



**CST Fuel Cell Program  
Program Opportunity Notice (PON) 2157  
Revised December 2015**

**SUMMARY OF REVISIONS**

**The following changes have been made to PON 2157, CST Fuel Cell Program:**

- Program Opportunity Notice (PON) PON 2157 has been extended until **February 29, 2016**



RENEWABLE PORTFOLIO STANDARD  
CUSTOMER-SITED TIER  
SMALL FUEL CELL PROGRAM

Program Opportunity Notice (PON) 2157  
Total Program Funding \$0.6 Million  
\$100,000 per Year

Financial incentives are available to support the installation and operation of continuous duty fuel cell systems in New York State, with up to \$50,000 available for fuel cell systems rated at 25 kW or less. Funding is on a first-come, first-served basis until February 29, 2016 at 5:00 PM Eastern Daylight Time, or until all funding has been fully committed, whichever comes first.

Generally, only electric customers that pay the Renewable Portfolio Standard (RPS) Program Surcharge on their electric bill are eligible to receive funding through this program.

In order to participate in PON 2157, Applicants must comply with all program rules, procedures, and eligibility requirements, submit all required forms and supplemental documentation, and enter into a Standard Performance Agreement (SPA) with NYSERDA. Applicants must also adhere to the performance measurement requirements throughout the term of the SPA.

**Application Submission:** A digital copy of the Application Package on CD-ROM plus one (1) printed copy (**which must contain an original signature**) of all Project Application materials must be sent to the following address:

Roseanne Viscusi, PON 2157  
NYS Energy Research and Development Authority  
17 Columbia Circle  
Albany, NY 12203-6399

All Program Questions should be directed to the following Project Managers: Scott Larsen, (518) 862-1090 ext. 3208, [LSL@nyserda.org](mailto:LSL@nyserda.org), or Ed Kear, (518) 862-1090 ext. 3269, [ebk@nyserda.org](mailto:ebk@nyserda.org)

All Contractual Questions should be directed to: Nancy Marucci, (518) 862-1090 ext. 3335, [nsm@nyserda.org](mailto:nsm@nyserda.org).

*Applications lacking the appropriate completed and signed Application Checklist will be returned. Faxed or e-mailed applications will not be accepted. Applications will not be accepted at any NYSERDA location other than the **Albany** address above. If changes are made to this solicitation, notification will be posted on NYSERDA's web site at [www.nyserda.org](http://www.nyserda.org).*

## I. INTRODUCTION

The Customer Sited Tier Fuel Cell Program seeks to support the purchase, installation, and operation of continuous duty stationary fuel cell electric power generation equipment in New York State. This is one of several Customer-Sited Tier (CST) programs of the New York State RPS. The CST, commonly described as “behind the meter” generation, refers to generation that is sited at the electric customer’s location and used primarily to serve the electric customer’s load (i.e., not primarily exported to the utility grid).

For the purposes of the PON 2157 Small Fuel Cell Program, a fuel cell module with a nameplate rating of 25 kW or less shall be considered “small”. A “fuel cell system” may consist of one or more small fuel cell module(s) installed at a project site.

The CST Fuel Cell Program is aimed at quickly maximizing the amount of electricity produced by fuel cells in New York State, and therefore addresses rapid installation and long-term operation of mature, commercially-available continuous duty fuel cell systems. NYSERDA has other programs that are aimed at the development and product-testing of fuel cell prototypes. NYSERDA maintains a list of fuel cell systems which are eligible to participate in this solicitation (see Appendix E – check NYSERDA’s website for periodic updates to Appendix E).

Since the CST Fuel Cell Program is aimed at electric generation, the recovery and beneficial use of heat produced by the fuel cell is not mandated under this program, however, applicants are advised to consider maximizing the efficiency of their systems by including heat recovery features, if applicable, as an approach to optimizing the economic life cycle of their projects. Furthermore, the applicant is not prohibited from seeking support from other NYSERDA programs for certain benefits attributable to heat recovery, such as electricity peak load reduction.

**Renewable Portfolio Standard (RPS) Attributes:** Orders issued by the NYS Public Service Commission provide that the RPS Program will support and promote an increase, to 30%, of the percentage of the energy consumed in NYS that comes from renewable sources. The implications for projects participating in this PON are specified in Section VII of this solicitation.

## II. INCENTIVES

### PERFORMANCE-BASED INCENTIVES

Performance-based incentives will be paid to those facilities operating with an annual capacity factor greater than or equal to 50%. For any given year, performance based payments of \$0.15 per net kWh are offered through this program for the system’s net production (the portion of verified fuel cell electricity generation, which exceeds the fuel cell system’s parasitic consumption) and may be provided for up to three consecutive operating years subsequent to commissioning. Each annual performance payment is capped at a maximum of \$20,000 per year per project site. Facilities with annual capacity factors of less than 50% in a given year will not be eligible for performance payments for that year.

Annual Capacity Factors (ACF) will be determined by dividing the net output of the fuel cell system during a one-year period by the maximum rated output (nameplate rating) of the fuel cell times 8760 hours per year (see Equation 1 below).

$$\text{Eq. 1: } ACF = \frac{\text{Actual Net Annual Output}}{\text{Nameplate rating} \times 8760} \quad \text{where;}$$

- *Actual Net Annual Output* is the total verified electrical energy delivered by the fuel cell system to the site per year (i.e., fuel cell stack production minus parasitic consumption)

Projects receiving performance-based payments will require performance measurement to ascertain appropriate payment. The project site will be required to install and maintain an on-site kilowatt hour meter capable of reporting the net annual electricity production delivered to the site. Projects must provide annual electricity production data for a minimum of three consecutive years. All data acquired by NYSERDA may be made available to the general public.

A representative from the project site must read the installed kilowatt hour meter at least once every 3 months, record the electricity production data and provide such data to the NYSERDA Project Manager. NYSERDA will exercise its option to visually inspect the kilowatt hour meter on an annual basis.

#### MAXIMUM TOTAL INCENTIVE

NYSERDA will calculate the Maximum Total Incentive based on the nameplate rating of the proposed system. NYSERDA will encumber the Maximum Total Incentive upon execution of the SPA. Projects accepted into the program will be reviewed annually to evaluate the electricity generated and calculate performance-based incentive payments. After each annual performance payment, NYSERDA will calculate NYSERDA's residual maximum financial obligation and may reprogram any surplus funds for use in other projects.

Incentives will only be paid for systems installed as approved by NYSERDA. Any system modifications or equipment changes must be approved by NYSERDA in writing before a system is installed. Failure to get NYSERDA approval on any and all modifications may result in revocation of the incentive reservation or nonpayment of the incentive.

### Small Fuel Cell System Incentive Summary

**Definitions:** Fuel Cell Modules 25 kW or less

**CST Program Funding Allocation:** \$100,000 per year

**Project Funding Caps:** \$50,000 per project site.

#### Performance Incentives (three consecutive annual payments):

- \$0.15/kWh for operation with an annual capacity factor greater than or equal to 50%
- Maximum Performance payment: \$20,000 per year per project site

### III. PROGRAM STEPS

This section describes the program steps for participation in the CST Small Fuel Cell Program. NYSERDA will place applicants in a queue for contracting. An applicant's spot in the queue will be secured only when NYSERDA deems their application package to be full and complete. Thereafter, the applicant must adhere to a rapid-paced timeline in order to remain in the program; timely execution of NYSERDA's SPA is essential for an applicant to maintain their spot in the queue for entering the program. Applicants must meet all of the deadlines outlined in the Program Steps to avoid being ejected from the program (if ejected, projects will be eligible to re-enter the rear of the queue and seek re-admittance to the program contingent upon the availability of funds).

#### 1. Submit Application Package

The Applicant's first step is to submit a completed Application Package to NYSERDA. Procedures for submitting the Application Package are described in *Section V*. NYSERDA or its Agent may conduct a site inspection to verify the accuracy of the information in the Application Package.

#### 2. Provide Purchase Agreement from OEM or Manufacturer

Once NYSERDA has informed the applicant their application has been approved and sufficient funds are available and have been set aside, the applicant has thirty (30) days to furnish documentation that they have signed a purchase agreement with a fuel cell manufacturer and a letter from the fuel cell OEM confirming the delivery date of the fuel cell system to the applicant's site. If the applicant fails to provide this information within the time allotted the applicant will automatically forfeit their position in the queue and be placed at the rear of the queue – such a forfeiture of position in the queue may result in the release of funds to the next eligible applicant.

#### 3. Sign Standard Performance Agreement (SPA)

Upon acceptance and approval of a completed Application Package and signed purchase agreement, NYSERDA will offer the Applicant an SPA. The SPA will specify the Maximum Total Incentive. The Applicant must sign and return the SPA to NYSERDA. Funds for a project will be encumbered only upon issuance of a fully-executed SPA, a sample of which is included as *Appendix B*.

#### 4. Equipment Delivery

The Applicant *has 9 months* upon transmittal of the fully executed SPA to demonstrate to NYSERDA that the Fuel Cell System has been delivered on site. If delivery is not completed within this timeframe, the Applicant must request an extension from NYSERDA for continued reservation of the incentive funding. This request must describe the reasons for the delay and the expected timeframe to complete the delivery. *Continuation will be at NYSERDA's option. Only a limited number of short term extensions will be granted. Requests for extensions will only be granted upon demonstration of sufficient and reasonable cause for the delay.* NYSERDA will notify the Applicant in writing whether or not the extension has been granted.

#### 5. Installation and Commissioning

The Applicant *has 12 months* upon transmittal of the fully executed SPA to complete Installation and Commissioning of all system equipment. *Installation and Commissioning* is defined as the completion of installation of the Fuel Cell System, interconnection of the System with the utility grid, and at least one month of satisfactory operation of the system according to its design intent. If Installation and Commissioning are not completed within this timeframe, the Applicant must request an extension from NYSERDA for continued reservation of the incentive funding, which describes the reasons for the delay and the expected timeframe for completion of this task. *Continuation will be at NYSERDA's option. Only a limited number of short term extensions will be granted. Requests for extensions will only be granted upon demonstration*

of sufficient and reasonable cause for the delay.. NYSEERDA will notify the Applicant in writing whether or not the extension has been granted.

#### **6. Submit Project Installation Report**

After Installation and Commissioning have been completed, the Applicant must submit a Project Installation Report to NYSEERDA, which includes As-Built Drawings of the system. Details on the requirements for the Project Installation Report are located in *Appendix D*. NYSEERDA's approval of the Report is contingent upon the result of a Post-Installation Site Inspection, which will confirm the information provided in the Project Installation Report, the post-installation inspection will be performed by NYSEERDA and/or NYSEERDA's designated agent.

#### **7. Annual Performance Reporting**

The Applicant is responsible for monitoring the electric generation from the fuel cell system. The verified electric generation will provide the basis of the performance incentive payments. At the end of each annual performance period, the Applicant shall produce a performance report summarizing the performance of the system based on the data collected during that period.

#### **8. Requesting Performance Incentive Payments**

Based on the information provided in the three required Annual Performance Reports, three annual Performance Incentive payments will be made for the verified electricity generated. These payments will be made after the Annual Performance Reports have been approved by NYSEERDA, and invoices have been submitted to NYSEERDA for payment.

### **IV. ELIGIBILITY**

To participate in PON 2157 Small Fuel Cell Program, the following criteria must be met:

- Only new generation equipment purchased or installed under a fully executed PON2157 Small Fuel Cell Program Standard Performance Agreement will be eligible for the program;
- Fuel cell modules must be 25 kW or less;
- Project sites must be located in New York State;
- In general, projects must be located at sites that pay the NYS RPS Program Surcharge
- Fuel Cell electricity must be generated and used primarily by the project sites, where the utility meter, which is interconnected with the grid, is located;
- Fuel Cell Systems must:
  - Consist of Commercially Available Technologies as listed in Appendix E,
  - Be warranted for continuous duty for the duration of the 3 consecutive year performance period by the original equipment vendor, and
  - Have a detailed maintenance agreement with a factory service provider for the duration of the project.
- Applicants (and Project Sites, if different) must comply with all applicable:
  - Federal, State and Local codes, rules, and regulations;
  - Federal, State and Local permitting requirements; and
  - Federal, State and Local emissions limits

#### *Eligibility Note 1: THIRD PARTY OWNERSHIP*

Under a third-party ownership scenario, contractors that meet the eligibility requirements included in this solicitation may be permitted to build, own and operate a fuel cell project at a customer's site if the

customer pays the RPS surcharge and if the contractual relationship between the customer and the third party clearly indicates that the entire incentive payment is being passed on to the customer.

*Eligibility Note 2:* It is preferred that the Fuel Cell Electric Power Generation Equipment be located at project sites owned or operated by customers who currently pay the NYS RPS Program Surcharge, however, projects located in New York State at project sites owned or operated by customers who currently do not pay the NYS RPS Program Surcharge may request special dispensation seeking eligibility. Projects will be evaluated depending upon the circumstances involved and whether a significant amount of **widespread** public benefit will result. Exceptions that demonstrate significant public benefit consistent with NYSERDA's program objectives may be considered on a case by case basis. Applicants are directed to fill out the appropriate question box on Section FC.2 of the Application Form Worksheet (see Appendix A) and provide any necessary supporting documentation to substantiate the request. Determination of host site eligibility is at NY State Department of Public Service (DPS) Staff's discretion. Applicants will be notified in writing of DPS's decision. Project sites seeking exemption from the RPS program surcharge requirements will not be deemed full and complete, and therefore, will not be admitted to the queue until DPS staff has rendered a decision regarding the host site's eligibility.

## V. APPLYING FOR THE PROGRAM

### APPLICATION PACKAGE

Detailed Application Package requirements are included in *Appendix A*. The Application Package consists of the following:

- Completed, Signed, and Notarized Application Form (2157Small-appform.xls);
- Description of Tariff Impacts and Interconnection Requirements;
- Site Plan;
- Applicable Permits;
- Environmental Assessment Form; and
- Other forms as applicable – i.e. Form Requesting Addition to the List of Eligible Fuel Cells

The submitted application package shall consist of one (1) hard copy of the entire application package with the original signatures and a CD in a format viewable on Windows 98 containing a PDF of the entire application and the digital versions of the completed 2157Small-appform.xls in Microsoft Excel format.

All project application materials must be sent to the following address:

Roseanne Viscusi, PON 2157  
New York State Energy Research and Development Authority  
17 Columbia Circle  
Albany, NY 12203-6399

NYSERDA will date/time-stamp and log all application materials as they are received. NYSERDA recommends that all application materials be sent via delivery service, certified or registered mail. Applicants should retain proof of delivery (such as a return receipt for certified, registered, or overnight mail) for all application materials submitted.

## APPLICATION PACKAGE REVIEW

Upon receipt of application materials, NYSERDA will review the materials to ensure the following requirements are met:

- The project meets the CST Small Fuel Cell Program requirements;
- The Application Package is complete; and
- The *Maximum Total Incentive* and *Estimated Annual Production* estimates (from *Section FC.6 of the Application Form Worksheet*) and related assumptions and projections are reasonable and supportable, and the supporting data and calculations are correct.

NYSERDA or its Agent may conduct a site inspection to verify the accuracy of the information in the Application Package.

## VI. PROCESSING OF APPLICATIONS

Funds are provided to the program on an annual (funding year) basis. NYSERDA anticipates that there may be times when there will be more requests for funds than there are funds available, and therefore establishes the following rigid procedure for establishing and managing a queue of applicants.

- a) An application will be entered into the rear of the queue when NYSERDA deems the application to be full and complete. If two or more applications are deemed to be full and complete on the same day, the position in the queue for each application will be determined by the time and date that the application was surrendered to a carrier service that provided a tracking number that can be used to track a shipment on-line, or the time and date received by NYSERDA if such a carrier service was not used or if a suitable tracking number was not provided. If an application had previously been deemed by NYSERDA to be deficient, the time and date of receipt of the supplemental application materials that resolve such deficiencies will be used.
- b) Unprocessed applications will retain their position in the queue from one funding year to the next.
- c) NYSERDA has an interest in promoting diversity of equipment in the program. As such, if a queue exists at the beginning of a funding year, applications in the queue will be processed in the following order:
  1. The first application for each fuel cell original equipment manufacturer (OEM) represented in the queue at the start of the funding year will be processed based on their relative positions in the queue.
  2. Once one application representing each fuel cell OEM in the queue as of the start of the funding year has been processed, any remaining applications will be processed in queue order. Otherwise, applications will be processed in queue order.
- d) NYSERDA will inform the applicant when it is its application's turn to be processed and sufficient funds are available and have been set aside. The applicant will then have thirty (30) days to provide NYSERDA with:
  1. A copy of the signed purchase agreement with a fuel cell OEM; and
  2. A letter from the fuel cell OEM confirming the scheduled delivery date of the fuel cell system to the project site. Such scheduled delivery date shall not be more than 9 months after the start of this thirty (30) day period.

- e) If the applicant fails to provide this information within the time allotted, the applicant will automatically forfeit its position in the queue and be placed at the rear of the queue – such a forfeiture of position in the queue will result in the release of funds to the next eligible applicant.
- f) For those applications where funds have been set aside, and the applicant has furnished the required documentation within the prescribed thirty (30) days, NYSERDA will then enter into a Standard Performance Agreement with the applicant.

NYSERDA will promptly review applications and supplemental application materials in the order that they are received, and applications deemed full and complete in their “as received” form will be entered into the queue in the order the application was received. Deficient applications will not be entered into the queue until the application has been revised to become full and complete (at which point the applicant will be placed at the rear of the queue).

Applicants should be “ready to go” when submitting their application so that the applicant will be capable of complying with the thirty (30) day requirement to submit a signed purchase agreement with the fuel cell OEM along with a letter from the fuel cell OEM confirming the delivery date of the fuel cell system to the project site.

## VII. ADDITIONAL INFORMATION AND REQUIREMENTS

**RENEWABLE PORTFOLIO STANDARD (RPS) ATTRIBUTES:** Orders issued by the NYS Public Service Commission provide that the RPS Program will support and promote an increase, to 30%, of the percentage of the energy consumed in NYS that comes from renewable sources. When assessing and reporting on progress towards that goal, or on the composition of the energy generated and/or consumed in NYS, NYSERDA and the NYS Department of Public Service will include all electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program, for the life of such projects, and the environmental attributes associated with such energy, whether metered or projected, as a part of any report, evaluation, or review of the RPS Program, whenever any such report, evaluation, or review may be conducted or issued, as renewable energy consumed in NYS. No party, including but not limited to owners, lessees/lessors, operators, and/or associated contractors shall agree to or enter any transaction that would or may be intended to result in the exportation or transmittal of any electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program to any party or system outside of New York State.

### **STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)**

NYSERDA is required under SEQRA to consider the environmental implications of all funded projects. All proposals must include a completed SEQRA Short Environmental Assessment Form (Appendix G).

## VIII. GENERAL CONDITIONS

**Proprietary Information** - Careful consideration should be given before confidential information is submitted to NYSERDA as part of your application. Review should include whether it is critical for evaluating an application, and whether general, non-confidential information, may be adequate for review purposes.

The NYS Freedom of Information Law, Public Officers law, Article 6, provides for public access to information NYSERDA possesses. Public Officers Law, Section 87(2)(d) provides for exceptions to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a

commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Information submitted to NYSERDA that the Applicant wishes to have treated as proprietary and confidential trade secret information, should be identified and labeled "Confidential" or "Proprietary" on each page at the time of disclosure. This information should include a written request to except it from disclosure, including a written statement of the reasons why the information should be excepted. See Public Officers Law, Section 89(5) and the procedures set forth in 21 NYCRR Part 501 [www.nyserda.org/nyserda.regulations.pdf](http://www.nyserda.org/nyserda.regulations.pdf). However, NYSERDA cannot guarantee the confidentiality of any information submitted.

**Omnibus Procurement Act of 1992** - It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority- and women-owned business enterprises, as bidders, subcontractors, and suppliers on its procurement Agreements.

Information on the availability of New York subcontractors and suppliers is available from:

Empire State Development  
Division for Small Business  
30 South Pearl Street  
Albany, NY 12245

A directory of certified minority- and women-owned business enterprises is available from:

Empire State Development  
Minority and Women's Business Development Division  
30 South Pearl Street  
Albany, NY 12245

**Contract Award** –NYSERDA may request additional data or material to support applications including, but not limited to supporting invoices, and manufacturer's technical data sheets. NYSERDA may elect to inspect any and all projects prior to final approval. NYSERDA expects to notify Applicants in approximately four weeks from the date of receipt of a completed application whether an application has been selected to receive an incentive.

**Limitation** - This solicitation does not commit NYSERDA to award a contract, pay any costs incurred in preparing an application, or to procure or contract for services or supplies. NYSERDA reserves the right to accept or reject any or all applications received, to negotiate with all qualified sources, or to cancel in part or in its entirety the solicitation when it is in NYSERDA's best interest.

**Disclosure Requirement** - The Applicant shall disclose any indictment for any alleged felony, or any conviction for a felony within the past five years, under the laws of the United States or any state or territory of the United States, and shall describe circumstances for each. When an Applicant is an association, partnership, corporation, or other organization, this disclosure requirement includes the organization and its officers, partners, and directors or members of any similarly governing body. If an indictment or conviction should come to the attention of NYSERDA after the award of a contract, NYSERDA may exercise its stop-work right pending further investigation, or terminate the agreement; the contractor may be subject to penalties for violation of any law which may apply in the particular circumstances. Applicants must also disclose if they have ever been debarred or suspended by any agency of the U.S. Government or the New York State Department of Labor.

## IX. OTHER OPPORTUNITIES

### NYSERDA PON 1219 Existing Facilities Program

Fuel Cell projects may be eligible to qualify for additional incentives from NYSERDA by making efficient use of the waste heat from the Fuel Cell System. For example, NYSERDA will provide incentives for Peak Electric Demand Reductions (for example utilizing the waste heat from the fuel cell in an absorption chiller to displace electric chillers) as described in Program Opportunity Notice (PON) 1219 and subsequent offerings. Information can be found on NYSERDA's website at [www.nyserdera.org](http://www.nyserdera.org), by e-mailing [info@nyserdera.org](mailto:info@nyserdera.org) or by telephoning toll free at 1-866-NYSERDA.

### NYSERDA PON 2276 RPS-CST Anaerobic Digester Gas Program

NYSERDA has a dedicated CST program for providing financial support for the procurement and installation of power generation systems using anaerobic digester gas (ADG) as a fuel to produce electricity. Fuel cell projects which will operate exclusively on anaerobic digester gas are directed to apply to NYSERDA under the ADG program while funds are available. Fuel cells that will be operated exclusively on ADG fuel will be allowed to apply under PON 2157 only when NYSERDA's program funds in the ADG program have been depleted. Please contact Tom Fiesinger at (518) 862-1090, ext. 3218, [twf@nyserdera.org](mailto:twf@nyserdera.org) or Kathleen O'Connor at (518) 862-1090, ext. 3422, [kmo@nyserdera.org](mailto:kmo@nyserdera.org) for information regarding NYSERDA PON 2276.

### NYSERDA PON 2156 RPS-CST Regional Program (Geographic Balance Program)

NYSERDA has a dedicated CST program for providing funding support for the procurement and installation of certain renewable power generation systems in downstate regions of New York (ISO zones G, H, I & J). Fuel cell projects that seek funding from PON 2156 are not eligible to receive further incentives under PON 2157. Please contact Paul Vainauskas at (518) 862-1090, ext. 3554, [pv2@nyserdera.org](mailto:pv2@nyserdera.org) for more information.

### Potential non-NYSERDA Opportunities

Customers may be eligible for State and federal tax credits.

Tax Incentives: If the Applicant has been provided with information regarding the expected tax benefits (real property, federal or state tax incentives, or sales and use tax exemptions), as with any tax issue, the Applicant is encouraged to consult the Internal Revenue Service (See, [www.irs.gov](http://www.irs.gov)), the NYS Department of Taxation and Finance (See [www.tax.state.ny.us](http://www.tax.state.ny.us)) and with an accountant/tax adviser for details on eligibility for the credit provided in the law). NYSERDA does not provide tax advice.

## X. APPENDICES

### Appendix A: Application Form

Section FC.1: Contact Information

Section FC.2: Project Site

Section FC.3: Fuel Cell System Definition

Section FC.4: Environmental Questionnaire

Section FC.5: Costs and Schedule

Section FC.6: Estimated Incentive

Section FC.7: Project Site Control Letter

Section FC.8: Applicant Agreement

### Appendix B: Sample Standard Performance Agreement

### Appendix C: Small Fuel Cell Performance Monitoring Form

### Appendix D: Project Installation Report Requirements

### Appendix E: List of Eligible Fuel Cell Modules by Manufacturer Make and Model

### Appendix F: Instructions to Manufacturers of Fuel Cells – How to Request Addition of Your Equipment to the List of Eligible Fuel Cells

### Appendix G: SEQRA Short Environmental Assessment Form

## ATTACHMENT A

### EXHIBIT A TERMS & CONDITIONS

#### 1. Approval

Incentives are not payable unless NYSERDA has approved the Engineering Analysis, conducted site visits, and approved the other activities and documentation provided by the Applicant.

#### 2. Amounts Payable

The Purchase Order is a not-to-exceed amount, based on the applicant's estimate of savings. The final payment will be based on the approved savings, Project cost, and M&V results, when required. Should this amount be lower than the original not-to-exceed Purchase Order amount, then NYSERDA reserves the right to lower the incentive accordingly. Should this amount be above the not-to-exceed Purchase Order amount, NYSERDA may, at its own discretion, modify the Purchase Order pending availability of funds. NYSERDA also reserves the right to seek a refund for incentives paid if, at any time, it learns that the Project was not actually and properly installed or has subsequently been disconnected.

#### 3. Inspections, Follow-up Visits and On-Site Monitoring

(a) NYSERDA reserves the right to make a reasonable number of pre- and post-installation visits to the facility. Such visit(s) will be at a time convenient to the Applicant and made with at least one week advance notice to the applicant by NYSERDA.

(b) Generally, the purpose of the follow-up visit(s) is to evaluate the installed Project in order to determine the actual kW reduction and energy savings for program evaluation purposes, which may occur well after the project is completed.

(c) The scope of review by NYSERDA of the design and installation of the Project is limited to solely determining the energy savings and whether program conditions have been met. It does not include any kind of safety, quality or other review.

#### 4. Cost and Invoice Documentation

Upon completion of the post-installation inspection, and at any other time upon NYSERDA's request, the Applicant shall provide NYSERDA copies of all invoices (including all materials, labor, and equipment discounts) reflecting the costs of purchasing and installing the Project. The invoices shall include a breakdown of all equipment purchased for installation under this Agreement (the application and these Terms and Conditions). In addition, NYSERDA may request any other reasonable documentation or verification of the cost to the Applicant of purchasing and installing the equipment.

#### 5. Incentive Payments

NYSERDA shall pay the incentive in accordance with and subject to the provisions of NYSERDA's Prompt Payment Policy upon the applicants' meeting the requirements of the Industrial and Process Efficiency Program. This includes, but is not limited to: (1) installation of the Project in the identified building is completed; (2) all necessary documentation is provided; and (3) NYSERDA has verified installation costs and satisfactory installation of the Project, all in accordance with the specifications.

#### 6. Post-Installation Verification

NYSERDA is not bound to pay any incentives until it has performed a satisfactory post-installation verification of the installation. If NYSERDA determines that the equipment was not installed in a manner that is consistent with the purpose of achieving energy savings, or if the installation was not consistent with generally accepted good engineering practices, NYSERDA may require changes before making any payments.

#### 7. Changes in the Program

Notwithstanding paragraph 21 (b), the program and these Terms & Conditions may be changed by NYSERDA at any time without notice. Approved applications, however, will be processed to completion under the Terms & Conditions in effect at the time of application to NYSERDA.

#### 8. Indemnification

The Applicant shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to Applicant's or its subcontractors' performance of this Agreement. The obligations of the Applicant under this Article shall survive any expiration or termination of this Agreement, and shall not be limited by any enumeration herein of required insurance coverage.

#### 9. No Warranties

(a) NYSERDA does not endorse, guarantee, or warrant any particular manufacturer or product, and NYSERDA provides no warranties, expressed or implied, for any product or services. The applicant's reliance on warranties is limited to any warranties that may arise from, or be provided by contractors, vendors, etc.

(b) The Applicant acknowledges that neither NYSERDA nor any of its consultants are responsible for assuring that the design, engineering and construction of the Project is proper or complies with any particular laws (including patent laws), codes, or industry standards. NYSERDA does not make any representations of any kind regarding the results to be achieved by the Project or the adequacy or safety of such measures.

#### **10. Limit of Incentive Payments**

NYSERDA reserves the right, for any reason, to stop approving incentive applications and limit or stop making incentive payments at any time without notice.

#### **11. Release by the Applicant**

The acceptance by the Applicant of final payment shall release NYSERDA from any and all claims and liability the applicant, its representatives, and assigns might otherwise have relating to this award.

#### **12. Title to equipment**

Title to all of the equipment purchased under this Agreement shall vest with the Applicant.

#### **13 Vendor Selection**

NYSERDA has the right not to allow a vendor or contractor to participate in this program.

#### **14. Removal of Equipment**

The Applicant agrees, as a condition of participation in the program, to remove and dispose of the equipment being replaced by the Project in accordance with all laws, rules, and regulations.

#### **15. Review of Specifications Submittals and Drawings**

For New Construction projects, the applicant will provide NYSERDA with a copy of the specifications for the construction of the building projects that will be provided to the construction contractors. Such specifications must include the equipment.

NYSERDA may refuse to pay incentives if the specifications do not provide for installation of the equipment consistent with good engineering and energy-efficient design practices. Applicant will, upon request by NYSERDA, provide a copy of the as-built drawings and equipment submittals for the facility. NYSERDA may refuse to pay incentives if the final submittals and drawings do not substantially reflect the installation of the equipment consistent with the original design intent as identified on the applicant application and worksheets.

#### **16. Miscellaneous**

(a) This Agreement (the application and these Terms and Conditions) is the entire agreement between the parties and supersedes all other communications and representations.

(b) If either NYSERDA or the applicant desires to modify this Agreement, the modification must be in writing and signed by an authorized representative of both parties.

#### **17. Audit**

The Applicant shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three years after acceptance of the Work, full and detailed books, accounts, and records pertaining to this Agreement, including without limitation, all data, bills, invoices, payrolls, time records, expense reports, subcontracting efforts and other documentation evidencing, or in any material way related to, Applicant's performance under this Agreement.

NYSERDA shall have the right from time to time and at all reasonable times during this period to inspect and audit any and all books, accounts and records related to this Agreement or reasonably necessary to the performance of an audit at the office or offices of the Applicant where they are then being kept, maintained and preserved. Any payment made under the Agreement shall be subject to retroactive reduction for amounts included therein which are found by NYSERDA on the basis of any audit of the Applicant by NYSERDA, the State of New York or an agency of the United States not to constitute an allowable charge or cost hereunder.

#### **18. Stop Work Order**

(a) NYSERDA may at any time, by written Order to the Applicant, require the Applicant to stop all or any part of the Work called for by this Agreement for a period of up to ninety (90) days after the Stop Work Order is delivered to the Applicant, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this Section. Upon receipt of such an Order, the Applicant shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the Work covered by the Order during the period of work

stoppage consistent with public health and safety. Within a period of ninety (90) days after a Stop Work Order is delivered to the Applicant, or within any extension of that period to which the parties shall have agreed, NYSERDA shall either:

(i) by written notice to the Applicant, cancel the Stop Work Order, which shall be effective as provided in such cancellation notice, or if not specified therein, upon receipt by the Applicant, or

(ii) terminate the Work covered by such order as provided in the Termination Section of this Agreement.

(b) If a Stop Work Order issued under this Section is cancelled or the period of the Order or any extension thereof expires, the Applicant shall resume Work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, if any, or a combination thereof, and in any other provisions of the Agreement that may be affected, and the Agreement shall be modified in writing accordingly, if:

(i) the Stop Work Order results in an increase in the time required for, or in the Applicant's cost properly allocable to, the performance of any part of this Agreement, and

(ii) the Applicant asserts a claim for such adjustments within 30 days after the end of the period of Work stoppage; provided that, if NYSERDA decides the facts justify such action, NYSERDA may receive and act upon any such claim asserted at any time prior to final payment under this Agreement.

(c) If a Stop Work Order is not cancelled and the Work covered by such Order is terminated, the reasonable costs resulting from the Stop Work Order shall be allowed by equitable adjustment or otherwise.

(d) Notwithstanding the provisions of this Section, the maximum amount payable by NYSERDA to the Applicant pursuant to this Section shall not be increased or deemed to be increased except by specific written amendment hereto.

#### **19. Termination**

(a) This Agreement may be terminated by NYSERDA at any time during the term of this Agreement with or without cause, upon ten (10) days prior written notice to the Applicant. In such event, payment shall be paid to the Applicant for Work performed and expenses incurred prior to the effective date of termination in accordance with the provisions of the Article hereof entitled Incentive Payment and in reimbursement of any amounts required to be paid by the Applicant pursuant to Subcontracts; provided, however, that upon receipt of any such notice of termination, the Applicant shall cease the performance of Work, shall make no further commitments with respect thereto and shall reduce insofar as possible the amount of outstanding commitments (including, to the extent requested by NYSERDA, through termination of subcontracts containing provisions therefor).

(b) NYSERDA specifically reserves the right to terminate this agreement in the event that the certification filed by the Applicant in accordance with State Finance Law Sections 139-j and 139-k is found to have been intentionally false or intentionally incomplete, or that the certification filed by the Applicant in accordance with New York State Tax Law Section 5-a is found to have been intentionally false when made. Terminations under this subsection (b) will be effective upon Notice.

(c) Nothing in this Article shall preclude the Applicant from continuing to carry out the Work called for by the Agreement after receipt of a Stop Work Order or termination notice at its own election, provided that, if the Applicant so elects: (i) any such continuing Work after receipt of the Stop Work Order or termination notice shall be deemed not to be Work pursuant to the Agreement, and (ii) NYSERDA shall have no liability to the Applicant for any costs of the Work continuing after receipt of the Stop Work Order or termination notice.

#### **20. Suspension or Termination for Non-Responsibility**

(a) Suspension. NYSERDA, in its sole discretion, reserves the right to suspend any or all activities under this Agreement, at any time, when it discovers information that calls into question the Responsibility of the Applicant. In the event of such suspension, the Applicant will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Applicant must comply with the terms of the suspension order. Contract activity may resume at such time as NYSERDA issues a written notice authorizing a resumption of performance under the Contract.

(b) Termination. Upon written notice to the Applicant, and a reasonable opportunity to be heard with appropriate NYSERDA officials or staff, this Agreement may be terminated by NYSERDA at the Applicant's expense where the Applicant is determined by NYSERDA to be non-Responsible. In such event, NYSERDA may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

Incentives are not payable unless NYSERDA has approved the Engineering Analysis, conducted site visits, and approved the other activities and documentation provided by the applicant.

#### **21. Independent Contractor**

(a) The status of the Applicant under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Applicant, the subcontractors, and their respective officers, agents, employees, representatives and servants, including the Project Director, shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, vicarious liability, professional liability coverage or indemnification, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit. It is understood and agreed that the personnel furnished by Applicant to perform the Work shall be Applicant's employee(s) or agent(s), and under no circumstances are such employee(s) to be considered NYSERDA's employee(s) or agent(s), and shall remain the employees of Applicant, except to the extent required by section 414(n) of the Internal Revenue Code.

(b) Applicant expressly acknowledges NYSERDA's need to be advised, on an immediate basis, of the existence of any claim or event that might result in a claim or claims against NYSERDA, Applicant and/or Applicant's personnel by virtue of any act or omission on the part of NYSERDA or its employees. Accordingly, Applicant expressly covenants and agrees to notify NYSERDA of any such claim or event, including but not limited to, requests for accommodation and allegations of harassment and/or discrimination, immediately upon contractor's discovery of the same, and to fully and honestly cooperate with NYSERDA in its efforts to investigate and/or address such claims or events, including but not limited to, complying with any reasonable request by NYSERDA for disclosure of information concerning such claim or event even in the event that this Agreement should terminate for any reason.

## EXHIBIT B

REVISED 5/12

### STANDARD TERMS AND CONDITIONS FOR ALL NYSERDA AGREEMENTS

(Based on Standard Clauses for New York State Contracts and Tax Law Section 5-a)

The parties to the Agreement agree to be bound by the following clauses which are hereby made a part of the Agreement:

1. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Applicant will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is an Agreement for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this Agreement shall be performed within the State of New York, Applicant agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this Agreement. If this is a building service Agreement as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Applicant agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Applicant is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this Agreement and forfeiture of all moneys due hereunder for a second subsequent violation.

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Applicant's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Applicant and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Applicant understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by NYSERDA of any NYSERDA-approved sums due and owing for work done upon the project.

3. NON-COLLUSIVE BIDDING REQUIREMENT. In accordance with Section 2878 of the Public Authorities Law, if this Agreement was awarded based upon the submission of bids, Applicant warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Applicant further warrants that, at the time

Applicant submitted its bid, an authorized and responsible person executed and delivered to NYSERDA a non-collusive bidding certification on Applicant's behalf.

4. INTERNATIONAL BOYCOTT PROHIBITION. If this Agreement exceeds \$5,000, the Applicant agrees, as a material condition of the Agreement, that neither the Applicant nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Applicant, or any of the aforesaid affiliates of Applicant, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the Agreement's execution, such Agreement, amendment or modification thereto shall be rendered forfeit and void. The Applicant shall so notify NYSERDA within five (5) business days of such conviction, determination or disposition of appeal. (See and compare Section 220-f of the Labor Law, Section 139-h of the State Finance Law, and 2 NYCRR 105.4).

5. SET-OFF RIGHTS. NYSERDA shall have all of its common law and statutory rights of set-off. These rights shall include, but not be limited to, NYSERDA's option to withhold for the purposes of set-off any moneys due to the Applicant under this Agreement up to any amounts due and owing to NYSERDA with regard to this Agreement, any other Agreement, including any Agreement for a term commencing prior to the term of this Agreement, plus any amounts due and owing to NYSERDA for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto.

6. PROPRIETARY INFORMATION. Notwithstanding any provisions to the contrary in the Agreement, Applicant and NYSERDA acknowledge and agree that all information, in any format, submitted to NYSERDA shall be subject to and treated in accordance with the NYS Freedom of Information Law ("FOIL," Public Officers Law, Article 6). Pursuant to FOIL, NYSERDA is required to make available to the public, upon request, records or portions thereof which it possesses, unless that information is statutorily exempt from disclosure. Therefore, unless the Agreement specifically requires otherwise, Applicant should submit information to NYSERDA in a non-confidential, non-proprietary format. FOIL does provide that NYSERDA may deny access to records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." [See Public Officers Law, § 87(2)(d)]. Accordingly, if the Agreement specifically requires submission of information in a format Applicant considers a proprietary and/or confidential trade secret, Applicant shall fully identify and plainly label the information "confidential" or "proprietary" at the time of disclosure. By so marking such information, Applicant represents that the information has actual or potential specific commercial or competitive value to the competitors of Applicant. Without limitation, information will not be considered confidential or proprietary if it is or has been (i) generally known or available from other sources without obligation concerning its confidentiality; (ii) made available by the owner to others without obligation concerning its confidentiality; or (iii) already available to NYSERDA without obligation concerning its confidentiality. In the event of a FOIL request, it is NYSERDA's policy to consider records as marked above pursuant to the trade secret exemption procedure set forth in 21 New York Codes Rules & Regulations § 501.6 and any other applicable law or regulation. However, NYSERDA cannot guarantee the confidentiality of any information submitted. More information on FOIL, and the relevant statutory law and regulations, can be found at the website for the Committee on Open Government (<http://www.dos.state.ny.us/coog/foil2.html>) and NYSERDA's Regulations, Part 501 (<http://www.nyserda.ny.gov/en/About~/media/Files/About/Contact/NYSERDARegulations.ashx>).

7. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION. (a) FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER. As a condition to NYSERDA's obligation to pay any invoices submitted by Applicant pursuant to this Agreement, Applicant shall provide to NYSERDA its Federal employer identification number or Federal social security number, or both such numbers when the Applicant has both such numbers. Where the Applicant does not have such number or numbers, the Applicant must give the reason or reasons why the payee does not have such number or numbers.

(b) PRIVACY NOTIFICATION. The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by Applicant to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

8. CONFLICTING TERMS. In the event of a conflict between the terms of the Agreement (including any and all attachments thereto and amendments thereof) and the terms of this Exhibit B, the terms of this Exhibit B shall control.

9. GOVERNING LAW. This Agreement shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

10. NO ARBITRATION. Disputes involving this Agreement, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily required) without the NYSERDA's written consent, but must, instead, be heard in a court of competent jurisdiction of the State of New York.

11. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Applicant hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Applicant's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Applicant must promptly notify NYSERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSERDA to the last known address shall be sufficient. Applicant will have thirty (30) calendar days after service hereunder is complete in which to respond.

12. CRIMINAL ACTIVITY. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of any allegation previously unknown to it that the Applicant or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Applicant's proposal to NYSERDA, convicted of a felony, under the laws of the United States or Territory of the United States, then NYSERDA may exercise its stop work right under this Agreement. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of the fact, previously unknown to it, that Applicant or any of its principals is under such indictment or has been so convicted, then NYSERDA may exercise its right to terminate this Agreement. If the Applicant knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Applicant and its principals. The Applicant or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For an Applicant which is an association, partnership, corporation, or other organization, the provisions of this paragraph apply to any such indictment or conviction of the organization itself or any of its officers, partners, or directors or members of any similar governing body, as applicable.

13. PERMITS. It is the responsibility of the Applicant to acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers and permissions of every nature necessary to perform the work.

14. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Applicant certifies and warrants that all wood products to be used under this Agreement will be in accordance with, but not limited to, the specifications and provisions of State Finance Law Section 165 (Use of Tropical Hardwoods), which prohibits purchase and use of tropical hardwoods, unless specifically exempted by NYSERDA.

15. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business  
30 South Pearl St -- 7th Floor  
Albany, New York 12245  
Telephone: 518-292-5220  
Fax: 518-292-5884  
<http://www.esd.ny.gov>

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
30 South Pearl St -- 2nd Floor  
Albany, New York 12245  
Telephone: 518-292-5250  
Fax: 518-292-5803  
<http://www.empire.state.ny.us>

The Omnibus Procurement Act of 1992 requires that by signing this Agreement, Applicants certify that whenever the total amount is greater than \$1 million:

(a) The Applicant has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Applicant has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Applicant agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Applicant agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Applicant acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

16. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

17. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT. Applicant shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

18. PROCUREMENT LOBBYING. To the extent this Agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this Agreement the Applicant certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, NYSERDA may terminate the agreement by providing written notification to the Applicant in accordance with the terms of the agreement.

19. COMPLIANCE WITH TAX LAW SECTION 5-a. The following provisions apply to Applicants that have entered into agreements in an amount exceeding \$100,000 for the purchase of goods and services:

- a) Before such agreement can take effect, the Applicant must have on file with the New York State Department of Taxation and Finance an Applicant Certification form (ST-220-TD).
- b) Prior to entering into such an agreement, the Applicant is required to provide NYSERDA with a completed Applicant Certification to Covered Agency form (Form ST-220-CA).
- c) Prior to any renewal period (if applicable) under the agreement, the Applicant is required to provide NYSERDA with a completed Form ST-220-CA.

Certifications referenced in paragraphs (b) and (c) above will be maintained by NYSERDA and made a part hereof and incorporated herein by reference.

NYSERDA reserves the right to terminate this agreement in the event it is found that the certification filed by the Applicant in accordance with Tax Law Section 5-a was false when made.

20. IRANIAN ENERGY SECTOR DIVESTMENT. In accordance with Section 2879-c of the Public Authorities Law, by signing this contract, each person and each person signing on behalf of any other party certifies, and in the case of a joint bid or partnership each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each person is not on the list created pursuant to paragraph (b) of subdivision 3 of [section 165-a of the State Finance Law](#) (See [www.ogs.ny.gov/about/regs/ida.asp](http://www.ogs.ny.gov/about/regs/ida.asp)).

## EXHIBIT C

### NYSERDA PROMPT PAYMENT POLICY STATEMENT

**504.1. Purpose and Applicability.** (a) The purpose of this Exhibit is to provide a description of Part 504 of NYSERDA's regulations, which consists of NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under this Agreement. The section numbers used in this document correspond to the section numbers appearing in Part 504 of the regulations.<sup>1</sup>

(b) This Exhibit applies generally to payments due and owing by the NYSERDA to the Applicant pursuant to this Agreement. However, this Exhibit does not apply to Payments due and owing when NYSERDA is exercising a Set-Off against all or part of the Payment, or if a State or Federal law, rule or regulation specifically requires otherwise.

**504.2. Definitions.** Capitalized terms not otherwise defined in this Exhibit shall have the same meaning as set forth earlier in this Agreement. In addition to said terms, the following terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

(a) "Date of Payment" means the date on which NYSERDA requisitions a check from its statutory fiscal agent, the Department of Taxation and Finance, to make a Payment.

(b) "Designated Payment Office" means the Office of NYSERDA's Controller, located at 17 Columbia Circle, Albany, New York 12203.

(c) "Payment" means payment properly due and owing to Applicant pursuant to Exhibit A of this Agreement.

(d) "Prompt Payment" means a Payment within the time periods applicable pursuant to Sections 504.3 through 504.5 of this Exhibit in order for NYSERDA not to be liable for interest pursuant to Section 504.6.

(e) "Payment Due Date" means the date by which the Date of Payment must occur, in accordance with the provisions of Sections 504.3 through 504.5 of this Exhibit, in order for NYSERDA not to be liable for interest pursuant to Section 504.6.

(f) "Proper Invoice" means a written request for Payment that is submitted by an Applicant setting forth the description, price or cost, and quantity of goods, property or services delivered or rendered, in such form, and supported by such other substantiating documentation, as NYSERDA may reasonably require, including but not limited to any requirements set forth in Exhibits A or B to this Agreement; and addressed to NYSERDA's Controller, marked "Attention: Accounts Payable," at the Designated Payment Office.

(g)(1) "Receipt of an Invoice" means:

(i) if the Payment is one for which an invoice is required, the later of:

(a) the date on which a Proper Invoice is actually received in the Designated Payment Office during normal business hours; or

(b) the date by which, during normal business hours, NYSERDA has actually received all the purchased goods, property or services covered by a Proper Invoice previously received in the Designated Payment Office.

(ii) if the Agreement provides that a Payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice the 30th calendar day, excluding legal holidays, before the date so specified or predetermined.

(2) For purposes of this subdivision, if the Agreement requires a multifaceted, completed or working system, or delivery of no less than a specified quantity of goods, property or services and only a portion of such systems or less than the required goods, property or services are working, completed or delivered, even though the Applicant has invoiced NYSERDA for the portion working, completed or delivered, NYSERDA will not be in Receipt of an Invoice until the specified minimum amount of the systems, goods, property or services are working, completed or delivered.

(h) "Set-off" means the reduction by NYSERDA of a payment due an Applicant by an amount equal to the amount of

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<sup>1</sup> This is only a summary; the full text of Part 504 can be accessed at:  
<http://www.nyserda.ny.gov/en/About/~media/Files/About/Contact/NYSERDARegulations.ashx>

an unpaid legally enforceable debt owed by the Applicant to NYSERDA.

**504.3. Prompt Payment Schedule.** Except as otherwise provided by law or regulation or in Sections 504.4 and 504.5 of this Exhibit, the Date of Payment by NYSERDA of an amount properly due and owing under this Agreement shall be no later than thirty (30) calendar days, excluding legal holidays, after Receipt of a Proper Invoice.

**504.4. Payment Procedures.**

(a) Unless otherwise specified in this Agreement, a Proper Invoice submitted by the Applicant to the Designated Payment Office shall be required to initiate payment for goods, property or services. As soon as any invoice is received in the Designated Payment Office during normal business hours, such invoice shall be date-stamped. The invoice shall then promptly be reviewed by NYSERDA.

(b) NYSERDA shall notify the Applicant within fifteen (15) calendar days after Receipt of an Invoice of:

- (1) any defects in the delivered goods, property or services;
- (2) any defects in the invoice; or
- (3) suspected improprieties of any kind.

(c) The existence of any defects or suspected improprieties shall prevent the commencement of the time period specified in Section 504.3 until any such defects or improprieties are corrected or otherwise resolved.

(d) If NYSERDA fails to notify an Applicant of a defect or impropriety within the fifteen (15) calendar day period specified in subdivision (b) of this section, the sole effect shall be that the number of days allowed for Payment shall be reduced by the number of days between the 15th day and the day that notification was transmitted to the Applicant. If NYSERDA fails to provide reasonable grounds for its contention that a defect or impropriety exists, the sole effect shall be that the Payment Due Date shall be calculated using the original date of Receipt of an Invoice.

(e) In the absence of any defect or suspected impropriety, or upon satisfactory correction or resolution of a defect or suspected impropriety, NYSERDA shall make Payment, consistent with any such correction or resolution and the provisions of this Exhibit.

**504.5. Exceptions and Extension of Payment Due Date.** NYSERDA has determined that, notwithstanding the provisions of Sections 504.3 and 504.4 of this Exhibit, any of the following facts or circumstances, which may occur concurrently or consecutively, reasonably justify extension of the Payment Due Date:

(a) If this Agreement provides Payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice, if any documentation, supporting data, performance verification, or notice specifically required by this Agreement or other State or Federal mandate has not been submitted to NYSERDA on a timely basis, then the Payment Due Date shall be extended by the number of calendar days from the date by which all such matter was to be submitted to NYSERDA and the date when NYSERDA has actually received such matter.

(b) If an inspection or testing period, performance verification, audit or other review or documentation independent of the Applicant is specifically required by this Agreement or by other State or Federal mandate, whether to be performed by or on behalf of NYSERDA or another entity, or is specifically permitted by this Agreement or by other State or Federal provision and NYSERDA or other entity with the right to do so elects to have such activity or documentation undertaken, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when any such activity or documentation has been completed, NYSERDA has actually received the results of such activity or documentation conducted by another entity, and any deficiencies identified or issues raised as a result of such activity or documentation have been corrected or otherwise resolved.

(c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the Contract, prior to Payment, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when the State or Federal agency, or other contributing party to the Contract, has completed the inspection, advised NYSERDA of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.

(d) If appropriated funds from which Payment is to be made have not yet been appropriated or, if appropriated, not yet been made available to NYSERDA, then the Payment Due Date shall be extended by the number of calendar days from the date of Receipt of an Invoice to the date when such funds are made available to NYSERDA.

**504.6. Interest Eligibility and Computation.** If NYSERDA fails to make Prompt Payment, NYSERDA shall pay interest to the Applicant on the Payment when such interest computed as provided herein is equal to or more than ten dollars (\$10.00). Interest shall be computed and accrue at the daily rate in effect on the Date of Payment, as set by the New York State Tax Commission for corporate taxes pursuant to Section 1096(e)(1) of the Tax Law. Interest on such a Payment shall be computed for the period beginning on the day after the Payment Due Date and ending on the Date of Payment.

**504.7. Sources of Funds to Pay Interest.** Any interest payable by NYSERDA pursuant to Exhibit shall be paid only from the same accounts, funds, or appropriations that are lawfully available to make the related Payment.

**504.8. Incorporation of Prompt Payment Policy Statement into Contracts.** The provisions of this Exhibit shall apply to all Payments as they become due and owing pursuant to the terms and conditions of this Agreement, notwithstanding that NYSERDA may subsequently amend its Prompt Payment Policy by further rulemaking.

**504.9. Notice of Objection.** Applicant may object to any action taken by NYSERDA pursuant to this Exhibit that prevents the commencement of the time in which interest will be paid by submitting a written notice of objection to NYSERDA. Such notice shall be signed and dated and concisely and clearly set forth the basis for the objection and be addressed to the Vice President, New York State Energy Research and Development Authority, at the notice address set forth in this Agreement. The Vice President of NYSERDA, or his or her designee, shall review the objection for purposes of affirming or modifying NYSERDA's action. Within fifteen (15) working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the Applicant either that NYSERDA's action is affirmed or that it is modified or that, due to the complexity of the issue, additional time is needed to conduct the review; provided, however, in no event shall the extended review period exceed thirty (30) working days.

**504.10. Judicial Review.** Any determination made by NYSERDA pursuant to this Exhibit that prevents the commencement of the time in which interest will be paid is subject to judicial review in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Such proceedings shall only be commenced upon completion of the review procedure specified in Section 504.9 of this Exhibit or any other review procedure that may be specified in this Agreement or by other law, rule, or regulation.

**504.11. Court Action or Other Legal Processes.**

(a) Notwithstanding any other law to the contrary, the liability of NYSERDA to make an interest payment to an Applicant pursuant to this Exhibit shall not extend beyond the date of a notice of intention to file a claim, the date of a notice of a claim, or the date commencing a legal action for the payment of such interest, whichever occurs first.

(b) With respect to the court action or other legal processes referred to in subdivision (a) of this section, any interest obligation incurred by NYSERDA after the date specified therein pursuant to any provision of law other than Public Authorities Law Section 2880 shall be determined as prescribed by such separate provision of law, shall be paid as directed by the court, and shall be paid from any source of funds available for that purpose.

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## LIST OF ATTACHMENTS

Exhibit A	Maximum Total Incentive
Exhibit B	Standard Terms and Conditions for All NYSERDA Agreements
Exhibit C	Prompt Payment Policy Statement
Exhibit D	Final completed Application Form, and Appendices C and D of NYSERDA PON 2157 Small Fuel Cell Program

# AGREEMENT

This Standard Performance Agreement (hereinafter referred to as the "Agreement"), dated and effective as of the \_\_\_ day of \_\_\_\_\_, 201\_ ("Effective Date") by and between the New York State Energy Research and Development Authority (hereinafter referred to as "NYSERDA") with its principal office located at 17 Columbia Circle, Albany, New York, 12203-6399, and \_\_\_\_\_ [Contractor], (hereinafter "Contractor") with offices located at \_\_\_\_\_. NYSEDA and the Contractor may be individually referred herein as a "Party" and collectively as the "Parties."

In consideration of the mutual promises and agreements herein expressed, NYSEDA and the Contractor hereby agree as follows:

## ARTICLE 1: DEFINITIONS

§1.1. Definitions. Unless the context otherwise requires, the terms defined below shall have, for all purposes of this Agreement, the respective meanings set forth below, the following definitions to be equally applicable to both the singular and plural forms of any of the terms defined.

Agreement: This Standard Performance Agreement, including Exhibits A (Maximum Total Incentive), B (Standard Terms and Conditions), C (Prompt Payment Policy Statement), D (final completed Application Form, and Appendices C and D of NYSEDA PON 2157 Small Fuel Cell Program), and E (RPS Attributes Transfer Certificate), and NYSEDA PON 2157 as published by NYSEDA on \_\_\_\_\_, 2011, which is incorporated herein and made part hereof as though herein set forth in full.

Annual Performance Report: A report submitted annually to NYSEDA for a period of three consecutive years. The report provides data that should demonstrate clearly to NYSEDA the net amount of electrical energy delivered to the site by the fuel cell system during the annum so it can be determined whether or not an installed project is generating the amount of electricity projected in this Agreement.

Application Package: The Contractor's submission to NYSEDA containing the items listed in Section V of PON 2157 requesting incentives through a Standard Performance Agreement.

As-Built Diagrams: The final Site Plan, which is comprised of schematic and Plan View Diagrams, showing the installed and commissioned system. The As-Built Diagrams must be included in the Project Installation Report.

Capacity Factor: The net annual output of the fuel cell system delivered to the Project Site divided by the maximum (nameplate) rated output times 8760 hours per year.

Contractor: The Customer or third party who is submitting the Application Package and a party to this Agreement.

Customer: The owner or tenant of a Project Site and who, generally, pays the RPS Program Surcharge.

Effective Date: The date of execution of this Agreement, appearing in the first paragraph of this Agreement.

Installation and Commissioning: The completion of construction of the fuel cell system, interconnection of the system with the utility grid, if applicable, at least one month of satisfactory

operation of the system according to its design intent, and demonstration of the ability to upload information to NYSERDA's CHP Website.

Installation Phase: The phase of the Standard Performance Agreement that includes Procurement, developing the Performance Measurement Plan, Installation and Commissioning, and submitting the Project Installation Report.

Maximum Total Incentive: The dollar amount listed in Exhibit A of this Agreement, representing the maximum amount payable under this Agreement.

Performance Measurement: The process of monitoring, measuring, and verifying the electrical energy generated by the fuel cell system, upon commencement of the Performance Phase of the Project.

Performance Phase: The final phase of this Agreement that commences on the date upon which the Contractor begins providing performance data, and continues for three consecutive years from that date.

Project Installation Report: The detailed description of the installed and commissioned fuel cell system. The Project Installation Report includes updates to the information provided in the Application Package, which subsequently were used to develop the Standard Performance Agreement, to reflect the installed System, including As-built Diagrams of the Fuel Cell Electric Power Generation Equipment.

Project Site: The site at which the fuel cell system is located, the electricity is generated and used, and where the utility meter, which is generally interconnected with the grid, is located.

Project Term: The term of this Agreement as defined in Section 2.2 hereof.

Renewable Portfolio Standard (RPS) Program: A program established by the New York State Public Service Commission to increase the proportion of renewable electricity used by New York consumers to at least 25% by 2013.

RPS Surcharge: One of the delivery charges levied by National Grid, NYSEG, Rochester Gas and Electric, Orange and Rockland, Central Hudson Gas and Electric, and Consolidated Edison. The RPS Surcharge permits these companies to recover costs associated with providing financial incentives for the development of renewable resources in New York State. NYSERDA is the administrator of the RPS program.

## ARTICLE 2: PROJECT ORGANIZATION

§2.1. Project Organization. The Project contemplated herein shall be implemented in accordance with the Agreement and in two phases: Installation and Performance. The Installation Phase shall begin with the Effective Date and will include the Procurement, Installation and Commissioning of the fuel cell system set forth in the approved Application Package, and preparation of the Project Installation Report. The Performance Phase shall begin upon approval by NYSERDA of the Project Installation Report and will include and continue through completion of the performance measurement activities required by the approved Performance Measurement Plan.

§2.2. Project Term. The term of this Agreement shall begin on the Effective Date and continue until approval of the third Annual Performance Report, unless extended or terminated under the terms hereof.

§2.3. Extensions of Time. The Project Term or other deadlines for submittal of documentation to NYSERDA, including those described under Article 3 hereto, may be extended for good cause at

NYSERDA's discretion. As used herein, "good cause" means an unanticipated circumstance or event, which despite the due diligence of the Contractor, renders compliance with project term or other deadline impracticable. A request for an extension must be submitted in writing to NYSERDA no less than 30 calendar days prior to the expiration of the applicable deadline. Extensions may be granted or denied at NYSERDA's sole discretion. Any such extension shall be communicated in writing. NYSERDA may terminate this Agreement upon the failure of the Contractor to conform to these requirements.

§2.4. Manner of Performance. The Contractor shall perform its responsibilities under this Agreement in an efficient and expeditious manner and in accordance with all of the terms and provisions of this Agreement. The Contractor shall perform all responsibilities in accordance with the current professional standards and with the diligence and skill expected for the performance of work of the type described in this Agreement. The Contractor shall furnish such personnel and shall procure such materials, machinery, supplies, tools, equipment and other items as may reasonably be necessary or appropriate to perform its responsibilities in accordance with this Agreement. Operation of the Facility must conform to the eligibility requirements imposed by the RPS Program with regard to the Customer-Sited Tier.

### ARTICLE 3: PROCUREMENT; INSTALLATION

§3.1. Procurement. Procurement of major equipment must be completed, and sufficient documentation of Procurement must be provided to NYSERDA, within nine (9) months of the Effective Date. Major equipment includes, but is not limited to, the fuel cell stacks, on-board reformer, fuel storage tanks and appurtenances, electric power conditioning equipment, essential heat management systems, controls, meters, and interconnection equipment. Sufficient documentation of Procurement may include, but may not be limited to invoices, Bills of Lading, etc.

§3.2. Installation and Commissioning. The Contractor shall be responsible for Installation and Commissioning of the fuel cell system, which shall include interconnection of the system with the utility grid, if applicable, at least one month of satisfactory operation of the system according to its design intent, and demonstration of the ability to accurately monitor and retain data on electricity delivered to the site from the fuel cell system.

§3.3. Project Installation Report. A Project Installation Report must be completed and submitted to NYSERDA within 15 months of the Effective Date; such Report must be prepared in accordance with the requirements of Exhibit D to PON 2157, and must sufficiently document that Installation and Commissioning has been completed. The Project Installation Report must include As-Built Diagrams of the commissioned fuel cell system. NYSERDA's approval of the Project Installation Report will depend on the results of a Post-Installation Site Inspection, which will verify the information provided in the Project Installation Report. NYSERDA will provide notice of approval of the Project Installation Report or will request additional information within 60 days of receipt. NYSERDA will review the Project Installation Report, inspect the system and either approve the Project Installation Report as submitted, approve it with minor revisions, or reject it. If the Project Installation Report is rejected, the Contractor will be provided with a period of 60 calendar days from the date of rejection to provide necessary information and resolve all outstanding issues with NYSERDA.

§3.4. Permits. Contractor shall be responsible for the acquisition and maintenance, at its own cost, of any and all permits, approvals, licenses, easements, waivers and permissions of every nature necessary to perform the Project.

## ARTICLE 4: PERFORMANCE MEASUREMENT

§4.1. Performance Measurement Plan. The Contractor must develop a Performance Measurement Plan to ascertain appropriate payment. The Performance Measurement Plan must be received and approved by NYSERDA prior to submittal (or payment) of any invoices. Contractor shall be responsible to provide the instrumentation and communications capability specified within the approved Performance Measurement Plan; all performance measurement activities shall be conducted in accordance with the approved Performance Measurement Plan.

§4.2. Annual Performance Reports. Within four (4) months of NYSERDA's approval of the Project Installation Report, the Contractor must begin providing quarterly performance data to the NYSERDA Project Manager. The first year's (consecutive 12 months) Performance period will commence on the date upon which the Contractor begins providing such data. Within 60 days from the end of the first year's Performance period, the Contractor must submit an Annual Performance Report to NYSERDA, which will become the basis for the first Performance Incentive payment. Annual performance reporting shall be in accordance with Appendix C to PON 2157 Small Fuel Cell Program. Annual Performance Reports must also be submitted to NYSERDA within 60 days from the end of the second and third year Performance periods. The Contractor shall be responsible for ensuring that data provided in the Annual Performance Reports accurately represents the operation of the fuel cell system.

§4.3. Prior Notice. NYSERDA or its agent may choose to visit a project site to verify that the information provided in the Annual Performance Report is accurate with regard to project equipment, site conditions, and monitoring configurations. These inspections may occur at any time after project installation. Should NYSERDA decide to inspect a site, NYSERDA, or its agent may or may not contact the Contractor to schedule the inspection. In other words, an inspection may occur without advance notice given to the Contractor. If the performance measurement activities are found to be different from those represented in either the Performance Measurement Plan or the Annual Performance Report, NYSERDA may refuse any further incentive payments. If NYSERDA deems an inspection necessary, an Annual Performance Report that is under review will not be approved until the inspection has been completed.

## ARTICLE 5: PAYMENTS

§5.1. Invoicing. Payments may be requested by the Contractor by submitting an invoice to NYSERDA. Invoices must be accompanied by all additional required information and documentation. NYSERDA shall make payments to the Contractor in accordance with terms of this Agreement and subject to its Prompt Payment Policy Statement, which is attached hereto as Exhibit C. No invoice may be submitted and no payment will become payable unless and until NYSERDA has approved Contractor's Performance Measurement Plan. No invoices will be accepted nor paid if received more than 90 days after the expiration of the Project Term.

§5.2. Performance Incentive Payments. Performance incentive payments will become payable upon approval by NYSERDA of each of the three required Annual Performance Reports spanning the three consecutive years of the Performance Phase, at the rate of fifteen cents per kWh for fuel cell systems operating at a capacity factor of 50% or higher. Fuel cell systems operating at a capacity factor of less than 50% will not be eligible to receive performance incentives. Performance Incentive payments will be calculated based on the verified electric energy generated by the System. Performance incentive payments shall not exceed \$20,000 per year for small fuel cell system installations.

## ARTICLE 6: FORCE MAJEURE

§6.1. Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, or strikes or the delay or failure to perform by any subcontractor by reason of any cause or circumstance beyond the reasonable control of such subcontractor. Variability in the frequency or force of the wind, of rainfall, or of water levels will in no event constitute force majeure events. Failure by Seller to obtain or secure any permit or approval or delay in obtaining any permit or approval of any sort with regard to Seller's performance under the Agreement shall not constitute a force majeure event.

## ARTICLE 7: TERMINATION

§7.1. This Agreement shall remain in effect for the term defined in Section 2.2, unless there is an event of default and the Agreement is terminated in accordance with this Article. Events of default include either Party's breach of any provision of this Agreement, including provisions incorporated by reference, and including, but not limited to, the following:

- a. failure of the Contractor to perform its responsibilities in a timely manner, including, but not limited to, failure to provide the required submittals within the required time frames, including responses to requests for clarification or additional information, or failure complete the required inspections within the time limits and manner set forth in PON 2157;
- b. failure of the Contractor to provide NYSERDA or its agent sufficient access to the Host Site's facility for inspection and/or observation of the Contractor's field performance measurement activities;
- c. failure of the Contractor to cure any deficiency in a material term or cure any material breach of this Agreement within 30 calendar days after written notice;
- d. failure of the Contractor to acquire or maintain any necessary permit, license or failure to maintain Insurance as required under this Agreement;
- e. assignment or subcontracting of all or part of the Contractor's obligations required under this Agreement without NYSERDA's prior written permission, except that the Contractor shall not be required to obtain NYSERDA approval to subcontract all or part of the work;
- f. submittal by the Contractor of false, misleading or incorrect information; and
- g. failure by NYSERDA to make payments due pursuant to the terms of this Agreement to the Contractor within the time limits set forth in this Agreement.

§7.2. Once an event of default occurs, and at any time thereafter so long as the default continues, the non-defaulting Party may, by written notice to the defaulting Party, specify the nature of such default, and declare this Agreement to be in default. The defaulting Party must remedy the default within the time specified in the written notice of default, or 30 calendar days from the date such written notice was given if no time is specified, or within any further period to which the parties may agree. In no event, however,

will the defaulting Party be required to remedy a default in less than 30 calendar days from the date the written notice of default was given.

§7.3. Notwithstanding the provisions of this Article, NYSERDA may terminate this Agreement on notice, and without providing an opportunity for cure, for Contractor's failure to fulfill, adhere to, or comply with the provisions of Article 3.

§7.4. If the defaulting party fails to cure its default within the appropriate time period, the non-defaulting party may terminate this Agreement at any time thereafter and, without a waiver of any other remedies which exist in law or equity, exercise at its election, any other rights or remedies it may have under this Agreement, at law or in equity, or institute other proceedings including but not limited to bringing an action or actions from time to time for specific performance, for the recovery of amounts due and unpaid, and for damages.

#### ARTICLE 8: RPS ATTRIBUTES

§8.1. RENEWABLE PORTFOLIO STANDARD (RPS) ATTRIBUTES: Orders issued by the NYS Public Service Commission provide that the RPS Program will support and promote an increase, to 30%, of the percentage of the energy consumed in NYS that comes from renewable sources. When assessing and reporting on progress towards that goal, or on the composition of the energy generated and/or consumed in NYS, NYSERDA and the NYS Department of Public Service will include all electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program, for the life of such projects, and the environmental attributes associated with such energy, whether metered or projected, as a part of any report, evaluation, or review of the RPS Program, whenever any such report, evaluation, or review may be conducted or issued, as renewable energy consumed in NYS. No party, including but not limited to owners, lessees/lessors, operators, and/or associated contractors shall agree to or enter any transaction that would or may be intended to result in the exportation or transmittal of any electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program to any party or system outside of New York State.

#### ARTICLE 9: INDEMNIFICATION

§9.1. The Contractor shall protect, indemnify, and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to the Contractor's performance of this Agreement. The Contractor agrees that such obligations under this Article shall survive any expiration or termination of this Agreement and shall not be limited by any insurance coverage required under this Agreement.

#### ARTICLE 10: INSURANCE.

§10.1. Maintenance of Insurance; Policy Provisions. The Contractor, at no additional cost to NYSERDA, shall maintain or cause to be maintained throughout the term of this Agreement, insurance of the types and in the amounts specified in the Section hereof entitled Types of Insurance. All such insurance shall be evidenced by insurance policies, each of which shall:

- a. name or be endorsed to cover NYSERDA and the State of New York as additional insured;
- b. provide that such policy may not be canceled or modified until at least thirty (30) calendar days after receipt by NYSERDA of written notice thereof; and

- c. be reasonably satisfactory to NYSERDA in all other respects.

§10.2. Types of Insurance. The types and amounts of insurance required to be maintained under this Article are as follows:

Commercial general liability insurance for bodily injury liability, including death, and property damage liability, incurred in connection with the performance of this Agreement, with minimum limits of \$1,000,000 in respect of claims arising out of personal injury or sickness or death of any one person, \$1,000,000 in respect of claims arising out of personal injury, sickness or death in any one accident or disaster, and \$1,000,000 in respect of claims arising out of property damage in any one accident or disaster.

§10.3. Delivery of Policies; Insurance Certificates. Prior to commencing the Work, the Contractor shall deliver to NYSERDA certificates of insurance issued by the respective insurers, evidencing the insurance required by this Article. In the event any policy furnished or carried pursuant to this Article will expire on a date prior to the termination date established under Article 2 hereof, the Contractor, not less than thirty (30) calendar days prior to such expiration date, shall deliver to NYSERDA certificates of insurance evidencing the renewal of such policies, and the Contractor shall promptly pay all premiums thereon due. In the event of threatened legal action, claims, encumbrances, or liabilities that may affect NYSERDA hereunder, or if deemed necessary by NYSERDA due to events rendering a review necessary, the Contractor shall, upon request, deliver to NYSERDA a certified copy of each policy.

## ARTICLE II: WARRANTIES AND GUARANTEES

§11.1. Each Party warrants and guarantees to the other that:

- a. it has all requisite power, authority, licenses, permits and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
- b. its execution, delivery and performance of this Agreement have been duly authorized by, or is in accordance with, its organizing instrument, and this Agreement has been duly executed and delivered for it by the signatories authorized, and it constitutes its legal, valid and binding obligation;
- c. its execution, delivery and performance of this Agreement shall not result in a breach or violation of, or constitute a default under, any agreement, lease, or instrument to which it is a party or by which it or its properties may be bound or affected; and
- d. it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

§11.2. The Contractor also warrants and guarantees that:

- a. it is financially and technically qualified to perform the Project;
- b. it is familiar with and will comply with all general and special federal, State, municipal and local laws, ordinances and regulations, if any, that may in any way affect the performance of this Agreement;

- c. the design, supervision and workmanship furnished with respect to performance of the Project shall be in accordance with sound and currently accepted engineering practices;
- d. neither the Contractor nor any of its employees, agents, representatives or servants has actual knowledge of any patent, copyright or trademark issued under the laws of the United States or any other matter which could constitute a basis for any claim that the performance of the Project or any part thereof infringes any patent, copyright, or trademark or otherwise interferes with any other right of any individual, corporation, association or partnership, organization, business or a government or political subdivision thereof, or any governmental agency or instrumentality;
- e. it has no actual knowledge that there are existing undisclosed or threatened legal actions, claims, or encumbrances, or liabilities that may adversely affect the Project or NYSERDA's rights hereunder;
- f. it has no actual knowledge that any information or document or statement furnished by the Contractor in connection with this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make the statement not misleading, and that all facts have been disclosed that would materially adversely affect the Project;
- g. it has no, and shall not obtain during the course of this Agreement any, interest, financial or otherwise, direct or indirect, nor is it engaged in any business or transaction or professional activity, nor has it incurred any obligation of any nature, which is in substantial conflict with the rendering of services under this Agreement; and
- h. it shall exercise reasonable care to achieve commercial standards of fitness for the Customer's use of the equipment that is installed in connection with the Project.

## ARTICLE 12: COMPLIANCE WITH CERTAIN LAWS

§12.1. Governing Law/Venue. This Agreement shall be interpreted according to the laws of the State of New York without regard to its conflicts of laws principles. The Contractor, its subcontractors and consultants will comply with all laws, rules, orders, regulations and requirements of federal, state and municipal governments applicable thereto, including provisions set forth in Exhibit C hereto. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in the United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

§12.2. All Legal Provisions Deemed Included. It is the intent and understanding of the Contractor and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Contractor, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

§12.3. Other Legal Requirements. The references to particular laws of the State of New York in this Article, and elsewhere in this Agreement are not intended to be exclusive and nothing contained in this

Article and the Agreement shall be deemed to modify the obligations of the Contractor to comply with all legal requirements.

§12.4. Equipment Requirements. All Equipment required for the fuel cell system described in the Project Application and subsequent As-built Drawings shall be consistent with the New York State Uniform Fire Prevention and Building Code, or the applicable local, State or Federal codes.

§12.5. State Environmental Quality Review Act (SEQRA). NYSERDA is subject to the provisions of SEQRA, implementing regulations of the New York State Department of Environmental Conservation, and implementing regulations of NYSERDA. Funding will not be released for a Project that has not complied with SEQRA.

§12.6. Permits and Approvals. The Contractor shall be responsible to obtain all applicable permits and regulatory approvals that may be required in order to develop and/or operate the Project during the Project Term. Neither the RPS Program nor entry into this Agreement in any way replaces or modifies the necessity or applicability of any permit or approval process by any jurisdiction. NYSERDA's obligations to make payments to Contractor will be conditional on the acquisition of all such permits and approvals. Upon request by NYSERDA, Contractor must demonstrate such acquisition and/or provide copies of all permits and approvals acquired. Contractor shall provide prompt Notice to NYSERDA of the initiation of any criminal or regulatory investigation, hearing, proceeding, or review process ("Process") by any federal or State entity regarding any actual or alleged violation of any permit or approval obtained or applied for with respect to the Project, as well as of any modification, penalty and/or fine that may be imposed or occur as a result of such a Process or violation.

#### ARTICLE 13: PUBLICITY

§13.1. The Contractor shall collaborate with NYSERDA's Manager of Communications to prepare any press release and to plan for any news conference concerning the Project. In addition, the Contractor shall notify NYSERDA's Manager of Communications regarding any media interview in which the Project is referred to or discussed.

§13.2. It is recognized that during the course of the Project under this Agreement, the Contractor or its employees may from time to time desire to publish information regarding scientific or technical developments made or conceived in the course of or under this Agreement. In any such information, the Contractor shall credit funding participation in the Project to the **New York State Renewable Portfolio Standard Customer-Sited Tier** program, and shall state that "NYSERDA has not reviewed the information contained herein, and the opinions expressed in this report do not necessarily reflect those of NYSERDA or the State of New York."

§13.3. The Contractor shall not use NYSERDA's corporate name, logo, identity, or any affiliation, without NYSERDA's prior written consent.

#### ARTICLE 14: MISCELLANEOUS

§14.1. Entire Agreement; Amendment. This Agreement embodies the entire agreement and understanding between NYSERDA and the Contractor and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be changed, waived, discharged or terminated only by an instrument in writing, signed by the party against which enforcement of such change, waiver, discharge or termination is sought.

§14.2. Record Retention. The Contractor and subcontractors shall keep, maintain, and preserve at its principal office throughout the term of the Agreement and for a period of three (3) years after the expiration or early termination of this Agreement, accurate records of the Project work which is performed hereunder. NYSERDA or its designated agent shall at reasonable times have access to inspect such records.

§14.3. NYSERDA'S Right to Inspect. NYSERDA, and its designated agents, may observe and inspect all Project work in any of the Customer's facilities.

§14.4. No Waiver. The failure of either Party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver nor deprive that Party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

§14.5. Rights and Remedies. No right or remedy conferred upon or reserved to the Parties by this Agreement excludes any other rights or remedies provided by law or equity nor restricts the Parties' rights to exercise any other right or remedy.

§14.6. Disputes. Where any matters related to this Agreement are in dispute, the SPC Program Manager and the Contractor contact person, or their designated representatives shall promptly but in any case, within twenty (20) calendar days of written notice by either party to the other, meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and attempt in good faith to resolve the dispute.

§14.7. Assignment. The assignment, transfer, conveyance, or other disposal of this Agreement or any of the Contractor's rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSERDA shall be void and of no effect as to NYSERDA.

§14.8. Notices. All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be deemed to have been sufficiently given for all purposes hereunder when delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, (i) if to NYSERDA, at 17 Columbia Circle, Albany, New York 12203-6399, or at such other address as NYSERDA shall have furnished to the Contractor in writing, and (ii) if to the Contractor, at the address noted in the first paragraph of Page 1 of this Agreement, or such other address as the Contractor shall have furnished to it in writing.

§14.9. Executory Clause. NYSERDA shall have no liability under this Agreement to the Contractor or to anyone else beyond RPS Surcharge funds actually paid to NYSERDA by third parties which would fund this Agreement.

§14.10. Independent Contractor. The status of the Contractor under this Agreement shall be that of an independent contractor and not that of an agent, and in accordance with such status, the Contractor, subcontractors, and their respective officers, agents, employees, representatives and servants shall at all times during the term of this Agreement conduct themselves in a manner consistent with such status and by reason of this Agreement shall neither hold themselves out as, nor claim to be acting in the capacity of, officers, employees, agents, representatives or servants of NYSERDA nor make any claim, demand or application for any right or privilege applicable to NYSERDA, including, without limitation, rights or privileges derived from workers' compensation coverage, unemployment insurance benefits, social security coverage and retirement membership or credit.

§14.11. Audit. NYSERDA shall have the right from time to time and at all reasonable times during the term of the Agreement and such period thereafter to inspect and audit any and all books, accounts and

records pertaining to Contractor's performance under this Agreement, at the office or offices of the Contractor where they are then being kept, maintained and preserved. If such books, accounts and records are not kept at an office within the State of New York, within a reasonable time of a request by NYSERDA, Contractor shall make such books, accounts and records available to NYSERDA at NYSERDA's offices or at an agreed upon location within the State of New York. Any payment made under this Agreement shall be subject to retroactive adjustment (reduction or increase) regarding amounts included therein which are found by NYSERDA on the basis of any audit of the Contractor by an agency of the United States, the State of New York or NYSERDA not to constitute a properly invoiced amount.

§14.12. Review and Disclaimer. NYSERDA's execution of this Agreement with the Contractor and any NYSERDA review of the design, construction, operation, or maintenance of the Project shall not constitute any representation as to the economic or technical feasibility, operational capability, or reliability of the Project or Facility. The Contractor shall in no way represent to any third party that NYSERDA's execution of this Agreement or any reviews by NYSERDA, including, but not limited to, NYSERDA's review of the design, construction, operation, or maintenance of the Project is a representation by NYSERDA as to the economic or technical feasibility, operational capability, or reliability of the Facility or Project.

§14.13. Requirement to Pay the RPS. NYSERDA's preference is that the Project Sites be paying the RPS Surcharge at the time of application submittal, however, in cases where widespread public benefit will result, Project Sites not currently paying the RPS surcharge may petition to receive dispensation from NYSERDA to be eligible to participate in the program.

#### ARTICLE 15: FREEDOM OF INFORMATION

§15.1. Freedom of Information Law. Contractor acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL," see Public Officers' Law Article 6).

§15.2. Claim of Confidentiality. Information of any tangible form including any document that Contractor wishes to be protected from disclosure to third parties must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

§15.3. Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Contractor and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations (see [www.nyserdera.org/About/NYSERDA.Regulations.pdf](http://www.nyserdera.org/About/NYSERDA.Regulations.pdf)).

IN WITNESS WHEREOF, the Parties hereto do indicate their acceptance of and agreement to the foregoing by causing their duly authorized representatives to execute this Agreement as of the day, month and year first above written.

[Contractor]

NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

By \_\_\_\_\_

By \_\_\_\_\_

Jeffrey J. Pitkin  
Treasurer

Name \_\_\_\_\_

Title \_\_\_\_\_

STATE OF            )  
                          ) SS.:  
COUNTY OF        )

On this \_\_\_\_\_ day of \_\_\_\_\_, 200\_ before me personally came  
, to me known, who, by me duly sworn, did depose and say that deponent resides in \_\_\_\_\_;  
that deponent is the \_\_\_\_\_ of \_\_\_\_\_, the corporation  
described in and which executed the foregoing instrument; and that (s)he executed the same by the  
authority of the Board of Directors or By-Laws of said corporation.

\_\_\_\_\_  
Notary Public

## EXHIBIT A

### STANDARD PERFORMANCE AGREEMENT

#### Maximum Total Incentive

Contractor Name:

Agreement Number:

Project Name:

Incentives	Maximum Possible Incentive
Performance Incentive (Year 1)	
Performance Incentive (Year 2)	
Performance Incentive (Year 3)	
<b>Maximum Total Incentive</b>	

The Maximum Total Incentive, shown on Section FC.6 and FC.7 of the Application Form Worksheet will serve as the basis for the Applicant's request for funding from NYSERDA. Projects accepted into the program will be contracted based on the Maximum Total Incentive (MTI) as calculated by the Application Form Worksheet. NYSERDA will encumber funds based on the Maximum Total Incentive estimate upon execution of the Standard Performance Agreement.

## EXHIBIT B

REVISED 6/98

### STANDARD TERMS AND CONDITIONS FOR ALL NYSERDA AGREEMENTS

(Based on Standard Clauses for New York State Contracts)

The parties to the attached agreement, contract, license, lease, amendment, modification or other agreement of any kind (hereinafter, "the Agreement" or "this Agreement") agree to be bound by the following clauses which are hereby made a part of the Agreement (the word "Contractor" herein refers to any party other than NYSERDA, whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. NON-DISCRIMINATION REQUIREMENTS. In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or Applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is an Agreement for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this Agreement shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this Agreement. If this is a building service Agreement as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this Agreement and forfeiture of all moneys due hereunder for a second subsequent violation.

2. WAGE AND HOURS PROVISIONS. If this is a public work Agreement covered by Article 8 of the Labor Law or a building service Agreement covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law.

3. NON-COLLUSIVE BIDDING REQUIREMENT. In accordance with Section 2878 of the Public Authorities Law, if this Agreement was awarded based upon the submission of bids, Contractor warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to NYSERDA a non-collusive bidding certification on Contractor's behalf.

4. INTERNATIONAL BOYCOTT PROHIBITION. If this Agreement exceeds \$5,000, the Contractor agrees, as a material condition of the Agreement, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the Agreement's execution, such Agreement, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify NYSERDA within five (5) business days of such conviction, determination or disposition of appeal. (See and compare Section 220-f of the Labor Law, Section 139-h of the State Finance Law, and 2 NYCRR 105.4).

5. SET-OFF RIGHTS. NYSERDA shall have all of its common law and statutory rights of set-off. These rights shall include, but not be limited to, NYSERDA's option to withhold for the purposes of set-off any moneys due to the Contractor under this Agreement up to any amounts due and owing to NYSERDA with regard to this Agreement, any other Agreement, including any Agreement for a term commencing prior to the term of this Agreement, plus any amounts due and owing to NYSERDA for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto.

6. CONFLICTING TERMS. In the event of a conflict between the terms of the Agreement (including any and all attachments thereto and amendments thereof) and the terms of this Exhibit C, the terms of this Exhibit C shall control.

7. GOVERNING LAW. This Agreement shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

8. NO ARBITRATION. Disputes involving this Agreement, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily required) without the NYSERDA's written consent, but must, instead, be heard in a court of competent jurisdiction of the State of New York.

9. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon NYSERDA's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify NYSERDA, in writing, of each and every change of address to which service of process can be made. Service by NYSERDA to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

10. CRIMINAL ACTIVITY. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of any allegation previously unknown to it that the Contractor or any of its principals is under indictment for a felony, or has been, within five (5) years prior to submission of the Contractor's proposal to NYSERDA, convicted of a felony, under the laws of the United States or Territory of the United States, then NYSERDA may exercise its stop work right under this Agreement. If subsequent to the effectiveness of this Agreement, NYSERDA comes to know of the fact, previously unknown to it, that Contractor or any of its principals is under such indictment or has been so convicted, then NYSERDA may exercise its right to terminate this Agreement. If the Contractor knowingly withheld information about such an indictment or conviction, NYSERDA may declare the Agreement null and void and may seek legal remedies against the Contractor and its principals. The Contractor or its principals may also be subject to penalties for any violation of law which may apply in the particular circumstances. For a Contractor which is an

association, partnership, corporation, or other organization, the provisions of this paragraph apply to any such indictment or conviction of the organization itself or any of its officers, partners, or directors or members of any similar governing body, as applicable.

11. PERMITS. It is the responsibility of the Contractor to acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers and permissions of every nature necessary to perform the work.

12. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this Agreement will be in accordance with, but not limited to, the specifications and provisions of State Finance Law Section 165 (Use of Tropical Hardwoods), which prohibits purchase and use of tropical hardwoods, unless specifically exempted by NYSERDA.

## EXHIBIT C

### PROMPT PAYMENT POLICY STATEMENT

#### Section 504.1 Purpose and applicability.

(a) The purpose of this Part is to implement section 2880 of the Public Authorities Law by detailing NYSERDA's policy for making payment promptly on amounts properly due and owing by NYSERDA under contracts. This Part constitutes NYSERDA's prompt payment policy statement as required by that section.

(b) This Part generally applies to payments due and owing by NYSERDA to a person or business in the private sector under a contract it has entered into with NYSERDA on or after May 1, 1988. This Part does not apply to payments due and owing:

- (1) under the Eminent Domain Procedure Law;
- (2) as interest allowed on judgments rendered by a court pursuant to any provision of law except Section 2880 of the Public Authorities Law;
- (3) to the Federal government; to any state agency or its instrumentalities; to any duly constituted unit of local government, including but not limited to counties, cities, towns, villages, school districts, special districts or any of their related instrumentalities; to any other public authority or public benefit corporation; or to its employees when acting in, or incidental to, their public employment capacity;
- (4) if NYSERDA is exercising a legally authorized set-off against all or part of the payment;  
or
- (5) if other State or Federal law or rule or regulation specifically requires otherwise.

Section 504.2 Definitions. As used in this Part, the following terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

- (a) "NYSERDA" means the New York State Energy Research and Development Authority.
- (b) "Contract" means an enforceable agreement entered into between NYSERDA and a contractor.
- (c) "Contractor" means any person, partnership, private corporation, or association:
  - (1) selling materials, equipment or supplies or leasing property or equipment to NYSERDA pursuant to a contract;
  - (2) constructing, reconstructing, rehabilitating or repairing buildings, highways or other improvements for, or on behalf of, NYSERDA pursuant to a contract; or
  - (3) rendering or providing services to NYSERDA pursuant to a contract.

(d) "Date of payment" means the date on which NYSERDA requisitions a check from its statutory fiscal agent, the Department of Taxation and Finance, to make a payment.

(e) "Designated payment office" means the Office of NYSERDA's Controller, located at 17 Columbia Circle, Albany, New York 12203-6399.

(f) "Payment" means provision by NYSERDA of funds in an amount sufficient to satisfy a debt properly due and owing to a contractor and payable under all applicable provisions of a contract to which this Part applies and of law, including but not limited to provisions for retained amounts or provisions which may limit NYSERDA's power to pay, such as claims, liens, attachments or judgments against the contractor which have not been properly discharged, waived or released.

(g) "Prompt payment" means a payment within the time periods applicable pursuant to Sections 504.3 through 504.5 of this Part in order for NYSERDA not to be liable for interest pursuant to Section 504.6.

(h) "Payment due date" means the date by which the date of payment must occur, in accordance with the provisions of Sections 504.3 through 504.5 of this Part, in order for NYSERDA not to be liable for interest pursuant to Section 506.

(i) "Proper invoice" means a written request for a contract payment that is submitted by a contractor setting forth the description, price or cost, and quantity of goods, property or services delivered or rendered, in such form, and supported by such other substantiating documentation, as NYSERDA may reasonably require, including but not limited to any requirements set forth in the contract; and addressed to NYSERDA's Controller, marked "Attention: Accounts Payable," at the designated payment office.

(j) "Receipt of an invoice" means:

(i) if the payment is one for which an invoice is required, the later of:

(a) the date on which a proper invoice is actually received in the designated payment office during normal business hours; or

(b) the date by which, during normal business hours, NYSERDA has actually received all the purchased goods, property or services covered by a proper invoice previously received in the designated payment office.

(ii) if a contract provides that a payment will be made on a specific date or at a predetermined interval, without having to submit a written invoice the 30th calendar day, excluding legal holidays, before the date so specified or predetermined.

(2) For purposes of this subdivision, if the contract requires a multifaceted, completed or working system, or delivery of no less than a specified quantity of goods, property or services and only a portion of such systems or less than the required goods, property or services are working, completed or delivered, even though the Contractor has invoiced NYSERDA for the portion working, completed or delivered, NYSERDA will not be in receipt of an invoice until the specified minimum amount of the systems, goods, property or services are working, completed or delivered.

(k) "Set-off" means the reduction by NYSERDA of a payment due a contractor by an amount equal to the amount of an unpaid legally enforceable debt owed by the contractor to NYSERDA.

Section 504.3 Prompt payment schedule. Except as otherwise provided by law or regulation or in Sections 504.4 and 504.5 of this Part, the date of payment by NYSERDA of an amount properly due and owing under a contract shall be no later than 30 calendar days, excluding legal holidays, after such receipt.

Section 504.4 Payment procedures.

(a) Unless otherwise specified by a contract provision, a proper invoice submitted by the contractor to the designated payment office shall be required to initiate payment for goods, property or services. As soon as any invoice is received in the designated payment office during normal business hours, such invoice shall be date-stamped. The invoice shall then promptly be reviewed by NYSERDA.

(b) NYSERDA shall notify the contractor within 15 calendar days after receipt of an invoice of:

- (1) any defects in the delivered goods, property or services;
- (2) any defects in the invoice; and
- (3) suspected improprieties of any kind.

(c) The existence of any defects or suspected improprieties shall prevent the commencement of the time period specified in Section 504.3 until any such defects or improprieties are corrected or otherwise resolved.

(d) If NYSERDA fails to notify a contractor of a defect or impropriety within the fifteen calendar day period specified in subdivision (b) of this section, the sole effect shall be that the number of days allowed for payment shall be reduced by the number of days between the 15th day and the day that notification was transmitted to the contractor. If NYSERDA fails to provide reasonable grounds for its contention that a defect or impropriety exists, the sole effect shall be that the payment due date shall be calculated using the original date of receipt of an invoice.

(e) In the absence of any defect or suspected impropriety, or upon satisfactory correction or resolution of a defect or suspected impropriety, NYSERDA shall make payment, consistent with any such correction or resolution and the provisions of this Part.

Section 504.5 Exceptions and extension of payment due date. NYSERDA has determined that, notwithstanding the provisions of Sections 504.3 and 504.4 of this Part, any of the following facts or circumstances, which may occur concurrently or consecutively, reasonably justify extension of the payment due date:

(a) If the case of a payment which a contract provides will be made on a specific date or at a predetermined interval, without having to submit a written invoice, if any documentation, supporting data, performance verification, or notice specifically required by the contract or other State or Federal mandate has not been submitted to NYSERDA on a timely basis, then the payment due date shall be extended by the number of calendar days from the date by which all such matter was to be submitted to NYSERDA and the date when NYSERDA has actually received such matter.

(b) If an inspection or testing period, performance verification, audit or other review or documentation independent of the contractor is specifically required by the contract or by other State or Federal mandate, whether to be performed by or on behalf of NYSERDA or another entity, or is specifically permitted by the contract or by other State or Federal provision and NYSERDA or other entity with the right to do so elects to have such activity or documentation undertaken, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when any such activity or documentation has been completed, NYSERDA has actually received the results of such activity or documentation conducted by another entity, and any deficiencies identified or issues raised as a result of such activity or documentation have been corrected or otherwise resolved.

(c) If an invoice must be examined by a State or Federal agency, or by another party contributing to the funding of the contract, prior to payment, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when the State or Federal agency, or other contributing party to the contract, has completed the inspection, advised NYSERDA of the results of the inspection, and any deficiencies identified or issues raised as a result of such inspection have been corrected or otherwise resolved.

(d) If appropriated funds from which payment is to be made have not yet been appropriated or, if appropriated, not yet been made available to NYSERDA, then the payment due date shall be extended by the number of calendar days from the date of receipt of an invoice to the date when such funds are made available to NYSERDA.

Section 504.6 Interest eligibility and computation. If NYSERDA fails to make prompt payment, NYSERDA shall pay interest to a contractor on the payment when such interest computed as provided herein is equal to or more than ten dollars. Interest shall be computed and accrue at the daily rate in effect on the date of payment, as set by the New York State Tax Commission for corporate taxes pursuant to Section 1096(e)(1) of the Tax Law. Interest on such a payment shall be computed for the period beginning on the day after the payment due date and ending on the date of payment.

Section 504.7 Sources of funds to pay interest. Any interest payable by NYSERDA pursuant to this Part shall be paid only from the same accounts, funds, or appropriations that are lawfully available to make the related contract payment.

Section 504.8 Incorporation of prompt payment policy statement into contracts. The provisions of this Part in effect at the time of the creation of a contract shall be incorporated into and made a part of such contract and shall apply to all payments as they become due and owing pursuant to the terms and conditions of such contract, notwithstanding that NYSERDA may subsequently amend this Part by further rulemaking.

Section 504.9 Notice of objection. Unless a different procedure is specifically prescribed in a contract, a contractor may object to any action taken by NYSERDA pursuant to this Part which prevents the commencement of the time in which interest will be paid by submitting a written notice of objection to NYSERDA. Such notice shall be signed and dated and concisely and clearly set forth the basis for the objection and be addressed to the Vice President, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York 12203-6399. The Vice President of NYSERDA, or his or her designee, shall review the objection for purposes of affirming or modifying NYSERDA's action. Within 15 working days of the receipt of the objection, the Vice President, or his or her designee, shall notify the contractor either that NYSERDA's action is affirmed or that it is modified

or that, due to the complexity of the issue, additional time is needed to conduct the review; provided, however, in no event shall the extended review period exceed 30 working days.

Section 504.10 Judicial Review. Any determination made by NYSERDA pursuant to this Part which prevents the commencement of the time in which interest will be paid is subject to judicial review in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Such proceedings shall only be commenced upon completion of the review procedure specified in Section 504.9 of this Part or any other review procedure that may be specified in the contract or by other law, rule, or regulation.

Section 504.11 Court action or other legal processes.

(a) Notwithstanding any other law to the contrary, the liability of NYSERDA to make an interest payment to a contractor pursuant to this Part shall not extend beyond the date of a notice of intention to file a claim, the date of a notice of a claim, or the date commencing a legal action for the payment of such interest, whichever occurs first.

(b) With respect to the court action or other legal processes referred to in subdivision (a) of this section, any interest obligation incurred by NYSERDA after the date specified therein pursuant to any provision of law other than Public Authorities Law Section 2880 shall be determined as prescribed by such separate provision of law, shall be paid as directed by the court, and shall be paid from any source of funds available for that purpose.

Section 504.12 Amendments. These regulations may be amended by resolution of NYSERDA, provided that the Chair, upon written notice to the other Members of NYSERDA, may from time to time promulgate nonmaterial amendments of these regulations.

EXHIBIT D

Final completed Application Form, and Appendices C and D  
of NYSERDA PON 2157 Small Fuel Cell Program

**Appendix C: PON 2157**  
**Small Fuel Cell Performance Measurement Form**

For use in assisting NYSERDA with determining eligibility for, and magnitude of performance payment(s)

<p><b><u>Project Information</u></b> Project Name: _____ Contractor: _____ NYSERDA Agmt #: _____ Commissioning Date: _____</p> <p><b><u>Fuel Cell Information</u></b> Make: _____ Model: _____ Unit Nameplate: _____ kW</p>	<p><b><u>Site Information</u></b> Host Site: _____ Street Add.: _____ City, State Zip: _____ Fuel Cell Location: _____</p> <p># of Units: _____ Total Nameplate: _____ kW Est. Annual Production: _____ MWh/yr</p>
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**Fuel Cell Output Monitoring**

Initial Meter Reading at Commissioning: _____	
Host Site Auth. Signatory: _____	Date: _____
NYSERDA Representative: _____	Date: _____
Proj. Developer (if applic.): _____	Date: _____

Meter Reading at end of Year 1: _____	
Kilowatt Hours Produced during year 1: _____ ( $\Delta$ meter reading from Initial)	
Host Site Auth. Signatory: _____	Date: _____
NYSERDA Representative: _____	Date: _____
Proj. Developer (if applic.): _____	Date: _____

Meter Reading at end of Year 2: _____	
Kilowatt Hours Produced during year 2: _____ ( $\Delta$ meter reading from Year 1)	
Host Site Auth. Signatory: _____	Date: _____
NYSERDA Representative: _____	Date: _____
Proj. Developer (if applic.): _____	Date: _____

Meter Reading at end of Year 3: _____	
Kilowatt Hours Produced during year 3: _____ ( $\Delta$ meter reading from Year 2)	
Host Site Auth. Signatory: _____	Date: _____
NYSERDA Representative: _____	Date: _____
Proj. Developer (if applic.): _____	Date: _____

## APPENDIX D: PON 2157 SMALL FUEL CELL PROGRAM PROJECT INSTALLATION REPORT REQUIREMENTS

The Project Installation Report reflects the installed and commissioned conditions of the project. Any deviations from the proposed design in the Application Package must be explained in the Project Installation Report. As-Built Drawings of the system must also be included in the Report.

### SUBMITTAL AND NOTIFICATION SCHEDULE

After the system has been installed and commissioned, as provided for in the approved Performance Measurement Plan, the Contractor must submit a Project Installation Report to NYSERDA. The Contractor can begin the clock for the annual performance period immediately following acceptance of the Project Installation Report, or can delay the start of the clock by a maximum of 4 months following Installation and Commissioning. Upon the start of the clock, NYSERDA will begin to compile the quarterly performance data being submitted to the NYSERDA Project Manager. This will initiate the first year's (consecutive twelve (12) months) performance measurement period. Within 60 days after its receipt of the Project Installation Report, NYSERDA will notify the Contractor in writing as to whether or not it has been approved. Approval of the Project Installation Report, however, is contingent upon the Contractor scheduling and NYSERDA or NYSERDA's agent conducting a post-installation inspection of the projects site within the time frames specified in the following section.

### POST-INSTALLATION SITE INSPECTION

The purpose of the Post-Installation Site Inspection is to confirm the information provided in the Project Installation Report is accurate, and that the system specified in the approved Application Package has been properly installed and successfully commissioned (i.e., operating for at least one month according to its design intent). NYSERDA or NYSERDA's agent will contact the Contractor to schedule the Post-Installation Site Inspection, which should be completed within 30 days of NYSERDA's receipt of the Project Installation Report. If the inspection is not completed within this timeframe, the Project Installation Report review process will be suspended until the inspection is performed. The Contractor or a representative must be present during the inspection.

### PROJECT INSTALLATION REPORT APPROVAL OR REJECTION

NYSERDA will review the Project Installation Report and determine whether to approve it as submitted, approve it with minor revisions, or reject it. NYSERDA will review the Report to ensure the following:

- The project meets all of the CST Fuel Cell Program requirements.
- The Project Installation Report contains complete and accurate information.
- The equipment listed in the Application Package has been installed or the Contractor has explained any variance, and NYSERDA determines a willingness to accept such variance.

NYSERDA will work with the Contractor on making minor revisions to the Project Installation Report as necessary. If NYSERDA finds the Project Installation Report to be complete but incorrect, NYSERDA may make an adjustment to the performance incentive payment estimates and will notify the Contractor of those changes in writing.

## Appendix E: PON 2157 Small Fuel Cell Program List of Eligible Commercially Available Stationary Fuel Cells by Manufacturer Make and Model

Manufacturer Name and Address	Fuel Cell Model Number (3)	Fuel Cell Type <i>(i.e. PEM, SOFC)</i>	Nameplate Rated Output	Manufacturer Contact Information
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-524-240-400	PEM	5kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-524-240	PEM	5kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-524-240-415	PEM	5kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-1024-240-400	PEM	10kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-1024-240	PEM	10kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-1024-240-415	PEM	10kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-548-240	PEM	5kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> 140 Blue Ravine Road, Folsom, CA 95630 (1)	FPS-548-240-405	PEM	5kW	Christopher Radley (916) 458 9409

*For instructions on how to have a particular stationary fuel cell added to the eligibility list, please see Appendix F of PON 2157*

**Footnote 1:** Fully eligible, fuel cells meet all eligibility requirements of PON 2157 Small Fuel Cell Program

## Appendix E (continued): PON 2157 Small Fuel Cell Program List of Eligible Commercially Available Stationary Fuel Cells by Manufacturer Make and Model

Manufacturer Name and Address	Fuel Cell Model Number (3)	Fuel Cell Type <i>(i.e. PEM, SOFC)</i>	Nameplate Rated Output	Manufacturer Contact Information
<b>Altery Systems</b> (1) 140 Blue Ravine Road, Folsom, CA 95630	FPS-548-240-415	PEM	5kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> (1) 140 Blue Ravine Road, Folsom, CA 95630	FPS-1048-240	PEM	10kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> (1) 140 Blue Ravine Road, Folsom, CA 95630	FPS-1048-240-405	PEM	10kW	Christopher Radley (916) 458 9409
<b>Altery Systems</b> (1) 140 Blue Ravine Road, Folsom, CA 95630	FPS-1048-240-415	PEM	10kW	Christopher Radley (916) 458 9409

*For instructions on how to have a particular stationary fuel cell added to the eligibility list, please see Appendix F of PON 2157*

**Footnote 1:** Fully eligible, fuel cells meet all eligibility requirements of PON 2157 Small Fuel Cell Program



State Environmental Quality Review  
**SHORT ENVIRONMENTAL ASSESSMENT FORM**  
For UNLISTED ACTIONS Only

**PART I - PROJECT INFORMATION (To be completed by Applicant or Project Sponsor)**

1. APPLICANT/SPONSOR	2. PROJECT NAME
3. PROJECT LOCATION: Municipality _____ County _____	
4. PRECISE LOCATION (Street address and road intersections, prominent landmarks, etc., or provide map)	
5. PROPOSED ACTION IS: <input type="checkbox"/> New <input type="checkbox"/> Expansion <input type="checkbox"/> Modification/alteration	
6. DESCRIBE PROJECT BRIEFLY:	
7. AMOUNT OF LAND AFFECTED: Initially _____ acres    Ultimately _____ acres	
8. WILL PROPOSED ACTION COMPLY WITH EXISTING ZONING OR OTHER EXISTING LAND USE RESTRICTIONS? <input type="checkbox"/> Yes <input type="checkbox"/> No    If No, describe briefly	
9. WHAT IS PRESENT LAND USE IN VICINITY OF PROJECT? <input type="checkbox"/> Residential <input type="checkbox"/> Industrial <input type="checkbox"/> Commercial <input type="checkbox"/> Agriculture <input type="checkbox"/> Park/Forest/Open Space <input type="checkbox"/> Other Describe:	
10. DOES ACTION INVOLVE A PERMIT APPROVAL, OR FUNDING, NOW OR ULTIMATELY FROM ANY OTHER GOVERNMENTAL AGENCY (FEDERAL, STATE OR LOCAL)? <input type="checkbox"/> Yes <input type="checkbox"/> No    If Yes, list agency(s) name and permit/approvals:	
11. DOES ANY ASPECT OF THE ACTION HAVE A CURRENTLY VALID PERMIT OR APPROVAL? <input type="checkbox"/> Yes <input type="checkbox"/> No    If Yes, list agency(s) name and permit/approvals:	
12. AS A RESULT OF PROPOSED ACTION WILL EXISTING PERMIT/APPROVAL REQUIRE MODIFICATION? <input type="checkbox"/> Yes <input type="checkbox"/> No	
I CERTIFY THAT THE INFORMATION PROVIDED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE Applicant/sponsor name: _____ Date: _____ Signature: _____	

**If the action is in the Coastal Area, and you are a state agency, complete the Coastal Assessment Form before proceeding with this assessment**

**PART II - IMPACT ASSESSMENT (To be completed by Lead Agency)**

A. DOES ACTION EXCEED ANY TYPE I THRESHOLD IN 6 NYCRR, PART 617.4? If yes, coordinate the review process and use the FULL EAF. <input type="checkbox"/> Yes <input type="checkbox"/> No	
B. WILL ACTION RECEIVE COORDINATED REVIEW AS PROVIDED FOR UNLISTED ACTIONS IN 6 NYCRR, PART 617.6? If No, a negative declaration may be superseded by another involved agency. <input type="checkbox"/> Yes <input type="checkbox"/> No	
C. COULD ACTION RESULT IN <b>ANY</b> ADVERSE EFFECTS ASSOCIATED WITH THE FOLLOWING: (Answers may be handwritten, if legible)	
C1. Existing air quality, surface or groundwater quality or quantity, noise levels, existing traffic pattern, solid waste production or disposal, potential for erosion, drainage or flooding problems? Explain briefly:	
C2. Aesthetic, agricultural, archaeological, historic, or other natural or cultural resources; or community or neighborhood character? Explain briefly:	
C3. Vegetation or fauna, fish, shellfish or wildlife species, significant habitats, or threatened or endangered species? Explain briefly:	
C4. A community's existing plans or goals as officially adopted, or a change in use or intensity of use of land or other natural resources? Explain briefly:	
C5. Growth, subsequent development, or related activities likely to be induced by the proposed action? Explain briefly:	
C6. Long term, short term, cumulative, or other effects not identified in C1-C5? Explain briefly:	
C7. Other impacts (including changes in use of either quantity or type of energy)? Explain briefly:	
D. WILL THE PROJECT HAVE AN IMPACT ON THE ENVIRONMENTAL CHARACTERISTICS THAT CAUSED THE ESTABLISHMENT OF A CRITICAL ENVIRONMENTAL AREA (CEA)? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain briefly:	
E. IS THERE, OR IS THERE LIKELY TO BE, CONTROVERSY RELATED TO POTENTIAL ADVERSE ENVIRONMENTAL IMPACTS? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain briefly:	

**PART III - DETERMINATION OF SIGNIFICANCE (To be completed by Agency)**

**INSTRUCTIONS:** For each adverse effect identified above, determine whether it is substantial, large, important or otherwise significant. Each effect should be assessed in connection with its (a) setting (i.e. urban or rural); (b) probability of occurring; (c) duration; (d) irreversibility; (e) geographic scope; and (f) magnitude. If necessary, add attachments or reference supporting materials. Ensure that explanations contain sufficient detail to show that all relevant adverse impacts have been identified and adequately addressed. If question D of Part II was checked yes, the determination of significance must evaluate the potential impact of the proposed action on the environmental characteristics of the CEA.

<input type="checkbox"/> Check this box if you have identified one or more potentially large or significant adverse impacts which <b>MAY</b> occur. Then proceed directly to the FULL EAF and/or prepare a positive declaration.	
<input type="checkbox"/> Check this box if you have determined, based on the information and analysis above and any supporting documentation, that the proposed action <b>WILL NOT</b> result in any significant adverse environmental impacts <b>AND</b> provide, on attachments as necessary, the reasons supporting this determination.	
_____	_____
Name of Lead Agency	Date
_____	_____
Print or Type Name of Responsible Officer in Lead Agency	Title of Responsible Officer
_____	_____
Signature of Responsible Officer in Lead Agency	Signature of Preparer (If different from responsible officer)