

SUPPLEMENTAL AGREEMENT TO THE COOPERATIVE AGREEMENT
BETWEEN
THE UNITED STATES DEPARTMENT OF ENERGY
AND THE
NEW YORK ENERGY RESEARCH DEVELOPMENT AUTHORITY
SETTING FORTH SPECIAL PROVISIONS
FOR THE PREPARATION OF A
JOINT ENVIRONMENTAL IMPACT STATEMENT
ON
WEST VALLEY DEMONSTRATION PROJECT COMPLETION
AND
CLOSURE OF THE WESTERN NEW YORK NUCLEAR SERVICE CENTER

THIS 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 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 the DOE to carry out a high level radioactive waste management 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 and protection of the public interest in safe, reliable, and economical energy supply; and

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

WHEREAS the DOE intends to prepare an Environmental Impact Statement (EIS) in accordance with Section 102(2)(C) of the National Environmental

Policy Act (NEPA) of 1969, to promote the consideration of environmental concerns on decisions related to WVDP completion, including transportation of solidified high level radioactive waste (HLW) off-site, disposal of low-level radioactive waste (LLRW) and transuranic waste (TRU), and decontamination and decommissioning (D&D) of the West Valley Demonstration Project Premises and Project Facilities used as part of the WVDP; and

WHEREAS NYSERDA intends to D&D, as may be necessary, the balance of the Center and effect closure of the Center as a whole and to comply with the provisions of the State Environmental Quality Review Act (SEQRA) in its related planning and decision-making processes; and

WHEREAS DOE and NYSERDA wish to cooperate to the fullest extent possible to reduce duplication of efforts consistent with NEPA and SEQRA and to better integrate the environmental evaluation of WVDP completion and closure of the Center into Federal and State planning and decision-making processes; and

WHEREAS to fulfill these objectives DOE and NYSERDA intend to cooperatively prepare a Joint Environmental Impact Statement which will involve joint planning processes, joint environmental research and studies, and joint public meetings or hearings; and

WHEREAS cooperation with NYSERDA in the joint preparation of the appropriate environmental documentation is consistent with and complementary to the United States Department of Energy's mission under the provisions of the West Valley Demonstration Project Act and other legislative authority; and

WHEREAS cooperation with DOE in the joint preparation of the appropriate environmental documentation is consistent with and complementary to NYSERDA's statutory purposes and powers for management and administration of the Center as a whole and other legislative authority; and

WHEREAS Section 6.03 of the Cooperative Agreement provides, in part, that DOE and NYSERDA shall cooperate in the preparation of environmental analyses of the WVDP as may be required under Federal and State law in discharging their respective environmental evaluation responsibilities consistent with NEPA and SEQRA; and

WHEREAS DOE and NYSERDA believe that, under the circumstances that currently exist at the Center, a Joint Environmental Impact Statement for the above purposes can best be prepared by a single support services contractor; and

WHEREAS DOE and NYSERDA wish to formally memorialize an understanding of the procedures and responsibilities associated with preparation of the Joint Environmental Impact Statement, including cost participation and support services contractor selection and subsequent contract administration;

WHEREAS it is in the best interests of DOE and NYSERDA to avoid or eliminate overlapping and duplication of effort in contractor selection and contract administration to support the preparation of the Joint Environmental Impact Statement, to provide consistent treatment of the contractor through a single authority, and to facilitate coordination of reviews, inspections, and examinations of the contractor involving the same practices, operations, and functions to the greatest extent practicable; and

WHEREAS joint DOE and NYSERDA development and coordination of a comprehensive data base which includes site and regional characterization, investigation, studies, performance evaluations, analyses, and research will enhance the quality of the resulting Joint Environmental Impact Statement and avoid overlapping or duplication of effort.

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

ARTICLE I. DEFINITIONS

Section 1.1. For purposes of this Supplemental Agreement:

- (a) "CFR" means the Code of Federal Regulations.
- (b) "Cooperative Agreement" means the Cooperative Agreement between DOE and NYSERDA, effective October 1, 1980, as amended September 18, 1981, for implementing the West Valley Demonstration Project pursuant to Pub. L. 96-368. When used in this 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) "Joint Environmental Impact Statement" (or "Joint EIS") means a single environmental impact statement prepared by DOE and NYSERDA on completion of the WVDP and closure of the Center in accordance with this Supplemental Agreement, which 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 617.16, and other applicable Federal and State implementing regulations.
- (e) "Joint Environmental Impact Statement Contractor" (or "Joint EIS Contractor") means the support services contractor selected consistent with the provisions of this Supplemental Agreement to assist in writing the Joint Environmental Impact Statement for completion of the WVDP and closure of the Center.

(f) "Lead agency" has, for purposes of compliance with NEPA, the meaning set forth in 40 CFR 1508.16; and, for purposes of compliance with SEQRA, the meaning set forth in 6 NYCRR 617.2(v).

(g) "NEPA" means the National Environmental Policy Act, Pub. L. 91-190.

(h) "NYSERDA" means the New York State Energy Research and Development Authority.

(i) "Records" (or "documents") means not only written 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) "SEQRA" means the State Environmental Quality Review Act, comprising Article 8 of the Environmental Conservation Law of the State of New York.

(k) "State" means the State of New York.

(l) "Supplemental Agreement" means this Supplemental Agreement to the Cooperative Agreement, setting forth special provisions for the preparation of a Joint Environmental Impact Statement on West Valley Demonstration Project completion and Center closure.

(m) "WVDP" 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. DOE and NYSERDA will use their best efforts to prepare or cause the preparation of a Joint EIS for WVDP completion and closure of the Center.

Section 2.2. (a) DOE is the Federal lead agency for purposes of compliance with NEPA. NYSERDA is the State lead agency for purposes of compliance with SEQRA.

(b) DOE shall have primary authority and responsibility for supervision and preparation of the Joint EIS. NYSERDA shall cooperate with DOE in the preparation of the Joint EIS and provide support and assistance to DOE consistent with the terms of this Supplemental Agreement, including coordination of the review of the Joint EIS and related environmental analyses by all appropriate State agencies.

(c) DOE shall cooperate and coordinate with NYSERDA in preparation of the Joint EIS to fulfill State requirements under SEQRA to the extent they are in addition to and not in conflict with Federal law, to further the objective of producing a Joint EIS that will comply with all applicable laws, including but not limited to NEPA and SEQRA. Similarly, NYSERDA will cooperate and coordinate with DOE in fulfilling Federal requirements under NEPA to the extent they are in addition to and not in conflict with State law, to further the same objective.

Section 2.3. (a) DOE and NYSERDA shall select, manage, fund, and use the assistance of a single support services contractor to draft the Joint EIS. However, in order to promote unified, consistent, and efficient treatment of the Joint EIS Contractor, the Joint EIS Contractor will contract with and be responsible directly to DOE consistent with the provisions of this Supplement Agreement. DOE and NYSERDA shall coordinate and cooperate in Joint EIS Contractor selection (as set forth in Article III) and in administration of the resulting contract (as set forth in Article IV).

(b) DOE and NYSERDA intend that the Joint EIS will be prepared in a manner which will avoid to the maximum extent practical duplication of effort in meeting requirements, to the extent applicable, under laws and implementing regulations in addition to NEPA and SEQRA, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended, the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, or similar State laws.

Section 2.4. The scope of this Supplemental Agreement covers only the relationship, procedures, cost responsibilities, rights, and obligations as between NYSERDA and DOE for preparation of the Joint EIS and directly related site characterization, waste characterization, sampling, research and development, evaluation and analyses, including evaluation and analyses regarding decontamination and decommissioning and closure criteria and alternatives, and other integrally related EIS predecisional planning, whether undertaken by the Joint EIS Contractor or by other contractors as provided in Article V below. This Supplemental Agreement does not address costs or responsibility for any other activity, including:

- (1) clean-up, remedial actions, or other activities for Project completion or closure of the Center resulting from or discussed in the Joint Environmental Impact Statement; or
- (2) any other activity which does not stem directly from fulfilling the requirements of NEPA or SEQRA for preparation of an environmental impact statement.

Nothing in this section precludes preparation of the Joint EIS under the cost sharing and other provisions of this Supplemental Agreement in a manner which

also fulfills requirements under other statutes, including without limitation, CERCLA or RCRA.

Section 2.5. (a) Except as expressly set forth in this Supplemental Agreement, the provisions of this 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. Nothing in this Supplemental Agreement, or any action or omission pursuant to it, is intended to affect the respective obligations of DOE to pay 90 percent and NYSERDA to pay 10 percent of Total Project Costs as set forth in Section 5.02 of the Cooperative Agreement and Public Law 96-368. The provisions of this 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.

(b) Nothing in this 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. Except as expressly set forth, nothing in this Supplemental Agreement shall affect or modify in any way any obligations or liabilities either party may otherwise have under any provision of State or Federal law, including, without limitation, damages for injury or loss or responsibility for any hazardous or radioactive substance or for removal or remedial action or the costs of removal or remedial action for any hazardous or radioactive substance.

(c) Nothing in this 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.

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

(e) Nothing in this Supplemental Agreement is intended to make either party liable to the other for attorney fees or other costs of litigation which may be incurred as a result of litigation with third parties to enforce the provisions of NEPA or SEQRA; provided, however, that to the extent such costs are Project Costs, the provisions of the Cooperative Agreement shall apply and the terms of this Supplemental Agreement shall not apply.

(f) Neither DOE nor NYSERDA by this Supplemental Agreement makes any warranties, express or implied, regarding the quality or legal sufficiency of any product, activity, or analysis, including any document, or other result from the performance of their respective obligations under this Supplemental Agreement.

Section 2.6. The respective undertakings of DOE and NYSERDA under this Supplemental Agreement are conditioned upon the availability of appropriated funds.

ARTICLE III. JOINT EIS CONTRACTOR SELECTION AND EVALUATIONS

Section 3.1. Solicitation and selection of the Joint EIS Contractor will be performed by DOE, with the consultation, assistance, and advice of

NYSERDA, pursuant to United States Department of Energy Acquisition Regulations (DEARs) and applicable Federal Acquisition Regulations (FARs). DOE intends to use negotiated competitive acquisition procedures utilizing a Source Evaluation Panel ("Panel") as described in DEAR Section 915.612, using the Acquisition Regulations Handbook for Source Evaluation Boards (DOE/MA0154, May 1984) as a guide. NYSERDA's advice and consultation regarding source selection shall be integrated into the Panel's evaluation in accordance with the provisions of this Article.

Section 3.2. (a) NYSERDA shall have two individuals (or such other number as may be agreed between DOE and NYSERDA) participate with the Technical Evaluation Committee appointed by DOE to perform technical evaluations on proposals and submit findings to the Panel. NYSERDA shall have an ex officio advisory member on the Panel who will be notified and invited to attend all meetings of the Source Evaluation Panel.

(b) Draft copies of the statement of work, evaluation criteria (including rating sheets and weights or value assigned thereto), and subsequently the request for proposals ("RFP"), will be made available to the NYSERDA representatives described in subsection (a) of this Section. NYSERDA representatives may make these drafts available for inspection to not more than three additional NYSERDA representatives (unless DOE approves additional representatives), provided such additional representatives hold such information in confidence and execute confidentiality certificates and conflict of interest certificates in the form DOE prescribes for members of the Panel in order to preserve the integrity of the selection process. NYSERDA representatives will be afforded opportunities to consult and/or meet

with the Panel prior to (1) the final decisions with respect to statement of work and evaluation criteria, and (2) issuance of the RFP.

(c) NYSERDA representatives described in subsections (a) and (b) of this section (and such other representatives as DOE may approve) shall have the opportunity to review the technical proposals, management proposals, and cost proposals, and to meet and consult with the Panel with respect thereto prior to establishment of a competitive range. NYSERDA shall be responsible for arranging with the Panel the schedule and timing of such review.

(d) NYSERDA representatives shall have the opportunity to participate as observers in the oral presentations and site visits (if any) for all proposers in the competitive range and thereafter shall have the opportunity to consult with the Panel prior to final ranking of proposals.

(e) NYSERDA representatives shall have the opportunity to attend and participate in a briefing of the source selection official, including an opportunity to review in advance all materials to be made available to the source selection official prior to or at the briefing. NYSERDA shall be promptly notified of the final selection and the bases for the final selection.

(f) NYSERDA representatives shall execute procurement integrity certificates, confidentiality certificates, and conflict of interest certificates in the form the DOE prescribes for members of the Panel.

(g) Except as may be required by an order of a court of competent jurisdiction, or as authorized in writing by DOE, NYSERDA shall not further disclose information contained in proposals made available under this Section.

Section 4.1. Those actions taken to award the Joint EIS Contract and, subsequent to award, to manage, administer, and monitor the performance of the Joint EIS Contractor and its adherence to the terms and conditions through completion of the contract will be under the direct authority and responsibility of the DOE, with the support and advice of and in consultation and cooperation with NYSERDA. DOE shall act as the overall business manager for administering and maintaining the integrity of the Joint EIS Contract and only DOE shall be vested with authority to modify the contract, make payments under the contract, disallow reimbursements or payments for costs, obligate DOE funds, assign tasks, and give guidance to the Joint EIS Contractor.

Section 4.2. DOE shall provide for NYSERDA's participation in any Joint EIS Contractor audits, reviews, and evaluations and will promptly furnish drafts of related audit reports and contractor review and evaluation reports for NYSERDA's review and, as appropriate, inclusion of NYSERDA's comments before such reports are made final.

Section 4.3. (a) NYSERDA personnel or representatives planning to visit the Joint EIS Contractor's facility or seek information directly from the Joint EIS Contractor shall coordinate with the DOE Contracting Officer or his designee. When a visit to the Joint EIS Contractor's facility is planned, NYSERDA shall provide the following information sufficiently in advance to permit DOE to make necessary arrangements:

- (1) visitors names and their official positions;
- (2) date and duration of visit; and
- (3) purpose of the visit.

In any event, the cognizant DOE Contracting Officer shall have final authority to decide whether DOE representatives shall accompany the visitors. Visitors

shall fully inform DOE of any results of the visit that may affect the interests of DOE.

(b) DOE personnel or representatives planning to visit the Joint EIS Contractor's facility or seek information directly from the Joint EIS Contractor shall coordinate with NYSERDA's West Valley Program Director or his designee. When a visit to the Joint EIS Contractor's facility is planned, DOE shall provide the following information sufficiently in advance to permit NYSERDA to determine whether to send its own personnel or representatives and make necessary arrangements:

- (1) visitors names and their official positions;
- (2) date and duration of visit; and
- (3) purpose of the visit.

Except for audits conducted by the Defense Contract Audit Agency or the DOE Inspector General, the NYSERDA West Valley Program Director shall have final authority to decide whether NYSERDA representatives shall accompany the DOE visitors. DOE visitors shall fully inform NYSERDA of any results of the visit that may affect the interests of NYSERDA.

(c) Any contacts with the Joint EIS Contractor regarding on-site inspections or evaluations by NYSERDA or DOE of the performance of the Joint EIS Contractor's assigned functions shall be accomplished only jointly by DOE and NYSERDA or on reasonable notice and opportunity for the other party to this Supplemental Agreement to participate.

(d) (1) Only DOE (through the DOE Contracting Officer or through those acting within the scope of their delegated authority from the DOE Contracting Officer) will be empowered to directly:

- (A) give direction to the Joint EIS Contractor,

- (B) make administrative changes in the Joint EIS Contract,
 - (C) issue change orders, execute modifications, or make changes authorized by clauses other than the changes clause of the Contract,
 - (D) cause any increase or decrease in the Joint EIS Contract price,
 - (E) execute any document which requires the signature of the DOE Contracting Officer,
 - (F) purport to accept or reject any work performed under the terms of the Joint EIS Contract, or
 - (G) otherwise control the Joint EIS Contractor's performance of the Contract work.
- (2) The powers described in paragraph (1) shall be exercised by DOE with the advice of and in consultation and cooperation with NYSERDA's designated personnel.
- (3) In regard to directions or control that do not require change orders, modifications, or other changes to the Joint EIS Contract, DOE and NYSERDA shall nonetheless regularly exchange views on and use their best efforts to agree on directions to be given to, and other control over, the Joint EIS Contractor's performance, and each party shall use its best efforts to accommodate the desires and concerns of the other with respect to such direction and control.
- (4) NYSERDA personnel shall not execute contract modifications or represent to the Joint EIS Contractor that they have authority to bind DOE.

Section 4.4. (a) Any change in the scope of the work being performed by the Joint EIS Contractor, or any other modification of or change to the Joint EIS Contract, which NYSERDA or DOE may from time to time desire must be proposed to the other party ("responding party") in writing, explained and justified clearly, including the following:

- (1) a short description of the proposed change or modification;
- (2) an estimate of the total incremental costs anticipated to be incurred as a result of the proposed change or modification;
- (3) how implementing the proposed change or modification may affect the Joint EIS Contractor's progress and the potential for achieving the desired Joint EIS Contract results; and
- (4) any effects of the proposed change or modification on the Contractor's schedule which are reasonably foreseeable.

(b) The responding party shall promptly evaluate any change or modification proposed by NYSERDA or DOE pursuant to subsection (a) of this Section. The two parties shall consult with each other and use their best efforts to agree on whether to proceed with the proposed change or modification, withdraw the proposal, or proceed with a substitute which accommodates the desires and concerns of both parties with respect to the subject of the proposal. The two parties will subsequently memorialize their agreement in writing. If, despite their best efforts, they have been unable to agree, the responding party will provide a written response to the proposing party which states its position on the proposed change or modification and the basis for that position.

Section 4.5. (a) DOE shall include provisions in the Joint EIS Contract which require in substance that:

(1) The Joint EIS Contractor shall transmit to NYSERDA copies of all documents transmitted to DOE by the Joint EIS Contractor, including but not limited to correspondence, evaluations, plans, drawings, reports, data (including graphic or pictorial delineation in media such as drawings or photographs, or technical or engineering data), proposals, or analyses.

(2) NYSERDA shall have, to the same extent as DOE, a right to inspect and audit at reasonable times all books of account and records relating to the Joint EIS Contract, including all financial and cost reports, data evidencing costs allowable, revenues, and other data evidencing costs, and all other records of the Joint EIS Contractor except personnel or medical or similar records; provided, however, that all such inspections and audits must be on notice to and with opportunity for participation of DOE and are subject to all other provisions of this Supplemental Agreement.

(b) DOE shall transmit to NYSERDA copies of all records transmitted to the Joint EIS Contractor by DOE, including but not limited to correspondence, evaluations, plans, drawings, reports, data (including graphic or pictorial delineation in media such as drawings or photographs, or technical or engineering data), proposals, or analyses.

(c) NYSERDA shall transmit to DOE copies of all records transmitted to the Joint EIS Contractor by NYSERDA, including but not limited to correspondence, evaluations, plans, drawings, reports, data (including graphic or pictorial delineation in media such as drawings or photographs, or technical or engineering data), proposals, or analyses.

(d) Nothing in this Supplemental Agreement shall preclude DOE and NYSERDA from time to time agreeing orally or in writing to provide for inspection or other means of making specific documents available in lieu of providing copies of such specific documents as would otherwise be required by this Section.

ARTICLE V. OTHER CONTRACTORS

Section 5.1. It is anticipated that site characterization, evaluations, associated planning, and other activities integrally related to the Joint EIS will be performed by DOE's managing and operating (M&O) contractor (currently West Valley Nuclear Services, Inc.) and its subcontractors. Such integrally related activities and associated costs (to the extent separately identified to the Joint EIS effort and properly so accounted for within the accounting systems of DOE and its M&O contractor (or its subcontractors, if appropriate)) shall be subject to the terms of this Supplemental Agreement, including the provisions of Article VI entitled "Cost Participation."

Section 5.2. (a) Either DOE or NYSERDA may contract for services, supplies, or equipment to support the Joint EIS effort, in addition to the services, supplies, and equipment provided by DOE's M&O contractor and the Joint EIS Contractor as specifically set forth in this Supplemental Agreement. The costs of such support may be credited to the cost allocation of DOE or NYSERDA under Article VI only to the extent:

- (1) the party seeking such credit provides the other party to this Supplemental Agreement with full disclosure of the services, supplies,

and equipment covered by such a contract and the amount of costs incurred;

(2) those costs are incurred on or after the effective date of this agreement; and

(3) DOE and NYSERDA agree to credit such costs to the cost allocation set forth in Article VI.

The parties will consult and cooperate fully with each other to share information concerning such contracting on a continuing basis, to facilitate timely mutual planning and budgeting in carrying out the provisions of this Supplemental Agreement and to ensure that the work and schedules of DOE's and NYSERDA's contractors are coordinated to avoid unnecessary delay or interference.

(b) Failure to agree on the appropriateness of such support or the crediting of costs to the allocations, estimates, and accountings set forth in Article VI shall be subject to the provisions of Section 11.1, "Disputes."

Section 5.3. DOE shall provide to NYSERDA, and NYSERDA shall provide to DOE, true and correct copies of any and all sampling and test results, reports, analyses, data, evaluations, drawings, and other records produced by contractors for which cost credit is sought under this Article V and Article VI.

ARTICLE VI. COST PARTICIPATION

Section 6.1. (a) The parties recognize that the cost sharing agreement set forth in Section 5.02 of the Cooperative Agreement, providing for the DOE paying 90 percent and the NYSERDA paying 10 percent of total WVDP costs, does not reflect any separate allocation NYSERDA is undertaking for preparation

of the Joint EIS insofar as its scope, in considering closure of the Center, is broader than the scope of the WVDP and includes facilities and premises that are not part of the WVDP under the WVDP Act and the Cooperative Agreement. Therefore, subject to the provisions of this Article, DOE and NYSERDA agree that DOE paying 73 percent and NYSERDA paying 27 percent of the costs of preparing the Joint EIS and directly related activities within the scope of this Supplemental Agreement is an appropriate allocation of cost responsibilities. Such 27 percent shall include and represent payment of:

(1) NYSERDA's 10 percent cost share for the WVDP under Section 5.02 of the Cooperative Agreement (which shall be payable under the terms of, and procedures implemented under, Article V of the Cooperative Agreement); and

(2) an additional 17 percent cost share ("Additional 17 Percent Share") which is the agreed reasonable value of the incremental costs incurred pursuant to this Supplemental Agreement for preparation of the Joint Environmental Impact Statement insofar as its scope is broader than the scope of the WVDP and includes premises and facilities that are not part of the WVDP.

(b) Except as otherwise may be applicable under Section 7.01 of the Cooperative Agreement with respect to DOE's and NYSERDA's respective shares of WVDP costs, DOE's and NYSERDA's respective shares of costs incurred pursuant to this Supplemental Agreement include payment for their proportionate shares of any claims, litigation costs, termination costs, or settlements paid to the Joint EIS Contractor, or other contractor under Article V of this Supplemental Agreement, or any obligations incurred as a result of modifications made to the Contract of the Joint EIS Contractor, or

to contracts of other contractors under Article V, to the extent that such claims, costs, or settlements arise from services within the scope of this Supplemental Agreement.

(c) Notwithstanding any language in the Cooperative Agreement to the contrary, the parties agree that NYSERDA's Additional 17 Percent Share shall be paid in accordance with the terms and procedures of this Article.

Section 6.2. (a) DOE shall include and specifically identify the Joint EIS activities which are within the scope of this Supplemental Agreement, and the costs of those activities, in the Annual Project Plans and Budgets prepared pursuant to Section 8.01 of the Cooperative Agreement. NYSERDA's Additional 17 Percent Share shall be separately identified, with a separate delineation of:

- (1) NYSERDA cash payments to DOE, and
- (2) credits to NYSERDA for its payments for services, supplies, or equipment for which it contracted directly as agreed in accordance with Section 5.2 above.

(b) To obtain credit toward NYSERDA's Additional 17 Percent Share for its payments for services, supplies, or equipment for which it has contracted directly in accordance with Section 5.2 above and incurs costs on or after the effective date of this agreement, NYSERDA shall comply with the following procedures:

- (1) No later than sixty days before the beginning of the New York State fiscal year commencing April 1, 1991, and of each succeeding State fiscal year until the completion of activities pursuant to this Supplemental Agreement, NYSERDA shall submit to DOE for review and comment:

(a) an annual plan for conducting work for which credit is sought, detailing the scope and schedule of the work to be performed within the next State fiscal year, and

(b) an annual budget for implementing the annual plan, detailing all estimated expenditures and costs which:

(i) have been incurred on the work to date,

(ii) will be incurred during the current and next State fiscal years, and

(iii) will be required to complete the work.

NYSERDA shall supply any amendment to the annual plan and budget to DOE promptly.

(2) NYSERDA shall submit to DOE for review and comment any amendment significantly changing the scope of work set forth in the annual plan or increasing the annual budget by more than 20 percent.

(3) DOE shall have the opportunity to review the annual plan and budget, and any amendment submitted pursuant to paragraph (2) of this subsection, to assess whether the work is within the scope of this Supplemental Agreement, is to be performed at a reasonable cost, and is not duplicative of work that DOE and NYSERDA have previously agreed will be performed by any other contractor to either DOE or NYSERDA. DOE's agreement to the annual plan and budget, or amendment thereto, shall be presumed unless, within 60 days after receipt of NYSERDA's annual plan and budget, DOE provides written objection or comment regarding their form, content, or completeness. DOE's agreement shall not unreasonably be withheld.

(c) NYSERDA shall carry out the work in accordance with the annual plans and budgets, as amended.

Section 6.3. (a) NYSERDA shall pay its Additional 17 Percent Share (less any applicable credits for its payments for services, supplies, or equipment for which it contracted directly as agreed in accordance with Section 5.2 above) on a quarterly basis by paying the quarterly amount due to DOE by check or other negotiable instrument.

(b) NYSERDA shall make pre-payments of its Additional 17 Percent Share to maintain as a minimum, at all times during the term of this Supplemental Agreement, a continuous balance of funds paid sufficient to meet estimated disbursements for work covered under this Supplemental Agreement, as reasonably estimated by DOE, at least one quarter in advance. For that purpose, each quarterly NYSERDA advance payment shall be made based on the estimated disbursements with respect to the next full quarter after the date on which that payment is due. For any particular calendar quarter, DOE shall deliver to NYSERDA an estimate and request for payment of anticipated disbursements no less than 120 days before the beginning of that quarter. NYSERDA shall pay the quarterly amount due no later than 60 days before the beginning of that quarter.

(c) The quarterly amount due from NYSERDA to DOE pursuant to subsection (b) of this section ("Quarterly Payment Estimate") shall be determined in cooperation and consultation with NYSERDA. In estimating the quarterly amount due, DOE will reconcile any cumulative prior under- and over-payments by NYSERDA toward its Additional 17 Percent Share, taking into account:

(1) all cumulative actual expenditures previously made by DOE, through the end of the last complete calendar quarter before the date the

estimate is due, for work within the scope of this Supplemental Agreement;

(2) all additional expenditures for such work projected to be made by DOE through the end of the second full calendar quarter after the estimate is due;

(3) all advance payments previously made by NYSERDA toward its Additional 17 Percent Share pursuant to this section; and

(4) all cumulative actual NYSERDA expenditures previously made, through the end of the last complete calendar quarter, and all NYSERDA expenditures reasonably projected by NYSERDA to be made, through the end of the quarter in which the estimate by DOE is due, for services, supplies, or equipment for which NYSERDA contracted directly as agreed in accordance with Section 5.2.

(d) For any Federal fiscal year, requests to NYSERDA for payment pursuant to this section shall not exceed by more than 20 percent the total amount set forth as the estimated NYSERDA Additional 17 Percent Share for that Federal fiscal year in the DOE Annual Project Plan and Budget issued for that fiscal year, unless NYSERDA agrees in writing to the additional amounts requested.

(e) Notwithstanding any other provisions of this section, the first DOE estimate and request for payment, and NYSERDA payment of its Additional 17 Percent Share (as well as DOE and NYSERDA annual plans and budgets) may be adjusted as appropriate to initiate this Supplemental Agreement and shall include the first payment period described in subsection (g) of this section.

(f) Within 60 days after the end of each calendar quarter, DOE will provide NYSERDA with an accounting of costs and expenses for work within the

scope of this Supplemental Agreement which DOE actually incurred during that quarter; and NYSERDA will provide DOE with an accounting of costs and expenditures which NYSERDA actually incurred during that quarter for services, supplies, or equipment for which NYSERDA contracted directly as agreed in accordance with Section 5.2 above.

(g) For the purposes of this section, quarterly periods will begin January 1, April 1, July 1, and October 1 of each year; except that the first payment period may commence on the effective date of this Supplemental Agreement and end on the last day of the second full calendar quarter following receipt by NYSERDA of DOE's first estimate and request for payment pursuant to this section.

Section 6.4. (a) No in-kind contribution, annual facility credit (as provided in Section 5.03(b)(ii) of the Cooperative Agreement), volunteer services, or other similar form of non-cash cost participation, or credit for services provided by NYSERDA employees, shall be permitted for payment of NYSERDA's Additional 17 Percent Share.

(b) Nothing in subsection (a) of this section precludes credits as provided in Section 5.2 above (relating to NYSERDA contracts for services, supplies, or equipment). The total amount of such credits may not exceed 17 percent of the total amount of expenditures pursuant to this Supplemental Agreement.

(c) After completion of all work within the scope of this Supplemental Agreement, DOE and NYSERDA will each prepare accountings of their expenditures and payments for such work. Since NYSERDA will have made payments for its Additional 17 Percent Share in advance of expenditures made by DOE toward which the NYSERDA payments were made, the total of all such NYSERDA payments

and expenditures (including credits as provided in Section 5.2 for agreed NYSERDA contracts for services, supplies, or equipment) might then exceed 17 percent of the total cost of all expenditures for work within the scope of this agreement. Any such excess will, at NYSERDA's option, either:

- (1) be credited to NYSERDA as payment toward its 10 percent share of Project costs pursuant to Section 5.03 of the Cooperative Agreement, and treated as funds expended providing Authority Services for purposes of Section 5.03(c) of the Cooperative Agreement; or
- (2) be paid by DOE to NYSERDA by check or other negotiable instrument.

Section 6.5. NYSERDA has separately agreed with DOE that, for the purpose of paying a portion of its 10 percent share of Project Costs by provision of Authority Services pursuant to Section 5.03(d) of the Cooperative Agreement, allowable costs shall be determined in accordance with Office of Management and Budget Circular A-87, Cost Principles for State and Local Governments, Revised (see 48 CFR Subpart 31.06). Similarly, for the purpose of credits to NYSERDA in accordance with Sections 5.2 and 6.2 above toward its Additional 17 Percent Share, allowable costs shall be as determined in accordance with the revision of Office of Management and Budget Circular A-87 which is in effect on the effective date of this Supplemental Agreement.

ARTICLE VII. PROPRIETARY INFORMATION

Section 7.1. (a) When NYSERDA obtains material identified as proprietary or company confidential data or information from DOE or DOE's contractors (including the Joint EIS Contractor) for use in connection with the work performed pursuant to this Supplemental Agreement, it shall not be further released except as may be required by law or approved by DOE.

Proprietary or company confidential data or information includes without limitation:

- (1) trade secrets;
- (2) information which is obtained from the contractor and confidential or privileged, including such commercial or financial information;
- (3) information which, as may be determined by DOE, would not be available by law to a person under the Freedom of Information Act, Title 5, United States Code, Section 552, if requested from DOE; and
- (4) information or documents which would not be available to a party in litigation with DOE, as may be determined by DOE, including but not limited to information or documents subject to executive privilege, attorney-client privilege, or information which, if released, would harm the competitive position of DOE in the award of a contract or contracts.

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

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

- (2) NYSERDA shall not release such requested information unless approved by DOE, after referring the request to DOE for a determination of the appropriateness of releasing the requested information or denying the request.

(c) Transmittal of proprietary or confidential data by DOE or DOE's contractors (including the Joint EIS Contractor) to NYSERDA shall not be deemed a waiver by DOE or DOE's contractors of any right, benefit, or privilege associated with the information.

Section 7.2. (a) When DOE obtains material identified as proprietary or company confidential data or information from NYSERDA or NYSERDA's contractors for use in connection with the work performed pursuant to this Supplemental Agreement, it shall not be further released except as may be required by law or approved by NYSERDA. Proprietary or company confidential data or information includes without limitation:

- (1) trade secrets;
- (2) information which is obtained from the contractor and confidential or privileged, including such commercial or financial information;
- (3) information which, as may be determined by NYSERDA, would not be available by law to a person under the New York State Freedom of Information Law, New York Public Officers Law, Article 6, if requested from NYSERDA; and
- (4) information or documents which would not be available to a party in litigation with NYSERDA, as may be determined by NYSERDA, including but not limited to information or documents subject to executive privilege, attorney-client privilege, or information which, if released, would harm the competitive position of NYSERDA in the award of a contract or contracts.

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

- (1) DOE shall adhere to all restrictive legends or restrictions contained in notices on documents and shall promptly notify NYSERDA of any request received by DOE for information which may reasonably be subject to this paragraph;
- (2) DOE shall not release such requested information unless approved by NYSERDA, after referring the request to NYSERDA for a determination

of the appropriateness of releasing the requested information or denying the request.

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

ARTICLE VIII. SCOPING PROCESS, CIRCULATION OF THE EIS
AND OTHER REQUIREMENTS

Section 8.1. (a) As the Federal lead agency, DOE will ensure implementation and completion of the scoping process found at 40 CFR 1501.7. NYSERDA will provide support and assistance to DOE in the scoping process, and particularly shall have a representative in attendance at all public hearings or public meetings.

(b) DOE and NYSERDA each shall have the opportunity to review all comments submitted to either of them.

(c) As the State lead agency, NYSERDA shall ensure that any additional requirements under SEQRA which may affect the NEPA process are timely brought to DOE's attention so that DOE may take appropriate action to ensure that such requirements are accommodated or coordinated without unnecessary duplication of effort and do not otherwise adversely affect the NEPA process.

ARTICLE IX. TERMINATION

Section 9.1. Either party to this Supplemental Agreement may terminate this Supplemental Agreement at any time upon 15 days written notice to the other party.

Section 9.2. (a) Upon receipt of a Notice of Termination from NYSERDA or issuance of a Notice of Termination by DOE, DOE shall immediately proceed to take appropriate actions to adjust its contracts or solicitations accordingly, including the Joint EIS Contractor solicitation or resulting contract. DOE 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 the termination to the extent necessary to accommodate the Notice of Termination described in Section 9.1 of this Article in accordance with the provisions of its contract with DOE;

(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 NYSERDA, DOE 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.

(c) DOE may direct a contractor to proceed with the unterminated portion of the work under its contract with DOE.

(d) Upon request from NYSERDA, DOE shall direct any contractor to deliver to NYSERDA 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 from DOE.

(e) DOE may make payments or partial payments to the contractor(s), or receive payments or partial payments from NYSERDA pursuant to this Article, without waiving any rights it may have to further performance or payments from NYSERDA under the terms of this Supplemental Agreement.

Section 9.3. The party issuing a Notice of Termination pursuant to Section 9.1 of this Article shall be responsible for the termination costs unless such termination right is invoked to remedy a material breach of this Supplemental Agreement, in which event the party whose action or omission comprised the breach shall be responsible for such termination costs.

ARTICLE X. RIGHTS IN TECHNICAL DATA

Section 10.1. Except as may otherwise be agreed in writing by DOE and NYSERDA, the provisions set forth in Appendix A (entitled "Requirements for Rights in Technical Data") attached to this 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 Section 5.2 of this Agreement. Bracketed language referencing "the Government," "DOE," and "NYSERDA" shall be redacted in such a manner that brackets will be removed and only "the Government" and "DOE" will be referenced in DOE contracts and subcontracts, and only "NYSERDA" will be referenced in NYSERDA contracts and subcontracts.

Section 10.2. DOE and NYSERDA each shall have exclusive authority under its own respective contracts and subcontracts which are subject to the provisions set forth in Appendix A with regard to:

- (a) grant or denial of approvals or authorizations, and
- (b) the right to remove, cancel, correct, or ignore any markings on technical data.

DOE shall consult and coordinate with NYSERDA, and NYSERDA shall consult and coordinate with DOE, regarding such approvals or authorizations and neither shall unreasonably refuse to honor a request from the other party to grant or deny such an approval or authorization.

Section 10.3. With respect to DOE contracts or subcontracts subject to the provisions set forth in Appendix A, NYSERDA shall exercise any of its rights, or make any inquiries or notifications, that may be provided for in such clauses only through DOE's Contracting Officer. With respect to NYSERDA contracts or subcontracts subject to the provisions set forth in Appendix A, DOE shall exercise any of its rights, or make any inquiries or notifications, that may be provided for in such clauses only through NYSERDA's Contracting Officer.

ARTICLE XI. MISCELLANEOUS

Section 11.1. Disputes. Disputes may be submitted to nonbinding arbitration or other alternative dispute resolution procedure to which DOE and NYSERDA may agree. In any event, a dispute not otherwise resolved by agreement of the parties shall be subject to the provisions of Section 8.03 of the Cooperative Agreement. Nothing in this section shall limit the rights

of the parties to terminate this Supplemental Agreement under the provisions of Article IX, "Termination."

Section 11.2. Exhibit F to the Cooperative Agreement, entitled "General Conditions," is incorporated by reference and made applicable to this Supplemental Agreement. Any citations therein include subsequent amendments thereto.

Section 11.3. This 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 Supplemental Agreement, the provisions of this 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 Supplemental Agreement are for convenience of reference only, and shall not define or limit its terms. The provisions of this Supplemental Agreement shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of NYSERDA and DOE.

Section 11.4. This Supplemental Agreement shall become effective upon execution by DOE and NYSERDA. Upon such execution, the effective date of this Supplemental Agreement shall be deemed to be October 1, 1990.

The New York State Energy Research and Development Authority:

Dated: 12/31/90

By: Irvin L. White
Irvin L. White, President

The United States Department of Energy:

Dated: _____

By: _____
A. A. Pitrolo, Manager
Idaho Operations Office

Section 11.4. This Supplemental Agreement shall become effective upon execution by DOE and NYSERDA. Upon such execution, the effective date of this Supplemental Agreement shall be deemed to be October 1, 1990.

The New York State Energy Research and Development Authority:

Dated: 12/31/90

By: Irvin L. White
Irvin L. White, President

The United States Department of Energy:

Dated: 2/8/91

By: A. A. Pitrolo
A. A. Pitrolo, Manager
Idaho Operations Office

APPENDIX A. REQUIREMENTS FOR RIGHTS IN TECHNICAL DATA.

The following provisions concerning requirements for rights in technical data shall be included in all U.S. Department of Energy ("DOE") or New York State Energy Research and Development Authority ("NYSERDA") contracts and subcontracts as required by Article 10 of the 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.

ARTICLE [XXX]. RIGHTS IN TECHNICAL DATA.

Section [XXX].1. Introduction.

The work being undertaken pursuant to this agreement is part of work falling within the terms of an agreement between the New York State Energy Research and Development Authority ("NYSERDA") and the U.S. Department of Energy ("DOE") for the preparation of a Joint Environmental Impact Statement relating to 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 or NYSERDA contracts pursuant to such Supplemental Agreement.

Section [XXX].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 [XXX].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 or NYSERDA, as appropriate] 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, as appropriate] 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, as appropriate] 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 or a DOE contractor or subcontractor, or from NYSERDA or a NYSERDA 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, as appropriate] 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 [XXX].4. Copyrighted material.

(a) The contractor shall not, without prior written authorization of [DOE's Patent Counsel or NYSERDA's Contracting Officer, as appropriate], 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 or NYSERDA's, as appropriate] Contracting Officer to include such copyrighted material in the technical data, prior to its delivery.

Section [XXX].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 or NYSERDA, as appropriate], 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 Officer.

Section [XXX].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 [XXX].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 or

NYSERDA, as appropriate] 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 U.S. Department of Energy 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 or with NYSERDA, as appropriate], 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 or 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 [XXX].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 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 [XXX].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.