

**CONSULTATION AND COORDINATION PLAN FOR THE PARTIES TO THE  
CONSENT DECREE IN THE STATE OF NEW YORK, ET. AL, V. UNITED STATES,  
ET. AL, CIVIL ACTION NO. 06-CV-0810 (WDNY)**

THIS CONSULTATION AND COORDINATION PLAN is entered into by the Parties to the CONSENT DECREE in the STATE OF NEW YORK, et. al v. UNITED STATES, et. al, in accordance with the terms of PARAGRAPH 49 of the CONSENT DECREE.

WITNESSETH

WHEREAS, the West Valley Demonstration Project Act of 1980, Pub. L. 96-368, provides for the U.S. Department of Energy (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, the New York State Energy Research and Development Authority (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, on December 11, 2006, the State of New York, NYSERDA, and the New York State Department of Environmental Conservation (NYSDEC), collectively as plaintiffs, filed a complaint in the U.S. District Court for the Western District of New York, naming the United States and the Secretary of DOE, collectively as defendants. The Complaint alleged

certain claims under the West Valley Demonstration Project Act (WVDPA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9607; and the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §10107; 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 29, 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”). Phase 2 actions would complete decommissioning and/or long-term management decisionmaking for the remaining facilities according to the approach deemed most appropriate by the agency with the responsibility for the decision; 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, on July 1, 2010, the federal government 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 Parties to the Consent Decree are the State, NYSERDA, NYSDEC, the United States, DOE and Stephen Chu as Secretary of DOE. The Consent Decree does not determine which cleanup measures will be selected, only the agreed-upon allocation of costs for certain Remedy Actions as that term is 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, pursuant to paragraph 49 of the Consent Decree, “the Parties shall develop and mutually agree upon detailed plans to assure continued consultation between the Parties prior to and during the performance of Remedy Actions.” Paragraph 49 of the Consent Decree further stated that the plan, shall include, but need not be limited to provisions identified in

paragraph 49(a) – (g). This document, entitled the Consultation and Coordination Plan, is designed to satisfy the obligations set forth in paragraph 49 of the Consent Decree.

NOW, THEREFORE, in consideration of the above and other provisions of the Consent Decree, the Parties hereby agree as follows:

#### ARTICLE I: DEFINITIONS

1. The following definitions apply to this Consultation and Coordination Plan:
  - (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
  - (b) “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.
  - (c) “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 29, 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.
  - (d) “NEPA” means the National Environmental Policy Act, 42 U.S.C. 4321 et. seq.

- (e) "Parties" means the Parties to the Consent Decree which are the State of New York, NYSDEC, NYSERDA, collectively Plaintiffs, and the United States of America, DOE and Steven Chu, as Secretary of DOE, collectively Defendants.
- (f) "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.
- (g) "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.
- (h) "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.

- (i) "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.
- (j) "Remedy Actions" is defined in paragraph 3 of the Consent Decree.
- (k) "Remedy Cost" is defined in paragraph 3 of the Consent Decree.
- (l) "SEQRA" means the State Environmental Quality Review Act, comprising Article 8 of the Environmental Conservation Law of the State of New York.
- (m) "Second Supplemental Agreement" means the Second Supplemental Agreement, executed on May 2, 2011, which set 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.

## ARTICLE II: SCOPE

1. Remedy Actions at the Center are expected to occur over the next several decades in order to complete Phase 1 and Phase 2 of Phased Decisionmaking (once Phase 2 decisions are reached).
2. The scope of this Consultation and Coordination Plan covers only the relationship, procedures, rights and obligations as between the Parties with respect to consultation and coordination prior to and during the performance of all Remedy Actions. The Consultation and Coordination Plan does not address costs or responsibility for any other activity, including: cleanup, remedial actions, Phase 1 Studies 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.

3. (a) Except as expressly set forth in this Consultation and Coordination Plan, the provisions of this Consultation and Coordination Plan shall not impair or diminish or otherwise adversely affect the respective rights and responsibilities of the Parties pursuant to the Consent Decree. The Consultation and Coordination Plan supersedes Section 8.04 of the Cooperative Agreement between DOE and NYSERDA, with the exception of Section 8.04(d), which shall remain in effect. Additionally, nothing in this Consultation and Coordination Plan, or any action or omission pursuant to it, is intended to affect the respective obligations of the Parties to pay the various cost allocations agreed to by both parties in the Consent Decree. The provisions of the Consultation and Coordination Plan 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, except as expressly set forth in this Consultation and Coordination Plan.
- (b) Nothing in this Consultation and Coordination Plan 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 Consultation or Coordination Plan shall be deemed to constitute a waiver of sovereign immunity by any Party, nor shall it otherwise affect the respective rights of DOE, as an instrumentality of the United States, or of NYSERDA and NYSDEC, as

instrumentalities of the State, under the United States Constitution or the Constitution of the State of New York.

- (d) Nothing in this Consultation and Coordination Plan 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 Consultation and Coordination Plan, except as may be expressly provided herein.
4. The respective undertakings of the Parties under this Consultation and Coordination Plan are conditioned upon the availability of appropriated funds.

#### ARTICLE III: DESIGNATION OF RESPONSIBLE PARTY

1. As set forth in the Consent Decree, for any Remedy Action selected pursuant to Paragraphs 13 through 32 of the Consent Decree:
- (a) If the document in which the Remedy Action is selected identifies the Party that will carry out the Remedy Action, that Party shall be considered the Responsible Party for purposes of the consultation provisions of this Consent Decree;
  - (b) If the Remedy Action, when selected, does not identify the Party that will carry out the Remedy Action, and this Consent Decree provides that the United States shall bear 50 percent or more of the Remedy Costs for that Remedy Action, then the United States shall be considered the Responsible Party;
  - (c) If the Remedy Action, when selected, does not identify the Party that will carry out the

Remedy Action, and this Consent Decree provides that the United States shall bear less than 50 percent of the Remedy Costs for that Remedy Action, then one of the Plaintiffs (as Plaintiffs shall designate) shall be considered the Responsible Party.

#### ARTICLE IV: DUTIES OF RESPONSIBLE AND CONSULTING PARTY

1. In order to assure continued consultation and cooperation between the Parties prior to and during the performance of all Remedy Actions, the Parties have agreed to the following provisions, some of which supplement the provisions contained in paragraph 49 of the Consent Decree:
  - (a) Each Party shall designate a representative (the “Consulting or Responsible Party’s Representative”) to conduct consultations with respect to any Remedy Actions;
  - (b) The Responsible Party shall distribute to the Consulting Party’s Representative all draft and final: technical reports, contractors’ reports, budget documents and cost estimates, documents relating to contractor selection, and other documents pertaining to a Remedy Action, to the extent such distribution is permitted by applicable law. The Responsible Party shall provide prior notice of meetings pertaining to the planning or performance of a Remedy Action and shall permit the Consulting Party’s Representative to attend such meetings upon a reasonable request from the Consulting Party;
  - (c) The Responsible Party shall inform the Consulting Party’s Representative well in advance of any major changes to a Remedy Action that may be necessary;
  - (d) The Responsible Party shall permit the Consulting Party’s Representative access to the area where the Responsible Party is conducting a Remedy Action, for the purposes of

inspecting the same and observing the progress of the Remedy Action;

- (e) The Responsible Party shall meet with the Consulting Party's Representative, at the latter's reasonable request, to discuss the manner in which the Remedy Action is to be performed, and shall consider in good faith any points or objections raised by the Consulting Party's Representative. This discussion may relate to any aspect of the Remedy Action that the Responsible Party has the ability to alter or amend at its discretion, but the Parties intend that the consultation shall promote the interests of efficiency, effectiveness, environmental benefits, and cost savings in the performance of Remedy Actions;
- (f) Each Responsible Party shall meet with the Consulting Party's Representative on at least a monthly basis to share information concerning any Remedy Actions that the Responsible Party plans to initiate during the following 90 day period; and
- (g) Documents and information that constitute confidential business information shall be shared with the Consulting Party's Representative under this Paragraph only when the Responsible Party shall consider it necessary for adequate consultation. No Party may further release such information unless required by law or ordered by a court of competent jurisdiction. Additionally, the terms of the Letter Agreement executed between representatives of DOE and NYSERDA on May 11, 2011 (copy attached hereto), establishing a protocol to prevent the inadvertent release of Controlled Unclassified Information and other sensitive information potentially exempt from public disclosure, apply where relevant.

2. The Responsible Party shall promptly notify and consult with the Consulting Party's

Representative with respect to (1) any unexpected developments or material problems that may develop in implementing a Remedy Action; and (2) any event occurring at the Center which affects or may affect public health or safety.

#### ARTICLE V. TERMINATION

1. Any Party to this Consultation and Coordination Plan may terminate the Consultation and Coordination Plan at any time upon 60 days written notice to the other party, provided that the Parties have executed another written plan that satisfies the obligations of Paragraph 49 of the Consent Decree.

#### ARTICLE VI. MISCELLANEOUS

1. Disputes. Disputes may be resolved pursuant to the Dispute Resolution provisions of the Consent Decree, or by other alternative dispute resolution procedures to which DOE and NYSERDA agree. Nothing in this section shall limit the rights of the parties to terminate the Consultation and Coordination Plan under Article V, "Termination."
2. This Consultation and Coordination Plan 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. The headings in this Consultation and Coordination Plan are for convenience of reference only and shall not define or limit its terms. The provisions of this Consultation and Coordination Plan shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of the Parties.
3. This Consultation and Coordination Plan shall become effective upon execution by both DOE and NYSERDA.

The New York State Energy Research and Development Authority

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Hal Brodie, General Counsel and Secretary

The United States Department of Energy

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Bryan Bower, Director

West Valley Demonstration Project