm on the review and selection of subcontractors to assist in performing various tasks associated with Phase 1 Studies.

Section 4.9. DOE and NYSERDA will undertake all of the tasks set forth in Article IV as expeditiously as possible.

ARTICLE V. COST ALLOCATION

Section 5.1. (a) DOE and NYSERDA agree to each pay 50 percent of the costs of identifying, preparing and managing the Phase 1 Studies and directly related activities within the scope of this Second Supplemental Agreement.

(b) DOE's and NYSERDA's respective shares of costs incurred pursuant to this Second Supplemental Agreement shall include payment for their proportionate shares of any claims, litigation costs, termination costs, or settlements paid to any contractors retained pursuant to the Second Supplemental Agreement, or any obligations incurred as a result of modifications made to the contracts of any contractors retained pursuant to this Second Supplemental Agreement, to the extent that such claims, costs, or settlements arise from services within the scope of this Second Supplemental Agreement.

(c) The parties agree that DOE's and NYSERDA's respective shares shall be paid in accordance with the terms and procedures of this Article.

ARTICLE VI. PROPRIETARY INFORMATION

Section 6.1. (a) When either DOE or NYSERDA obtains material identified as proprietary or confidential data or information from any contractors used in connection with the work performed pursuant to this Second Supplemental Agreement, it shall not be further released except as may be required by law or approved by both DOE and NYSERDA. Proprietary or confidential data or information includes without limitation:

- (1) trade secrets;
- (2) information which is obtained from the contractor and marked "confidential" or "privileged;"
- (3) information which, as may be determined by DOE or NYSERDA, would not be available by law to a person under the Freedom of Information Act, Title 5, United States Code, Section 552, or under the New York State Freedom of Information Law, New York Public Officers Law, Article 6;
- (4) information or documents which would not be available to a party in litigation with either DOE or NYSERDA, including but not limited to information and documents subject to executive privilege, the deliberative process privilege, attorney-client privilege, attorney work product privilege or information which, if released, would harm the competitive position of either DOE or NYSERDA in the award of a contract or contracts.

(b) In any event, except as required by law or approved by both DOE and NYSERDA:

(1) DOE and NYSERDA shall adhere to all restrictive legends or restrictions contained in notices on documents and shall promptly notify the other party of any request for information received which may reasonably be subject to this paragraph;

(2) Neither DOE nor NYSERDA shall release proprietary or confidential data or information unless (1) required by a court of law, or (2) approved by the other party, after referring the request to the other party for a determination of the appropriateness of releasing the requested information or denying the request.

(c) Transmittal of proprietary or confidential data by either DOE or NYSERDA to the other party shall not be deemed a waiver by DOE or NYSERDA of any right, benefit, or privilege associated with the information.

ARTICLE VII. TERMINATION

Section 7.1. Either party to this Second Supplemental Agreement may terminate this Second Supplemental Agreement at any time upon 60 days written notice to the other party (hereafter identified in this Article as the “recipient party”).

Section 7.2. (a) Upon receipt of a Notice of Termination from either DOE or NYSERDA, the recipient party shall proceed to take appropriate actions to adjust the contracts or solicitations accordingly. The recipient party shall proceed to modify the existing contractual obligations with the following actions:

(1) Notify each contractor to stop work on the terminated portion of its contract;

(2) Require each contractor to terminate or partially terminate all applicable subcontracts or divert applicable commitments which extend beyond the date of termination to the extent necessary to accommodate the Notice of Termination described in Section 7.1 of this Article in accordance with the provisions of the contract;

(3) Direct each contractor to submit a termination settlement proposal promptly, but no later than one year after the effective date of the termination.

(b) In consultation and cooperation with the party submitting the Notice of Termination described in section 7.1 of this Article, the recipient party shall review each proposal submitted under paragraph (a)(3) of this section to determine the amount, if any, due the contractor. This amount may include reasonable cancellation charges, any reasonable loss on outstanding commitments, and the reasonable costs of preparing an evaluation and proposal for completion of the unterminated portion of the contract ("Termination costs").

(c) The recipient party may direct a contractor to proceed with the unterminated portion of the work under the existing contract.

(d) Upon request from the party submitting the Notice of Termination described in section 7.1 of this Article, the recipient party shall direct any contractor to deliver to the party submitting the Notice of Termination pursuant to section 7.1 of this Article copies of completed or partially completed drawings, plans, or information available as a result of work

performed by that contractor up to the time it stopped work on the terminated portion of the contract pursuant to notice received by the recipient party.

(e) Upon request from the party receiving the Notice of Termination described in section 7.1 of this Article, the submitting party shall direct any contractor to deliver to the party receiving the Notice of Termination pursuant to section 7.1 of this Article copies of completed or partially completed drawings, plans, or information available as a result of work performed by that contractor up to the time it stopped work on the terminated portion of the contract pursuant to notice submitted by the submitting party.

(f) The recipient party may make payments or partial payments to the contractor(s), or receive payments or partial payments from the party submitting the Notice of Termination pursuant to section 7.1 of this Article, without waiving any rights it may have to further performance or payments from the terminating party under the terms of this Second Supplemental Agreement.

Section 7.3. The party issuing a Notice of Termination pursuant to Section 7.1 of this Article shall be responsible for the termination costs described in section 7.2(b) above unless such termination right is invoked to remedy a material breach of this Second Supplemental Agreement, in which event then the party whose action or omission comprised the breach shall be responsible for such termination costs. DOE and NYSERDA shall be jointly responsible for costs incurred through the date of termination.

ARTICLE VIII. RIGHTS IN TECHNICAL DATA

Section 8.1. Except as may otherwise be agreed in writing by DOE and NYSERDA, the provisions set forth in Appendix A (entitled "Requirements for the Rights in Technical Data") attached to this Second Supplemental Agreement shall govern the allocation of rights in technical data under, and be included in, all contracts and subcontracts, at any tier, entered into pursuant to Articles III, IV and V of this Agreement.

ARTICLE IX. MISCELLANEOUS

Section 9.1. Disputes. Disputes may be submitted to nonbinding arbitration or other alternative dispute resolution procedures to which DOE and NYSERDA agree. In any event, a dispute not otherwise resolved by agreement of the parties shall be subject to the applicable provisions of Section 8.03 of the Cooperative Agreement. Nothing in this section shall limit the rights of the parties to terminate the Second Supplemental Agreement under the provisions of Article VII, "Termination."

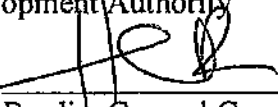
Section 9.2. This Second Supplemental Agreement may be executed in any number of counterparts, each of which shall be an original but all of which together shall constitute one and the same instrument. Except as otherwise expressly provided in this Second Supplemental Agreement, the provisions of this Second Supplemental Agreement may be amended, waived, or discharged only by a written instrument executed by the party against which enforcement of such amendment, waiver, or discharge is sought. The headings in this Second Supplemental Agreement are for convenience of reference only and shall not define or limit its terms. The provisions of this Second Supplemental

Agreement shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of DOE and NYSERDA.

Section 9.3. This Second Supplemental Agreement shall become effective upon execution by both DOE and NYSERDA.

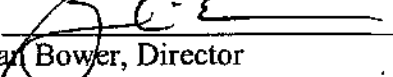
The New York State Energy Research and Development Authority

Dated: May 2, 2011

By: 
Hal Brodie, General Counsel and Secretary

The United States Department of Energy

Dated: 05-09-2011

By: 
Bryan Bower, Director
West Valley Demonstration Project

APPENDIX A. REQUIREMENTS FOR RIGHTS IN TECHNICAL DATA.

The following provisions concerning requirements for rights in technical data shall be included in all contracts and subcontracts entered into by the U.S. Department of Energy ("DOE") and the New York State Energy Research and Development Authority ("NYSERDA") as required by Article VIII of the Second Supplemental Agreement to which this Appendix A is attached; provided, that modifications that change only the subdivision format (e.g. article, sections, paragraphs, subparagraphs, clauses) and related number and letter designations, but not the substance of the provisions, are permissible.

Section 1. Introduction

The work being undertaken pursuant to the instant contract is part of work falling within the terms of a Second Supplemental Agreement between NYSERDA and the DOE for the identification, implementation and management of Phase 1 Studies for the Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and the Western New York Nuclear Service Center at West Valley, New York which provides, inter alia, for allocation of rights in technical data produced as a result of work for which DOE and NYSERDA contract pursuant to such Second Supplemental Agreement.

Section 2. Definitions.

For purposes of this contract:

(a) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media, such as drawings or photographs, text

in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. "Technical data" do not include financial reports, cost analyses, and other information incidental to contract administration.

(b) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(1) are not generally known or available from other sources without obligation concerning their confidentiality;

(2) have not been made available by the owner to others without obligation concerning their confidentiality; and

(3) are not already available to the Government or to NYSERDA without obligation concerning their confidentiality.

(c) "Contract data" means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, technical data that may be called for under the Additional Technical Data Requirements section of the contract, or technical data actually delivered in connection with the contract.

(d) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(e) "Government" means the United States of America.

Section 3. Allocation of rights.

(a) The Government and NYSERDA shall have:

(1) Unlimited rights in contract data, except as otherwise provided below with respect to proprietary data;

(2) No rights under this contract in any technical data which are not contract data.

(b) The Government and NYSERDA shall have the right to remove, cancel, correct, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE or NYSERDA concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case, DOE or NYSERDA will notify the contractor of the action taken.

(c) The contractor shall have:

(1) The right to withhold proprietary data in accordance with the provisions of this Article; and

(2) The right to use for its private purposes, subject to patent, security, or other provisions of this contract, data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that, to the extent it receives or is given access to proprietary data or other technical, business, or financial data in the form of recorded information from DOE, NYSERDA or a contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of DOE's or NYSERDA's Contracting Officer.

(d) Nothing contained in this Rights in Technical Data Article shall imply a license to the Government or NYSERDA under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government or NYSERDA under any patent.

Section 4. Copyrighted material.

(a) The contractor shall not, without prior written authorization of DOE's Patent Counsel and NYSERDA's Contracting Officer, establish a claim to statutory copyright in any contract data first produced in the performance of the contract. To the extent such authorization is granted, the Government and NYSERDA reserve for themselves and others acting on their behalf a royalty-free, nonexclusive, irrevocable, worldwide license for Governmental and NYSERDA purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the contractor.

(b) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor, and not to knowingly include any material copyrighted by others, without first granting or obtaining at no cost a license therein for the benefit of the Government and NYSERDA of the same scope as set forth in paragraph (a) of this section. If such royalty-free license is unavailable and the contractor nevertheless determines that such copyrighted material must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of DOE's and NYSERDA's Contracting Officer to include such copyrighted material in the technical data, prior to its delivery.

Section 5. Subcontracting.

It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government and NYSERDA, necessary to fulfill the

contractor's obligations to the Government and NYSERDA with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government and NYSERDA such rights, the contractor shall:

(a) promptly submit written notice to the Contracting Officer of DOE and NYSERDA, setting forth reasons for the subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

(b) not proceed with the subcontract without the written authorization of the Contracting Officers.

Section 6. Withholding of proprietary data.

(a) General. Notwithstanding the inclusion of the Additional Technical Data Requirements Section in this contract or any provision of this contract specifying the delivery of technical data, the contractor may withhold proprietary data from delivery, provided that the contractor furnishes in lieu of any such proprietary data so withheld technical data disclosing the source, size, configuration, mating, and attachment characteristics ("Form, Fit, and Function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.), or a general description of such proprietary data where "Form, Fit, and Function" data are not applicable. The Government and NYSERDA shall acquire no rights to any proprietary data so withheld, except that such data shall be subject to: the "Inspection Rights" provisions of paragraph (b) of this section; if included, the "Limited Rights in Proprietary Data" provisions of paragraph (c) of this section; and the provisions of Section 7 below.

(b) Inspection Rights. Except as may otherwise be provided in this contract for specific items of proprietary data which are expressly not subject to this paragraph, the Contracting Officer's representatives, at all reasonable times up to three years after final payment under this contract, may inspect at the contractor's facility any proprietary data

withheld under paragraph (a) and not furnished under paragraph (c) of this section (if this contract includes such paragraph (c)), for the purposes of verifying that such data properly fell within the withholding provisions of this section or for evaluating work performance.

(c) Limited rights in proprietary data. (1) Except as may otherwise be provided in this contract for specific items of proprietary data which are expressly not subject to this paragraph, the contractor shall, upon written request from the Contracting Officer at any time prior to three years after final payment under this contract, promptly deliver to the Government and NYSERDA any proprietary data withheld pursuant to this section. The following legend set forth in subparagraph (2) of this paragraph and no other is authorized to be affixed on any proprietary data delivered pursuant to this paragraph, provided the proprietary data meets the conditions for initial withholding under this section. The Government is subject to the Freedom of Information Act (FOIA) and NYSERDA is subject to the New York State Freedom of Information Law (FOIL). Contractors shall submit all proprietary data in accordance with and subject to these laws. As required by law, the Government and NYSERDA will thereafter treat the proprietary data in accordance with such legend.

(2) Limited Rights Legend:

“This technical data contains 'proprietary data,' furnished under ['Contract No. _____'] or, if applicable, 'Purchase Order No. _____'] with DOE and NYSERDA, which may be duplicated and used by the Government and NYSERDA with the express limitations that, except as may be required by law, the 'proprietary data' may not be disclosed outside the Government and NYSERDA or be used for purposes of manufacture without prior permission of the contractor, except that further disclosure or use may be made, solely for the following purposes:

“(A) This 'proprietary data' may be disclosed for evaluation purposes under the restriction that the 'proprietary data' be retained in confidence and not further disclosed;

“(B) This 'proprietary data' may be disclosed to other contractors participating in the program of which this contract is part, for information and use in connection with the work performed under the Government's and NYSERDA's contracts and under the restriction that the 'proprietary data' be retained in confidence and not be further disclosed; or

“(C) This 'proprietary data' may be used by the Government and NYSERDA or others on their behalf for emergency repair or overhaul work under the restriction that the 'proprietary data' be retained in confidence and not further disclosed.

“This legend shall be marked on any reproduction of this data in whole or in part.”

Section 7. Data Related to Regulatory Proceedings, Environmental Reviews, and Environmental Impact Statements.

(a) In addition to the rights in data set forth in the above sections and notwithstanding anything to the contrary, the contractor agrees that the Government and NYSERDA shall have unlimited rights in any data:

(1) specifically used in the preparation of any future environmental impact statement (EIS), or any section thereof, or in the preparation of any materials prepared for any regulatory proceedings or any environmental reviews, or

(2) actually delivered to the Government or NYSERDA for incorporation or use by the Government or NYSERDA in preparing any material for incorporation in any EIS or any section thereof, or in any materials prepared for any regulatory proceedings or any environmental reviews.

(b) The contractor further agrees that it will obtain such unlimited rights for the Government and NYSERDA from any third party whose data is so used or actually delivered

to the Government or NYSERDA. The contractor agrees to include appropriate provisions to secure for the Government and NYSERDA the unlimited rights in data consistent with or required by this section in any contract with a third party, which contract is in support of the efforts being undertaken under this contract.

Section 8. Additional Technical Data Requirements.

(a) In addition to the technical data specified elsewhere in this contract to be delivered, the Contracting Officer may at any time during the contract performance or within one year after final payment call for the contractor to deliver any technical data first produced or specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design.

(b) The provisions of the Rights in Technical Data Article are applicable to all technical data called for under this Additional Technical Data Requirements section. Accordingly, nothing contained in this section shall require the contractor actually to deliver any technical data, the actual delivery of which is otherwise excused by the provisions of this Article.

(c) When technical data are to be delivered under this section, the contractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction, and for delivery.