

**H2@ SCALE PROGRAM MULTI-PARTY
COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT
(hereinafter "CRADA")**

between

Contractor Name,
As Operator of [Insert Lab Name]
under its U.S. Department of Energy Contract ____
Address

and

Contractor Name,
As Operator of [Insert Lab Name]
under its U.S. Department of Energy Contract ____
Address

and

Contractor Name,
As Operator of [Insert Lab Name]
under its U.S. Department of Energy Contract ____
Address

(hereinafter being jointly referred to as "Contractors" or individually as "Contractor")

and

Company Name
Address
City, State ZIP

and

Company Name
Address
City, State ZIP

and

Company Name
Address
City, State ZIP

(hereinafter being jointly referred to as the "Participants" or individually as a "Participant")

(hereinafter Contractors and Participants being jointly referred to as the "Parties"

or individually as a "Party")

Task Title:

Field of Use:

ARTICLE I: DEFINITIONS

- A. "Government" means the United States of America and agencies thereof.
- B. "DOE" means the Department of Energy, an agency of the United States of America.
- C. "Contracting Officer" means the DOE employee administering the respective Contractor's DOE prime contract .

- D. "Generated Information" means information produced in the performance of this CRADA.
- E. "Proprietary Information" means information which is developed at private expense outside of this CRADA, is marked as Proprietary Information, and embodies (i) trade secrets or (ii) commercial or financial information which is considered privileged or confidential under the Freedom of Information Act (5 USC 552 (b)(4)).
- F. "Protected CRADA Information" means Generated Information which is marked as being Protected CRADA Information by a Party to this CRADA and which would have been Proprietary Information had it been obtained from a non-federal entity.
- G. "Subject Invention" means any invention of a Party conceived of or first actually reduced to practice in the performance of work under this CRADA.
- H. "Intellectual Property" means patents, trademarks, copyrights, mask works, Protected CRADA Information and other forms of comparable property rights protected by Federal law and other foreign counterparts.
- I. "Background Intellectual Property" means the Intellectual Property, if any, identified by the Parties in an Appendix titled "Background Intellectual Property", which was in existence prior to or is first produced outside of this CRADA, except that in the case of inventions in those identified items, the inventions must have been conceived outside of this CRADA and not first actually reduced to practice under this CRADA to qualify as Background Intellectual Property.

ARTICLE II: STATEMENT OF WORK, TERM, FUNDING AND COSTS

- A. Annex A is the Statement of Work.
- B. Notices: The names, postal addresses, telephone and email addresses for the Parties are provided in the Statement of Work. Any communications required by this CRADA, if given by postage prepaid first-class U.S. Mail or other verifiable means addressed to the Party to receive the communication, shall be deemed made as of the day of receipt of such communication by the addressee, or on the date given if by email. Address changes shall be made by written notice and shall be effective thereafter. All such communications, to be considered effective, shall include the number of this CRADA.
- C. The effective date of this CRADA shall be the latter date of (1) the date on which it is signed by the last of the Parties, (2) the date on which it is approved by DOE, or (3) the date on which the advance funding referred to in this Article is received by the Contractors. The work to be performed under this CRADA shall be completed within ___ months/years from the effective date.
- D. [Insert Participant's Name]'s estimated contribution is \$ ___, which includes \$ ___ funds-in and is comprised of the following funds-in contributions to the individual Contractors: \$ ___ funds-in to [Insert Lab Name]; \$ ___ funds-in to [Insert Lab Name]; and \$ ___ funds-in to [Insert Lab Name]; [Insert Participant's Name]'s estimated contribution is \$ ___, which includes \$ ___ funds-in and is comprised of the following funds-in contributions to the individual Contractors: : \$ ___ funds-in to [Insert Lab Name]; \$ ___ funds-in to [Insert Lab Name]; and \$ ___ funds-in to [Insert Lab Name]; [Insert Participant's Name]'s estimated contribution is \$ ___, which includes \$ ___ funds-in and is comprised of the following funds-in contributions to the individual Contractors: : \$ ___ funds-in to [Insert Lab Name]; \$ ___ funds-in to [Insert Lab Name]; and \$ ___ funds-in to [Insert Lab Name]. The Government's estimated contribution is subject to available funding and will be

provided directly to each Contractor through the prime contract between DOE and the Contractor. The Government's estimated contribution includes \$ ____ to [Insert Lab Name]; \$ ____ to [Insert Lab Name]; and \$ ____ to [Insert Lab Name].

- E. Each Participant shall provide the Contractors, prior to any work from being performed by the Contractors, a budgetary resource sufficient to cover the anticipated work that will be performed during the first billing cycle. In addition, each Participant shall provide sixty (60) days of additional funding to ensure that funds remain available for project during subsequent billing cycles. Failure of a Participant to provide the necessary advance funding is cause for termination of this CRADA in accordance with the Termination article of this CRADA. A billing cycle is the period of time between billings, usually thirty (30) days. The billing cycle is complete when the customer is billed for services rendered.

ARTICLE III: PERSONAL PROPERTY

All tangible personal property produced or acquired under this CRADA with all or partial Government funding shall become the property of the Government. All tangible personal property produced or acquired, without Government funding, shall be the property of the Parties who paid for it. Personal property shall be disposed of as directed by the owner (or owners) at the owner's (or owners') expense. Each Participant shall maintain records of receipts, expenditures, and the disposition of all Government property in its custody related to the CRADA.

ARTICLE IV: DISCLAIMER

THE GOVERNMENT, THE PARTICIPANTS, AND THE CONTRACTORS MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS CRADA, OR THE OWNERSHIP, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT. NEITHER THE GOVERNMENT, THE PARTICIPANTS, NOR THE CONTRACTORS SHALL BE LIABLE FOR SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES ATTRIBUTED TO SUCH RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS CRADA.

ARTICLE V: PRODUCT LIABILITY

Except for any liability resulting from any negligent acts, or willful misconduct or omissions of a Contractor or Government, each Participant agrees to hold harmless the Government and the Contractors for all damages, costs, and expenses, including attorney's fees, arising from personal injury or property damage a result of the making, using, or selling of a product, process, or service by or on behalf of that Participant, its assignees, or licensees, which was derived from the work performed under this CRADA.

ARTICLE VI: RIGHTS TO SUBJECT INVENTIONS

Wherein DOE has granted each Participant and each Contractor the right to elect to retain title to their respective Subject Inventions.

- A. Each Party shall have the first option to elect to retain title to any of its Subject Inventions and that election shall be made: (1) for each Participant, within 12 months of disclosure of the Subject Invention to DOE or (2) for each Contractor, within the time period specified in its prime contract for electing to retain title to Subject Inventions. However, such election shall occur not later than 60 days prior to the time when any statutory bar might foreclose filing of a U.S. Patent application. The electing Party has one year to file a patent application

after such election unless any statutory bar exists. If a Party elects not to retain title to any of its Subject Inventions or fails to timely file a patent application, the other Parties shall have the second option to elect to obtain such title, either by each electing Party having an equal undivided interest or by other arrangement agreed to by all the electing Parties. The electing Parties shall have the second option to elect to obtain title to such Subject Invention within one year of notification and file a patent application within one year after such election, or no less than 30 days prior to a statutory bar, if any. For Subject Inventions that are jointly made, title to such Subject Inventions shall be jointly owned by the inventing Parties.

- B. The Parties agree to assign to DOE, as requested by DOE, the entire right, title and interest in any country to each Subject Invention where the Parties (1) do not elect pursuant to this article to retain/obtain such rights, or (2) elect to retain/obtain title to a Subject Invention but fail to have a patent application filed in that country on the Subject Invention or decide not to continue prosecution or not to pay any maintenance fees covering the Subject Invention. If DOE is granted a patent on a Participant's Subject Invention, that Participant may request a non-exclusive license and DOE will determine whether to grant such license pursuant to statutory authority.
- C. The Parties acknowledge that the Government retains a nonexclusive, nontransferable, irrevocable, paid-up license to practice or to have practiced for or on behalf of the United States every Subject Invention under this CRADA throughout the world. The Parties agree to execute a Confirmatory License to affirm the Government's retained license.
- D. The Parties agree to disclose to one another each Subject Invention which may be patentable or otherwise protectable under U.S. patent law. The Parties agree that the Contractors and the Participants will disclose their respective Subject Inventions to DOE and one another within two (2) months after the inventor first discloses the Subject Invention in writing to the person(s) responsible for patent matters of the disclosing Party.

These disclosures should be in sufficiently complete technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, and operation of the Subject Invention. The disclosure shall also identify any known actual or potential statutory bars, e.g., printed publications describing the Subject Invention or the public use or "on sale" of the Subject Invention. The Parties further agree to disclose to one another any subsequently known actual or potential statutory bar that occurs for a Subject Invention disclosed but for which a patent application has not been filed. All Subject Invention disclosures shall be marked as confidential under 35 U.S.C. 205.

- E. The Parties agree to include within the beginning of the specification of any U.S. patent applications and any patent issuing thereon (including non-U.S. patents) covering a Subject Invention, the following statement: "This invention was made under a CRADA (identify CRADA number) among (names of the Participants) and (names of the laboratory/laboratories) operated for the United States Department of Energy. The Government has certain rights in this invention."
- F. The Parties acknowledge that DOE has certain march-in rights to any Subject Inventions in accordance with 48 CFR 27.304-1(g) and 15 U.S.C. 3710a(b)(1)(B) and (C).
- G. For each Subject Invention of a Contractor, each Participant has the option for six (6) months from the date that the Subject Invention was disclosed to the Participants to choose an exclusive license (if only one Participant elects the option) or a co-exclusive license (if more than one Participant elects the option), for reasonable compensation, in the limited Field of Use as specified on the first page of this CRADA to the Subject Invention.

ARTICLE VII: RIGHTS IN DATA

- A. The Parties agree that they shall have no obligations of nondisclosure or limitations on their use of, and the Government shall have unlimited rights in, all Generated Information produced and information provided by the Parties under this CRADA, except for restrictions and copyright on data provided for in this Article or data disclosed in a Subject Invention disclosure being considered for Patent protection.
- B. PROPRIETARY INFORMATION: Each Party agrees to not disclose Proprietary Information provided by another Party to anyone other than the Participants, Contractors, and their respective subcontractors (if any) performing work under this CRADA without written approval of the providing Party, except to Government employees who are subject to the statutory provisions against disclosure of confidential information set forth in the Trade Secrets Act (18 U.S.C. 1905). Government employees shall not be required to sign non-disclosure agreements due to the provisions of the above-cited statute.

If Proprietary Information is orally disclosed to a Party, it shall be identified as such, orally, at the time of disclosure and confirmed in a written summary thereof, appropriately marked by the disclosing Party, within ten (10) days as being Proprietary Information.

All Proprietary Information shall be protected by the recipient for a period of five (5) years from the effective date of this CRADA, unless such Proprietary Information becomes publicly known without the fault of the recipient, shall come into recipient's possession without breach by the recipient of any of the obligations set forth herein, can be demonstrated by the recipient by written record that it is known prior to receipt from disclosing Party, is disclosed by operation of law, or is independently developed by recipient's employees who did not have access to such Proprietary Information.

Proprietary Information in tangible form shall be returned to the disclosing Party or destroyed with a certificate of destruction submitted to the disclosing Party upon termination or expiration of this CRADA, or during the term of this CRADA upon request by the disclosing Party. Notwithstanding the foregoing destruction of copies shall not extend to archival copies maintained in computer system backup files, permanent business records, or as may otherwise be required by receiving Party's internal document retention policies.

- C. PROTECTED CRADA INFORMATION: Each Party may designate and mark as Protected CRADA Information any Generated Information produced by its employees, which meets the definition in Article I and, with the agreement of another Party, so designate any Generated Information produced by that other Party's employees which meets the definition in Article I. All such designated Protected CRADA Information shall be appropriately marked.

For a period of five (5) years from the date Protected CRADA Information is produced, the Parties agree not to further disclose such information and to use the same degree of care and discretion, but no less than reasonable care and discretion, to avoid disclosure, publication or dissemination of such information to a third party, as the Party employs for similar protection of its own information which it does not desire to disclose, publish, or disseminate except:

- (1) as necessary to perform this CRADA;
- (2) as published in a patent application or an issued patent before the protection period expires;
- (3) as provided in Article X [REPORTS AND ABSTRACTS];
- (4) as requested by the DOE Contracting Officer to be provided to other DOE facilities for use only at those DOE facilities solely for Government use only with the same protection in place and marked accordingly.
- (5) to existing or potential licensees, affiliates, customers, or suppliers of the Parties in support of

commercialization of the technology with the same protection in place. Disclosure of a Participant's Protected CRADA Information under this subparagraph shall only be done with that Participant's consent; or

(6) as mutually agreed to by the Parties in advance.

The obligations of this paragraph shall end sooner for any Protected CRADA Information which shall become publicly known without fault of any Party, shall come into a Party's possession without breach by that Party of the obligations of paragraph above, or shall be independently developed by a Party's employees who did not have access to the Protected CRADA Information. Federal Government employees who are subject to 18 USC 1905 may have access to Protected CRADA Information and shall not be required to sign non-disclosure agreements due to the provisions of the statute.

D. COPYRIGHT: The Parties may assert copyright in any of their respective Generated Information.

The Parties hereby acknowledge that the Government or others acting on its behalf shall retain a nonexclusive, royalty-free, worldwide, irrevocable, non-transferable license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, all copyrightable works produced in the performance of this CRADA, subject to the restrictions this CRADA places on publication of Proprietary Information and Protected CRADA Information.

When a Party writes computer software produced in the performance of this CRADA, the Party will provide the source code, object code, and expanded abstract, and the minimum support documentation needed by a competent user to understand and use the software to DOE's Energy Science and Technology Software Center (ESTSC) via www.osti.gov/estsc. The Party shall inform ESTSC when it abandons or no longer commercializes the computer software. Until such notice to ESTSC, the Government has for itself and others acting on its behalf, a royalty-free, nontransferable, nonexclusive, irrevocable worldwide copyright license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government (narrow license). After the Party owning the Computer Software abandons or no longer commercializes the Computer Software, the Government has for itself and others acting on its behalf, a royalty-free, nontransferable, nonexclusive, irrevocable worldwide copyright license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government (broad license).

The Parties agree to place Copyright and other notices, as appropriate for the protection of Copyright, in human-readable form onto all physical media, and in digitally encoded form in the header of machine-readable information recorded on such media such that the notice will appear in human-readable form when the digital data are off loaded or the data are accessed for display or printout.

ARTICLE VIII: U.S. COMPETITIVENESS

The Parties agree that a purpose of this CRADA is to provide substantial benefit to the U.S. economy.

A. In exchange for the benefits received under this CRADA, each Participant therefore agrees to the following:

- (1) Products embodying Intellectual Property developed under this CRADA shall be substantially manufactured in the United States, and
- (2) Processes, services, and improvements thereof which are covered by Intellectual Property developed under this CRADA shall be incorporated into the Participant's manufacturing facilities in the United States either prior to or simultaneously with implementation outside the United States. Such processes, services, and improvements, when implemented outside the United States, shall not result in reduction of

the use of the same processes, services, or improvements in the United States.

- B. Each Contractor agrees to a U.S. Industrial Competitiveness clause in accordance with its prime contract with respect to any licensing and assignments of its Intellectual Property arising from this CRADA, except that any licensing or assignment of its intellectual property rights to any Participant shall be in accordance with the terms of paragraph A of this Article.

ARTICLE IX: EXPORT CONTROL

EACH PARTY IS RESPONSIBLE FOR ITS OWN COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS. EXPORT LICENSES OR OTHER AUTHORIZATIONS FROM THE U.S. GOVERNMENT MAY BE REQUIRED FOR THE EXPORT OF GOODS, TECHNICAL DATA OR SERVICES UNDER THIS AGREEMENT. THE PARTIES ACKNOWLEDGE THAT EXPORT CONTROL REQUIREMENTS MAY CHANGE AND THAT THE EXPORT OF GOODS, TECHNICAL DATA OR SERVICES FROM THE U.S. WITHOUT AN EXPORT LICENSE OR OTHER APPROPRIATE GOVERNMENTAL AUTHORIZATION MAY RESULT IN CRIMINAL LIABILITY.

ARTICLE X: REPORTS AND ABSTRACTS

The Parties agree to produce the following deliverables: an initial abstract suitable for public release; and a final report, to include a list of Subject Inventions. It is understood that the Contractors have the responsibility to provide this information at the time of completion to the DOE Office of Scientific and Technical Information. Each Participant agrees to provide the above information to the Contractors to enable full compliance with this Article.

The Parties agree to submit, for a period of five years from the expiration of this CRADA and, upon request of DOE, a non-proprietary report no more frequently than annually on the efforts to utilize any Intellectual Property arising under the CRADA.

The Parties agree that they will not use the name of another Party or its employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this CRADA, without prior written approval of such other Party.

ARTICLE XI: FORCE MAJEURE

No failure or omission by a Contractor or a Participant in the performance of any obligation under this CRADA shall be deemed a breach of this CRADA or create any liability if the same shall arise from any cause or causes beyond the control of such Contractor or such Participant, including but not limited to the following, which, for the purpose of this CRADA, shall be regarded as beyond the control of the Party in question: Acts of God, acts or omissions of any government or agency thereof, compliance with requirements, rules, regulations, or orders of any governmental authority or any office, department, agency, or instrumentality thereof, fire, storm, flood, earthquake, accident, acts of the public enemy, war, rebellion, insurrection, riot, sabotage, invasion, quarantine, restriction, transportation embargoes, or failures or delays in transportation.

ARTICLE XII: DISPUTES

The Parties shall attempt to mutually resolve all disputes arising from this CRADA. In the event a dispute arises under this CRADA, the Participants are encouraged to contact the Contractor's Technology Partnership Ombudsman for the Contractor involved in order to further resolve such dispute before pursuing third-party mediation or other remedies. If the Parties are unable to mutually resolve a dispute within a reasonable period of time, they agree to submit the dispute to a third-party mediation process that is mutually agreed upon by the

Parties. To the extent that there is no applicable U.S. Federal law, this CRADA and performance thereunder shall be governed by the state laws of the locale of a court of competent jurisdiction, without reference to that state's conflict of laws provisions.

ARTICLE XIII: ENTIRE CRADA, MODIFICATIONS AND TERMINATION

This CRADA with its annexes contains the entire agreement among the Parties in performing the research described in the Statement of Work (Annex A). Any agreement to materially change any terms or conditions of the CRADA and annexes shall be valid only if the change is made in writing, executed by the Parties hereto, and approved by DOE.

The Contractors enter into this CRADA under the authority of their prime contracts with DOE. The Contractors are authorized to and will administer this CRADA in all respects unless otherwise specifically provided for herein. Administration of this CRADA may be transferred from a Contractor to DOE or its designee with notice of such transfer to the Parties, and that Contractor shall have no further responsibilities except for the confidentiality, use and/or nondisclosure obligations of this CRADA.

Any Party may terminate its participation in this CRADA with thirty (30) days written notice to all other Parties. If Article II provides for advance funding, any Contractor may also terminate its participation in this CRADA in the event of failure by a Participant to provide the necessary advance funding to/for such Contractor.

If a Participant or a Contractor terminates its participation in this CRADA, the CRADA will continue in force and effect as to the remaining Parties unless they otherwise terminate this CRADA.

Each Party will be responsible for its own costs arising out of or as a result of this termination. The obligations of any clause of this CRADA that were intended to survive the expiration of the period of performance, for example confidentiality, use, and/or non-disclosure obligations, shall also survive any termination of this CRADA.

ARTICLE XIV: BACKGROUND INTELLECTUAL PROPERTY

Each Party may use another Party's Background Intellectual Property identified in an Annex to this CRADA solely in performance of research under the Statement of Work. This CRADA does not grant to any Party any option, grant, or license to commercialize, or otherwise use another Party's Background Intellectual Property outside of the CRADA. Licensing of Background Intellectual Property, if agreed to between any Parties, shall be the subject of separate licensing agreements between such Parties. Each Party has used reasonable efforts to list all relevant Background Intellectual Property, but Background Intellectual Property may exist that is not identified. No Party shall be liable to another Party because of failure to list Background Intellectual Property.

Signature page follows.

FOR [Insert Lab Name]:

BY _____
TITLE _____
DATE _____

FOR [Insert Lab Name]:

BY _____
TITLE _____
DATE _____

FOR [Insert Lab Name]:

BY _____
TITLE _____
DATE _____

FOR [Insert Participant Name]:

BY _____
TITLE _____
DATE _____

FOR [Insert Participant Name]:

BY _____
TITLE _____
DATE _____

FOR [Insert Participant Name]:

BY _____
TITLE _____
DATE _____