

THIRD SUPPLEMENTAL AGREEMENT TO THE COOPERATIVE AGREEMENT  
BETWEEN  
THE UNITED STATES DEPARTMENT OF ENERGY  
AND THE  
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY  
TO SUPPORT  
PHASE 2 DECISIONMAKING  
FOR THE  
DECOMMISSIONING AND/OR LONG-TERM STEWARDSHIP  
AT THE  
WEST VALLEY DEMONSTRATION PROJECT  
AND  
WESTERN NEW YORK NUCLEAR SERVICE CENTER

THIS THIRD SUPPLEMENTAL AGEEMENT 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 third 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, a number of highly contaminated facilities will be removed 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, 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 at 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, and

WHEREAS, on January 13, 2011, DOE and NYSERDA issued Guidance for Identifying and Conducting Potential Phase 1 Studies on the Decommissioning and/or Long-term Stewardship of the WVDP and the Center; and

WHEREAS, on May 9, 2011, DOE and NYSERDA executed a Second Supplemental Agreement to the Cooperative Agreement on the Identification, Implementation and Management of the Phase 1 Studies; and

WHEREAS, on February 26, 2014, DOE and NYSERDA announced the development of an integrated approach for making Phase 2 decisions for the WVDP and the Center, including (1) the utilization of the NRC's License Termination Rule criteria as the framework to evaluate all facilities at the WVDP and Center; (2) addressing uncertainty in the Phase 2 analysis; and (3) preparation of a Joint Supplemental Environmental Impact Statement (SEIS) to support Phase 2 decisions; and

WHEREAS the aforementioned integrated approach for making Phase 2 decisions will build upon the analysis conducted for the 2010 FEIS deterministic performance assessment and incorporate probabilistic analytical methods;

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

## ARTICLE I. DEFINITIONS

Section 1.1 For purposes of this Third 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 at 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 Third Supplemental Agreement, the terms defined in the Cooperative Agreement have the meanings set forth in the Cooperative Agreement.
- (c) “Deterministic Modeling” means a modeling approach that utilizes a single set of input parameter values for every variable in the model code. The output from such a model is a single output value. A deterministic analysis does not provide an indication of the sensitivity of the output to individual input parameters.
- (d) “Deterministic Performance Assessment” means a performance assessment prepared using deterministic modeling approaches.
- (e) “DOE” means the United States Department of Energy.
- (f) "Final Policy Statement" means the Decommissioning Criteria for the West Valley Demonstration Project (M-32) at the West Valley Site; Final Policy Statement, 67 Fed. Reg. 5003 (February 1, 2002), promulgated by the NRC.
- (g) “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.
- (h) “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.

- (i) "Joint Supplemental Environmental Impact Statement" (or "Joint SEIS") means a jointly prepared supplemental EIS to the Joint EIS.
- (j) "NEPA" means the National Environmental Policy Act, 42 U.S.C. 4321 et seq.
- (k) "NRC" means the United States Nuclear Regulatory Commission.
- (l) "NYSERDA" means the New York State Energy Research and Development Authority.
- (m) "Performance Assessment" means a quantitative evaluation of potential releases of radioactivity from a facility into the environment, and an assessment of the resultant radiological doses.
- (n) "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.

- (o) “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 (Phase 1), and provides for additional scientific studies in order to facilitate interagency consensus to complete decommissioning of the remaining facilities (Phase 2).
- (p) “Probabilistic Modeling” means a modeling approach that assigns a range of input parameter values to variables in the model code, instead of a single parameter value as in a deterministic modeling approach. The probabilistic model code selects the input parameter values for each variable from the parameter range each time it calculates an output. A probabilistic modeling approach calculates many solutions to the model equations using different input parameter values from the parameter ranges resulting in a distribution of output values.
- (q) “Probabilistic Performance Assessment” means a performance assessment prepared using probabilistic modeling approaches.
- (r) “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.

- (s) “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.
- (t) “Sensitivity Analysis” means an analysis that evaluates how sensitive a model output is to any change in an input parameter or set of input parameters.
- (u) “SEQRA” means the State Environmental Quality Review Act, comprising Article 8 of the Environmental Conservation Law of the State of New York.
- (v) “State” means the State of New York.
- (w) “Second Supplemental Agreement” means the agreement between DOE and NYSERDA executed on May 9, 2011, which defined the identification, implementation and management of the Phase 1 Studies.
- (x) “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.
- (y) “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 OF AGREEMENT

Section 2.1. The scope of this Third Supplemental Agreement covers only the relationship, procedures, cost responsibilities, rights and obligations as between

NYSERDA and DOE for the analytical and procedural processes described in Article III, Article IV and Article V. This Third 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 at the Center resulting from or as 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 2.2. (a) Except as expressly set forth in this Third Supplemental Agreement, the provisions of this Third 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 Third 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 Third 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 and the Second Supplemental Agreement.

(b) Nothing in this Third 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 Third 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 Third 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 Third Supplemental Agreement, except as may be expressly provided herein.

Section 2.3. The respective undertakings of DOE and NYSERDA under this Third Supplemental Agreement are conditioned upon the availability of appropriated funds (31 U.S.C. §1341 and New York State Finance Law, §41).

### ARTICLE III. PROBABILISTIC ANALYSIS

Section 3.1. DOE and NYSERDA intend to make a Phase 2 decision within 10 years of their respective Record of Decision and Findings Statement, as issued on April 14, 2010 and May 12, 2010, for all remaining facilities at the WVDP and Center that are not addressed in the Phase 1 decision. Such facilities include, but are not limited to: the Waste Tank Farm (including tanks 8D-1, 8D-2, 8D-3 and 8D-4); the NRC-Licensed Disposal Facility (NDA); the New York State Licensed Disposal Facility (SDA); the Construction and Demolition Debris Landfill (CDDL); the non-source area of the North Plateau groundwater plume; the Cesium Prong; and the Bulk Storage Warehouse. The parties intend that the Phase 2 decision will be based upon the entire administrative

record, as established by the date of the final decision, including relevant data and information from the following: (1) the ongoing Phase 1 Studies which are the subject of the Second Supplemental Agreement and which are expected to end in 2017; (2) additional studies and data collection by DOE and NYSERDA; (3) a sensitivity analysis to provide near-term direction to site data collection activities; (4) the transition of existing analyses to a probabilistic modeling approach; (5) the preparation of a long-term performance assessment (PA); and (6) a Joint SEIS.

Section 3.2. To further address uncertainty in the Phase 2 decision, DOE and NYSERDA will perform the following:

- (a) Near-term Sensitivity Analysis: A near-term sensitivity analysis will be prepared of the deterministic PA that supported the January 2010 Joint EIS.
- (b) Transition to a Probabilistic Modeling Approach:
  - (1) Concurrent with performing a near-term sensitivity analysis, work will begin on a transition from the deterministic PA modeling approach used in the Joint EIS to a probabilistic modeling approach. Input from the sensitivity analysis identified in Section 3.2(a) and the results of data collection activities at the WVDP and the Center will be considered.
  - (2) The deterministic and probabilistic results shall be compared in order to assess model equivalency and calibration. The probabilistic model will be used to complete a thorough evaluation of the nature and magnitude of uncertainty in the analysis and determine the extent to which uncertainty may be reduced.
- (c) Long-Term Probabilistic PA: Given the information and models developed in Section 3.2(a) and (b), and the results of other data collection activities at the

WVDP and the Center, future alternatives for the site will be developed and evaluated through a long-term probabilistic PA. DOE and NYSERDA agree that Phase 2 decommissioning decisions for all site facilities within the Center, including the NDA and SDA, will utilize a consistent analytical process for evaluating performance and balancing risk and cost considerations. DOE and NYSERDA agree that it is most appropriate to utilize one common set of decommissioning criteria for evaluating all facilities within the Center. Although NRC does not have the regulatory authority to apply the License Termination Rule (LTR) to the SDA, DOE and NYSERDA agree to apply the LTR criteria described in the NRC's Final Policy Statement for evaluating the SDA. NYSERDA will consider the entire record, including the analyses described in the Third Supplemental Agreement, in reaching a decision on the SDA in accordance with the range of options provided in the NRC's Final Policy Statement and all applicable regulatory requirements.

**ARTICLE IV. SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS)**

Section 4.1. To further the purposes of NEPA/SEQRA and in keeping with the agencies' commitment to develop an integrated Phase 2 decommissioning decision, DOE and NYSERDA will prepare a Joint SEIS. The preparation of a Joint SEIS is part of a Joint NEPA/SEQRA process to ensure transparency and obtain public input for the Phase 2 decision.

Section 4.2. The SEIS will be prepared under a jointly managed contract, the agencies will share in the cost of the SEIS, and the probabilistic performance assessment and

evaluation of uncertainty, previously described in Article III, will be important inputs for the SEIS.

Section 4.3. The SEIS will be completed in a timely fashion to support a comprehensive Phase 2 decision in 2020.

## ARTICLE V. DECOMMISSIONING PLANS, CLOSURE ANALYSIS AND DOCUMENTATION, AND LICENSE AND PERMIT APPLICATIONS

Section 5.1. DOE and NYSERDA agree to work together to prepare decommissioning plans, including related documentation such as facility closure analysis, license and permit applications for facilities at the Center, as necessary .

## ARTICLE VI. CONTRACT ADMINISTRATION

Section 6.1. DOE and NYSERDA propose to utilize the expertise of a contractor(s) to perform the various tasks identified in Articles III and IV, including but not limited to:

- (1) a sensitivity analyses to provide near-term direction to site data collection activities;
- (2) the transition of existing analyses to a probabilistic modeling approach; (3) the preparation of a long-term probabilistic PA to support Phase 2 decision making and (4) the SEIS. The contractor(s) may utilize the services of subcontractors where appropriate.

Section 6.2. Tripartite Contract: DOE and NYSERDA will conduct this work jointly, under one or more tripartite contract(s) with the contractor(s). Any such contract will include the Requirements for Rights in Technical Data attached as Appendix A.

Section 6.3. DOE will administer the contractor selection processes according to existing DOE regulations and procedures. NYSERDA staff will provide technical input to the evaluation committee that is selected by DOE to evaluate proposals.

Section 6.4. Both DOE and NYSERDA will sign the agreement(s) with the contractor(s) selected by DOE provided that such contractor(s) is/are acceptable to NYSERDA. DOE and NYSERDA will jointly administer and manage the contract(s) and will have equal ability to provide direction to the contractor(s).

Section 6.5. Both DOE and NYSERDA will issue timely approval of contractor(s) invoices in order to authorize payment.

Section 6.6. DOE and NYSERDA will use good faith efforts to agree on contract administration for the tasks identified in Article V.

## ARTICLE VII. COST ALLOCATION

Section 7.1. (a) (1) DOE and NYSERDA agree to each pay 50 percent of the costs of all activities identified within Articles III and IV of this Third Supplemental Agreement.

(2) With respect to the decommissioning plans and related documentation prepared pursuant to Article V, DOE and NYSERDA agree to each pay 50 percent of the costs of all such plans and documentation that relate to the entire Center. With respect to all such plans and documentation that relate to facilities and areas representing less than the entire Center, DOE and NYSERDA will use good faith efforts to agree upon a cost allocation based upon the relevant paragraphs of the Consent Decree.

(b) DOE's and NYSERDA's respective shares of costs incurred pursuant to this Third 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 Third Supplemental Agreement, or any obligations incurred as a result of modifications made to the contracts of any contractors retained pursuant to this Third

Supplemental Agreement, to the extent that such claims, costs, or settlements arise from services within the scope of this Third 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 and, to the extent not inconsistent with this Article, with the Cooperative Agreement.

## ARTICLE VIII. PROPRIETARY, CONFIDENTIAL AND CONTROLLED UNCLASSIFIED INFORMATION

Section 8.1. (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 Third Supplemental Agreement, it shall not be further released except as may be required by law or approved by both DOE and NYSERDA, and acting consistent with the terms of the letter agreement executed on May 10, 2011, which is attached as Appendix B. 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 consistent with the terms of the letter agreement executed on May 10, 2011.

(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.

(d) Controlled Unclassified Information (CUI) refers to unclassified information identified and marked as sensitive and information identified and safeguarded under Executive Order 13556. CUI may include Unclassified

Controlled Nuclear Information, Official Use Only, and Export Controlled Information. To the extent such marked material is utilized by DOE or NYSERDA, it shall be maintained and controlled with appropriate security measures to insure there is no unlawful disclosure or release. Additionally, DOE and NYSERDA shall comply with the terms of the May 10, 2011 letter agreement with respect to the implementation of measures preventing the inadvertent release of such information.

#### ARTICLE IX. TERMINATION

Section 9.1. Either party to this Third Supplemental Agreement may terminate this Third Supplemental Agreement at any time upon 60 days written notice to the other party (hereafter identified in this Article as the “recipient party”).

Section 9.2. (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 8.1 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 8.1 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 at the sole expense of the recipient party.

(d) Upon request from the party submitting the Notice of Termination described in section 8.1 of this Article, the recipient party shall direct any contractor to deliver to the party submitting the Notice of Termination pursuant to section 8.1 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 8.1 of this Article, the submitting party shall direct any contractor to deliver to the party receiving the Notice of Termination pursuant to section 8.1 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 8.1 of this Article, without waiving any rights it may have to further performance or payments from the terminating party under the terms of this Third Supplemental Agreement.

Section 9.3. The party issuing a Notice of Termination pursuant to Section 8.1 of this Article shall be responsible for the termination costs described in section 8.2(b) above unless such termination right is invoked to remedy a material breach of this Third 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 X. MISCELLANEOUS

Section 10.1. 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 Third Supplemental Agreement under the provisions of Article VIII, "Termination."

Section 10.2. This Third 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 Third Supplemental Agreement, the provisions of this Third 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 Third Supplemental Agreement are for convenience of reference only and shall not define or limit its terms. The provisions of this Third 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 10.3. This Third Supplemental Agreement shall become effective upon execution by both DOE and NYSERDA.

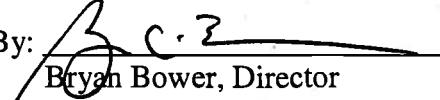
The New York State Energy Research and Development Authority

Dated: 7/16/15

By:   
Noah Shaw, General Counsel  
NYSERDA

The United States Department of Energy

Dated: 07-20-2015

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 V of the Third 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 Third Supplemental Agreement between NYSERDA and the DOE for the preparation of probabilistic analysis to support Phase 2 Decisions 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 Third 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 Supplemental 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.