STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 14, 2015

Mr. John Kotek
Acting Assistant Secretary
Office of Nuclear Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: U.S. Department of Energy (DOE) Request for Waiver of Section D.2.e. of the 1995 Settlement Agreement for the Purpose of Receiving Two Shipments of Commercial Spent Nuclear Fuel For Research

Dear John:

I appreciate the open and frank discussions we have had regarding DOE's desire to receive a shipment of 25 Commercial Spent Nuclear Fuel (CSNF) rods from the North Anna Power Plant and a shipment of 25 CSNF from the Byron Nuclear Generating Station for research purposes. As I have expressed to you, I am a strong advocate of INL's spent fuel research mission. As I have also made clear, I have an obligation to the citizens of Idaho to ensure that DOE complies with the terms and conditions of Governor Phil Batt's 1995 Settlement Agreement. The 1995 Settlement Agreement links the INL research mission to DOE's compliance with the cleanup milestones. Thus, any request to waive the prohibitions in the 1995 Settlement Agreement must address both matters. I propose the enclosed Supplemental Agreement as a pathway forward to fulfilling both missions.

Under the proposed Supplemental Agreement, Idaho would grant DOE a waiver for the receipt of not more than 25 fuel rods each from the North Anna Power Plant and the Byron Nuclear Generating Station for spent fuel research purposes subject to the following conditions:

First, DOE would have to demonstrate sustained operation of the Integrated Waste Treatment Unit (IWTU) prior to receiving the North Anna and Byron fuels. As stated in the Supplemental Agreement, "sustained operation" would be defined as successful treatment of sodium bearing high level liquid waste resulting in at least 100 casks of dry solid high level waste.

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The "sustained operation" definition reflects the project manager's representation to me that he would deem the IWTU operational and capable of converting the liquid waste once 100 casks had been generated. The sustained operation requirement will give Idaho assurance that DOE will be able to fulfill its obligation to convert the sodium bearing liquid waste at INL to a solid waste, while providing DOE a reasonable time to complete the task.

Second, the Supplemental Agreement incorporates DOE's proposal to ship TRIGA SNF and EBR-2 heavy metal out of Idaho to ensure there is not only no net increase in the amount of spent fuel at INL, but a net decrease.

Third, the Supplemental Agreement addresses DOE's failure to comply with the Transuranic (TRU) waste shipment provisions of the 1995 Settlement Agreement. While I appreciate that the shutdown of WIPP was an unforeseen circumstance, DOE's obligations relating to TRU waste remain of great concern to Idaho. Assuring that DOE promptly returns to compliance with its obligations under the 1995 Settlement Agreement once WIPP reopens also needs to be addressed. Thus, I propose that DOE commit to retrieval and packaging for shipment of above-ground TRU waste located at INL by December 31, 2018 – the deadline in the 1995 Settlement Agreement. Further, that DOE commit to retrieval and packaging of buried transuranic waste by December 31, 2019, and that DOE place Idaho's TRU waste on a priority shipment schedule once WIPP is reopened.

Finally, to assure compliance with the proposed terms of the Supplemental Agreement, I propose DOE be subject to a $60,000 penalty for each day that it fails to meet the terms of the Supplemental Agreement. This is the same penalty provided for in the 1995 Settlement Agreement for failure to remove SNF from Idaho.

The proposed Supplemental Agreement seeks to maintain the balance struck in the 1995 Settlement Agreement between the INL research mission and DOE's commitment to the cleanup of INL. I look forward to discussing this proposal.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

LGW:jc

enclosure

DRAFT – CONFIDENTIAL – SUBJECT TO I.R.E. 408

SUPPLEMENTAL AGREEMENT CONCERNING ONE-TIME CONDITIONAL WAIVER OF SECTION D.2.e OF 1995 SETTLEMENT AGREEMENT

This Supplemental Agreement (Agreement) is entered this __ day of _____ 2015 between the United States Department of Energy (DOE) by and through the Assistant Secretary for Environmental Management and the State of Idaho by and through the Governor of the State of Idaho and the Idaho Attorney General (Idaho).

PURPOSE:

Consistent with the principles set forth in the Settlement Agreement and Order dated October 13, 1995 in the matter of Public Service Co. of Colorado v. Batt, No. CV 91-0035-S-EJL (D. Id.) and United States v. Batt, No. CV-91-0054-S-EJL (D. Id.) ("1995 Agreement"), this Supplemental Agreement provides a one-time conditional waiver of section D.2.e. of the 1995 Agreement relating to receipt of 25 spent nuclear fuel rods from the North Anna Power Plant and 25 spent nuclear fuel rods from the Byron Nuclear Generating Station at INL for research purposes. DOE and Idaho (collectively "the Parties") agree as follows:

RECITALS

WHEREAS, the 1995 Agreement provides in section F that the INL is designated as the DOE Spent Fuel Lead Laboratory for the "research development and testing of treatment, shipment and disposal technologies for all DOE spent fuel" and provides for the receipt of DOE spent nuclear fuel for research purposes; and

WHEREAS, in 2002 the DOE designated the INL as the Nation's lead laboratory for nuclear energy research; and

WHEREAS, in furtherance of its research mission, the INL has developed and possesses unique technologies and capabilities which will further the research development and testing of new fuel types and technologies; and

WHEREAS, section D.2.e of the 1995 Agreement restricts the INL from accepting any shipments of "spent fuel from commercial nuclear power plants" (Commercial Power SNF absent the State's consent; and

WHEREAS, on January 13, 2011, the Parties executed a Memorandum of Agreement allowing INL to accept limited quantities of Commercial Power SNF so long as DOE was in compliance with other terms and conditions of the 1995 Agreement.

WHEREAS, on January 1, 2012, the DOE failed to meet its obligation under section E.2 of the 1995 Agreement to have treated all of the Sodium Bearing Liquid High Level Waste; and

WHEREAS, on January 1, 2015, the DOE failed to meet the obligation of section B.1.c of the 1995 Agreement to ship a running average of 2,000 m^3 per year of transuranic waste from Idaho due to the temporary closure of the Waste Isolation Pilot Plant; and

WHEREAS, DOE remains in non-compliance with these provisions of the 1995 Agreement; and

WHEREAS, because DOE is in non-compliance with provisions of the 1995 Agreement the 2011 Memorandum of Agreement is not operative; and

WHEREAS, on December 31, 2014, the DOE requested permission to receive 25 spent nuclear fuel rods from the North Anna Power Plant and 25 spent nuclear fuel rods from the Byron Nuclear Generating Station at INL for research purposes; and

WHEREAS, the State of Idaho has determined that acceptance of these two shipments at the INL is will provide valuable benefit to both Idaho and the nation in the form of increased knowledge concerning the safe generation of nuclear energy; and

WHEREAS, implementation of this Supplemental Agreement will result in a net reduction in the amount of waste stored at the INL, and

WHEREAS, section J.1 of the 1995 Agreement provides that Idaho, in its sole discretion, may waive portions of the 1995 Agreement; and

WHEREAS, the State has determined that compliance by DOE with the conditions set forth in this Supplemental Agreement Concerning One-Time Conditional Waiver will lead to resolution of DOE's non-compliance with the 1995 Settlement Agreement as described above; and

WHEREAS, Idaho will continue to insist upon the safe management of spent nuclear fuel and nuclear waste and disposition of such materials outside of the State of Idaho;

NOW THEREFORE IT IS HEREBY AGREED:

Pursuant to the terms and conditions of this Supplemental Agreement and solely for the purpose of research conducted at the INL, Idaho in its sole and exclusive discretion, grants a one-time conditional waiver of the section D.2.e prohibition on the shipment of commercial spent nuclear fuel to INL for the receipt of 25 SNF rods from North Anna Power Plant and 25 rods from Byron Nuclear Generating Station.

Specific Conditions

1. Prior to receipt at the INL of the North Anna Power Plant and Byron Nuclear Generating Station SNF rods for research purposes, DOE shall have achieved sustained operation of the Integrated Waste Treatment Unit. "Sustained operation" for purposes of this Agreement shall mean the successful treatment of sodium bearing HLW resulting in at least 100 casks of dry solid high level waste.

2. Prior to receipt at the INL of the North Anna Power Plant and Byron Nuclear Generating Station SNF rods for research purposes, DOE shall remove from Idaho a volume of TRIGA SNF equaling 66 pounds.

3. DOE shall complete the treatment of all sodium bearing high level liquid waste located at the INL by not later than December 31, 2017. If DOE fails to meet this required deadline, DOE shall be liable for a monetary penalty in the amount of $60,000 for each day such requirement is not met. Idaho shall be entitled to seek a judgment for any such penalty in the United States District Court for the District of Idaho pursuant to paragraph K.2.a of the 1995 Settlement Agreement. The parties disagree on whether the payment of such judgment is subject to the Anti Deficiency Act, 31 U.S.C. § 1341 and, therefore, reserve their legal arguments on this issue.

4. DOE shall ship for storage outside of the State of Idaho 4,850 pounds of EBR-2 heavy metal by ___. If DOE fails to meet this required deadline, DOE shall be liable for a monetary penalty in the amount of $60,000 for each day such requirement is not met. Idaho shall be entitled to seek a judgment for any such penalty in the United States District Court for the District of Idaho pursuant to paragraph K.2.a of the 1995 Settlement Agreement. The parties disagree on whether the payment of such judgment is subject to the Anti Deficiency Act, 31 U.S.C. § 1341 and, therefore, reserve their legal arguments on this issue. .

5. Except for buried transuranic waste that has not been exhumed and is governed under the 2008 Agreement to Implement, DOE shall have all transuranic waste located at INL certified for shipment out of the State of Idaho on or before December 31, 2018. If DOE fails to meet this required deadline, DOE shall be liable for a monetary penalty in the amount of $60,000 for each day such requirement is not met. Idaho shall be entitled to seek a judgment for any such penalty in the United States District Court for the District of Idaho pursuant to paragraph K.2.a of the 1995 Settlement Agreement. The parties disagree on whether the payment of such judgment is subject to the Anti Deficiency Act, 31 U.S.C. § 1341 and, therefore, reserve their legal arguments on this issue.

6. Upon the reopening of WIPP or the opening of an alternative storage facility permitted for the receipt of TRU waste, DOE shall ship fifteen (15) truck shipments of

transuranic waste from INL for storage outside of Idaho each week. Truck loads for purposes of this Agreement shall mean three TRUPact II shipping containers or an equivalent volume in similar containers. All transuranic waste shall be shipped for storage outside of Idaho by not later than ___ days following commencement of shipment. If DOE fails to comply with the shipment schedule required herein, DOE shall be liable for a monetary penalty in the amount of $10,000 for each missed or delinquent shipment. Idaho shall be entitled to seek a judgment for any such penalty in the United States District Court for the District of Idaho pursuant to paragraph K.2.a of the 1995 Settlement Agreement. The parties disagree on whether the payment of such judgment is subject to the Anti Deficiency Act, 31 U.S.C. § 1341 and, therefore, reserve their legal arguments on this issue.

7. DOE shall complete retrieval and packaging of buried transuranic waste located at the INL as required by Section B.1 of the 1995 Settlement Agreement and Section V of the July 1, 2008 Agreement to Implement by not later than December 31, 2019. Failure to meet this requirement shall be considered a breach of the 1995 Settlement Agreement.

8. Notwithstanding the foregoing schedule in section 6 above, the indefinite closure of WIPP or the availability of any alternative storage site, DOE shall remove all transuranic waste now located at the INL from Idaho by not later than _____. If DOE fails to meet this required deadline, DOE shall be liable for a monetary penalty in the amount of $60,000 for each day such requirement is not met. Idaho shall be entitled to seek a judgment for any such penalty in the United States District Court for the District of Idaho pursuant to paragraph K.2.a of the 1995 Settlement Agreement. The parties disagree on whether the payment of such judgment is subject to the Anti Deficiency Act, 31 U.S.C. § 1341 and, therefore, reserve their legal arguments on this issue.

9. Limits and Material Management:

(a) INL may receive for the purpose of research and examinations conducted at the INL only the 25 SNF rods from North Anna Power Plant and the 25 SNF from the Byron Nuclear Generating Station described in the December 16, 2014 and December 31, 2014 letters from DOE to Idaho. The total estimated weight of the fuel rods is 200 pounds.

(b) The 25 SNF rods from the North Anna Power Plant and the 25 SNF from the Byron Nuclear Generating Station will each count as a shipment of DOE SNF for purposes of the annual shipment limits contained in section D.2.f of the 1995 Agreement.

(c) The amount of SNF from the North Anna Power Plant and from the Byron Nuclear Generating Station, measured in fractions of metric tons heavy metal (MTHM), including the equivalent amount contained in any wastes generated during research,

remaining on site at the end of each calendar year will count toward the total metric tonnage limits for DOE SNF contained in section D.2.c of the 1995 Agreement.

(d) The SNF from North Anna Power Plant and the SNF from the Byron Nuclear Generating Station will be stored in appropriate SNF storage and will be managed as SNF until shipped off-site in compliance with the 2035 shipment deadline of the 1995 Agreement.

(e) Any TRU and low level waste resulting from the research on the SNF rods shall be shipped to sites outside of Idaho within five years of the date upon which it is generated.

(f) Nothing in this Agreement shall be construed to allow DOE to exceed the 55 MTHM limit for SNF allowed by the 1995 Agreement.

10. This Agreement reflects a conditional waiver of section D.2.e of the 1995 Agreement related to two shipments of research quantities of Commercial Power SNF to Idaho. This Agreement shall not be construed to alter or amend any provisions of the 1995 Agreement.

11. The research quantities of SNF shipped to Idaho pursuant to this Agreement and stored at the INL for any reason shall be removed from Idaho in accordance with the deadline set forth in section C.1 of the 1995 Agreement.

12. Nothing in this Supplemental Agreement shall be deemed or construed as a waiver for any other shipments of commercial Spent Nuclear Fuel to INL other than expressly provided for herein, nor indicate any support or commitment for any receipt of commercial Spent Nuclear Fuel in the future.

13. Nothing in this Supplemental Agreement shall be admissible in any judicial proceeding other than one for the enforcement of this Supplemental Agreement.

DATED this _____day of _____ 2015.

CONFIDENTIAL