

*The Department of Energy has opted to utilize the following agreement for Designated Non-Proprietary User Facilities transactions. Because these transactions are widespread across Departmental facilities, uniformity in agreement terms is desirable. Except for the *** provisions, minor modifications to the terms of this agreement may be made by CONTRACTOR, but any changes to the *** provisions or substantive changes to the non *** provisions will require approval by the DOE Contracting Officer, WHICH WILL LIKELY DELAY YOUR ACCESS TO THE USER FACILITY. In instances where DOE Contracting Officer approval for substantive changes cannot be obtained, Strategic Partnership Projects (SPPs) and Cooperative Research and Development Agreements (CRADAs) may be more appropriate due to the increased flexibility such agreements afford. Where this agreement is to be used as an umbrella agreement for multiple transactions it may be modified to reflect such usage.*

Non-Proprietary User Agreement

No. FP0000

BETWEEN

The Regents of the University of California

("CONTRACTOR")

Facility Operator of Ernest Orlando Lawrence Berkeley National Laboratory (hereinafter "Laboratory") under U.S. Department of Energy ("DOE") Contract No. DE-AC02-05CH11231

AND

("USER")

(Collectively, the "Parties")

The obligations of the above-identified DOE Contractor may be transferred to and shall apply to any successor in interest to said Contractor continuing the operation of the DOE Non-Proprietary User Facility involved in this User Agreement.

ARTICLE I. FACILITIES AND SCOPE OF WORK

CONTRACTOR shall make available to employees, consultants and representatives of USER (hereinafter called "USER Personnel") the Joint Genome Institute (hereinafter "JGI" or "User Facility"), which may include equipment, services, information and other material, with or without Laboratory scientist collaboration, for purposes as described in individual proposals approved by said User Facility or by DOE for execution at the User Facility and described in an Appendix which is attached to and made a part of this Agreement. In each Appendix, the Parties will agree to a Scope of Work that shall set forth the technical scope of work, including a biological materials description and deliverables (hereinafter, the "Work"), to be performed pursuant to this Agreement and can be modified as necessary without amending this Agreement. Additional future Appendices under this Agreement may be submitted by USER for additional purposes and Work. Such additional Appendices will be considered to be part of this Agreement upon acceptance by CONTRACTOR. The Work shall not be considered proprietary information and shall be publicly releasable. The Parties agree that an initial abstract of the Work to be performed shall be a deliverable under this Agreement.

IF THE USER REQUIRES ACCESS TO OTHER FACILITIES AT THE LABORATORY, A DIFFERENT AGREEMENT WILL NEED TO BE EXECUTED.

ARTICLE II. TERM OF THE AGREEMENT

This Agreement shall have a term of five (5) years from the effective date. The term of this Agreement shall be effective as of the date on which it is signed by the last of the Parties. Unless terminated by either Party in accordance with Article XVI., or as directed by DOE, this Agreement shall automatically renew for additional five-year terms.

ARTICLE III. COST

Each Party will bear its own costs and expenses associated with this Agreement. No money will be transferred to or from either Party as consideration, in whole or in part, for this Agreement.

ARTICLE IV. ADMISSION REQUIREMENTS—JGI SITE ACCESS

If USER Personnel consult with JGI staff on site, USER Personnel must complete all JGI Site Access documentations and requirements. USER Personnel must comply with all applicable safety, health, access to information, security and environmental requirements of the JGI.

ARTICLE V. PROPERTY AND MATERIALS***

- A. If USER needs to furnish equipment, tooling, test apparatus, or assist in performance of sequencing tasks at the JGI, the Agreement or Appendix will be amended accordingly.
- B. The Parties understand that under the Work, materials may be exchanged, including without limitation, biological materials that can be replicated or reproduced, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cells, etc. While every effort at JGI will be made to properly handle the materials, USER acknowledges that any material supplied by USER or to the USER may be damaged, consumed or lost. USER materials (including biological materials, vectors, nucleotide constructs, residues and/or other contaminated material) remaining at JGI after performance of the Work or analysis will be removed in their then condition and handled in accordance with the Work.
- C. USER asserts that it has, or has obtained from its collaborators for the Work, either title or sufficient legal rights in the material, sequences, and information to be provided to the JGI in accordance with the Work and this User Agreement, including that there are no third party intellectual property rights in the materials or sequences that would be infringed or misappropriated under the Work.

ARTICLE VI. SCHEDULING***

USER understands that CONTRACTOR will have sole responsibility and discretion for allocating and scheduling usage of the User Facilities and equipment needed for or involved under this Agreement.

ARTICLE VII. INDEMNITY AND LIABILITY***

A. Personnel Relationships

USER shall be responsible for the acts or omissions of its Personnel.

B. Product Liability

To the extent permitted by United States (“US”) and US State law of the USER, if USER utilizes the Work derived from this Agreement in the making, using, or selling of a product, process or service, then USER hereby agrees to hold harmless and indemnify CONTRACTOR and the US Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, as a

result of or arising out of such utilization of the Work by or on behalf of USER, its assignees or licensees.

C. General Indemnity

To the extent permitted by US and US State law of the USER, USER hereby agrees to indemnify and hold harmless CONTRACTOR and the US Government, their officers, agents and employees from any and all liability, claims, damages, costs and expenses, including attorney fees, for injury to or death of persons, or damage to or destruction of property, to the extent such liability, claims, or damages is caused by or contributed to the negligence or intentional misconduct of USER or its employees or representatives during the performance of the Work under this Agreement.

D. Patent and Copyright Indemnity—Limited

To the extent permitted by US and US State law of the USER, USER shall fully indemnify the US Government and CONTRACTOR and their officers, agents, and employees for infringement of any United States patent or copyright arising out of any acts required or directed or performed by USER under the Agreement to the extent such acts are not normally performed at the User Facility.

E. To the extent permitted by US and US State law of the USER, USER hereby agrees that all indemnifications provided by USER in the above paragraphs B, C, and D also include the CONTRACTOR vendors and suppliers of any CONTRACTOR biological materials generated in the course of the Work.

F. The liability and indemnity provisions in paragraphs B, C, D and E above shall not apply unless USER shall have been informed as soon as practicable by CONTRACTOR or the US Government of the suit or action alleging such liability or infringement, and such indemnity shall not apply to a claimed liability infringement that is settled without the consent of USER unless required by a court of competent jurisdiction.

G. General Disclaimer -

THE GOVERNMENT AND CONTRACTOR MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE CONDITIONS OF THE USER FACILITY FURNISHED HEREUNDER. IN ADDITION, THE GOVERNMENT, CONTRACTOR AND USER MAKE NO EXPRESS OR IMPLIED WARRANTY AS TO THE RESEARCH OR ANY INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DEVELOPED UNDER THIS AGREEMENT, OR THE OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE RESEARCH OR RESULTING PRODUCT; THAT THE GOODS, SERVICES, MATERIALS, PRODUCTS, PROCESSES, INFORMATION, OR DATA TO BE FURNISHED HEREUNDER WILL ACCOMPLISH INTENDED RESULTS OR ARE SAFE FOR ANY PURPOSE INCLUDING THE INTENDED PURPOSE; OR THAT ANY OF THE ABOVE WILL NOT INTERFERE WITH PRIVATELY OWNED RIGHTS OF OTHERS. THE GOVERNMENT, CONTRACTOR AND/OR USER SHALL NOT BE LIABLE FOR SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ATTRIBUTED TO USE OF SUCH FACILITIES, RESEARCH OR RESULTING PRODUCT, INTELLECTUAL PROPERTY, GENERATED INFORMATION, OR PRODUCT MADE OR DELIVERED UNDER THIS AGREEMENT.

ARTICLE VIII. PATENT RIGHTS***

This Patent Rights clause, which is binding on the Parties, shall cover Work approved in accordance with JGI requirements.

If research subject to this Agreement is performed by the USER under a federal agency grant or contract, then, to the extent that the patent rights provisions in the USER's grant or contract with a federal agency are inconsistent with the terms and conditions contained in this Article, the terms and conditions of the grant or contract shall apply.

A. Definitions

1. "Subject Invention" means any invention or discovery conceived or first actually reduced to practice in the course of or under this Agreement.
2. "USER Invention" means any Subject Invention of USER.
3. "CONTRACTOR Invention" means any Subject Invention of CONTRACTOR.
4. "Patent Counsel" means the DOE Counsel for Intellectual Property assisting the DOE Contracting activity.

B. Subject Inventions

CONTRACTOR and USER agree to disclose their Subject Inventions to each other, concurrent with reporting such Subject Inventions to DOE.

C. CONTRACTOR's Rights

Except as provided below in the case of joint inventions, CONTRACTOR Inventions will be governed by the provisions of CONTRACTOR'S Prime Contract for operation of the User Facility.

D. USER's Rights

Subject to the provisions herein, USER may elect title to any USER Invention and in any resulting patent secured by USER within one year of reporting the subject invention to DOE. The USER shall file a US patent application within a reasonable period of time. Where appropriate, the filing of patent applications by USER is subject to DOE security regulations and requirements.

E. Joint Inventions

For Subject Inventions conceived or first actually reduced to practice under this Agreement that are joint Subject Inventions made by CONTRACTOR and USER, each Party shall have the option to elect and retain title to its undivided rights in such joint Subject Inventions.

F. Rights of Government

1. USER agrees to timely assign to the Government, if requested, the entire right, title, and interest in any country to each USER Invention where USER:
 - a. Does not elect to retain such rights; or
 - b. Fails to timely have a patent application filed in that country on the USER Invention or decides not to continue prosecution or not to pay the maintenance fees covering the Invention; or
 - c. At any time, no longer desires to retain title.
2. USER shall provide the Government a copy of any application filed by USER promptly after such application is filed, including its serial number and filing date.

3. USER hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States Government the USER Invention made under said project throughout the world.
4. USER acknowledges that the DOE has certain March-in Rights to any USER Inventions elected by the USER in accordance with 48 C.F.R. 27.304-1(g) and that the USER is subject to the requirements with respect to preference for U.S. industry pursuant to 35 U.S.C. § 204 to any USER Inventions elected by the USER.
5. The USER agrees to include, within the specification of any U.S. patent applications and any patent issuing thereon covering a USER Invention, the following statement: "The Government has rights in this invention pursuant to a User Agreement (specify number) between (USER name) and The Regents of the University of California, which manages and operates Ernest Orlando Lawrence Berkeley National Laboratory for the US Department of Energy."
6. USER agrees to submit on request, periodic reports to DOE no more frequently than annually on the utilization of USER Inventions or on efforts to obtain such utilization that are being made by USER or its licensees or assignees.
7. **Facilities License**
USER agrees to and does hereby grant to the Government a nonexclusive, nontransferable, irrevocable, paid-up license in and to any inventions or discoveries, regardless of when conceived or actually reduced to practice or acquired by USER, which are incorporated in the User Facility as a result of this Agreement to such an extent that the User Facility is not restored to the condition existing prior to the Agreement (1) to practice or to have practiced by or for the Government at the User Facility, and (2) to transfer such licenses with the transfer of that User Facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

G. Invention Report and Election

USER shall furnish the Patent Counsel a written report concerning each USER Invention within six months after conception or first actual reduction to practice, whichever occurs first. If USER wishes to elect title to the Invention, a notice of election should be submitted with the report or within one year of such date of reporting.

ARTICLE IX. RIGHTS IN TECHNICAL DATA***

A. Definitions

1. "Technical Data" means recorded information regardless of form or characteristic, of a scientific or technical nature. Technical Data as used herein does not include financial reports, costs analyses, and other information incidental to Agreement administration.
2. "Proprietary Data" means Technical Data which embody trade secrets developed at private expense, outside of this Agreement.
3. "Unlimited Rights" means right to use, duplicate, or disclose Technical Data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of Rights

The US Government and the USER shall have Unlimited Rights in Technical Data first produced or specifically used in the performance of this Agreement. USER may request the data when generated if practical. Sequences and related information that will be posted to GenBank or otherwise be made

publicly available may be used by anyone, including CONTRACTOR and USER, for any purpose, and may result in intellectual property rights accruing to such person or entity.

C. Deliverables

1. USER agrees to furnish to DOE or CONTRACTOR those data, if any, which are (a) specified to be delivered in Appendices, (b) essential to the performance of Work by DOE or CONTRACTOR personnel or (c) necessary for the health and safety of such personnel in the performance of the Work. Any data furnished to DOE or CONTRACTOR shall be deemed to have been delivered with Unlimited Rights.
2. Upon completion or termination of the project, USER agrees to deliver to DOE and CONTRACTOR a nonproprietary report describing the Work performed under this Agreement.

D. Legal Notice

The following legal notice shall be affixed to each report or publication resulting from this Agreement which may be distributed by USER:

DISCLAIMER NOTICE

This document contains results from work performed under the auspices of the U.S. Department of Energy's Office of Science, Biological and Environmental Research Program and by the University of California, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory. Neither CONTRACTOR, DOE, the U.S. Government, nor any person acting on their behalf: (a) make any warranty or representation, express or implied, with respect to the information contained in this document; or (b) assume any liabilities with respect to the use of, or damages resulting from the use of any information contained in the document.

E. Copyrighted Material

1. USER agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:
 - a. A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use, and dispose of and to authorize others so to do, all copyrightable material first produced or composed in the performance of this Agreement by USER, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and
 - b. A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by USER in the performance of this Agreement but which are incorporated in the material furnished or delivered under the Agreement, provided that such license shall be only to the extent USER now has, or prior to completion or final settlement of the Agreement may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.
2. USER agrees that it will not knowingly include in any report to DOE or deliverable under the Work, any copyrightable material furnished or delivered under this Agreement without a license as provided for in subparagraph 1(b) hereof, or without the consent of the copyright owner, unless it obtains specific written approval of the DOE Contracting Officer for the inclusion of such copyrighted materials.

F. Disclosure of Proprietary Data

The USER shall not send or disclose Proprietary Data or material to the User Facility except at USER's own risk. Any such data or material, regardless how it is marked, shall be deemed Technical Data and CONTRACTOR shall have Unlimited Rights in the data.

G. Release of Biological Materials Information

1. Sequencing Data: The permitted use of the materials will be limited to that which is described in the Work. Substantive changes in the Work will require execution of a new Appendix. JGI will not transfer the biological materials it receives for sequencing to other parties without the consent of USER. Sequence data from the biological materials JGI receives for sequencing will be posted to GenBank or will otherwise be made publicly available for use by anyone for any purpose. Such release of sequencing data to Genbank will not be delayed unless as otherwise stated in the JGI Data Release Policy. The USER understands that the JGI cannot limit how the sequence data will be ultimately used after posting to GenBank.
2. Synthesis Data: Upon project completion or end date, whichever is later, detailed information on the biological materials created, synthesized and generated in the course of the Work will be posted to GenBank and/or will otherwise be made publicly available to the public subject to the terms and conditions of an executed Material Transfer Agreement. Such release of sequencing data or the biological materials will not be delayed unless as otherwise stated in the JGI Data and Genetic Resource Release Policy. The USER understands that the JGI cannot limit how the synthesis data will be ultimately used after posting to GenBank.

ARTICLE X. LABORATORY SITE ACCESS, SAFETY AND HEALTH*--RESERVED**

ARTICLE XI. PERSONNEL RELATIONSHIPS*--RESERVED**

ARTICLE XII. EXPORT CONTROLS***

USER acknowledges that the export of goods, material or Technical Data may require some form of export control license from the US Government and that failure to obtain such export control license may result in criminal liability under the laws of the United States.

ARTICLE XIII. PUBLICATIONS***

- A. USER and CONTRACTOR will provide each other copies of articles or any publication of information generated pursuant to this Agreement for review and comment 14 days prior to publication.
- B. USER will not use the name of CONTRACTOR or the US Government or their employees in any promotional activity, such as advertisements, with reference to any product or service resulting from this Agreement, without prior written approval of the US Government and CONTRACTOR.

C. Acknowledgements

1. Any external publication using data or biological materials and/or resulting from a joint JGI-EMSL proposal should contain the following statement in the acknowledgments:

“(A portion of) This research was performed under the JGI-EMSL Collaborative Science Initiative and used resources at the DOE Joint Genome Institute and the Environmental Molecular Sciences Laboratory, which are DOE Office of Science User Facilities. Both facilities

are sponsored by the Office of Biological and Environmental Research and operated under Contract Nos. DE-AC02-05CH11231 (JGI) and DE-AC05-76RL01830 (EMSL).”

- 2. All other external publications using JGI data or biological materials and/or resulting from the proposal under the Work should contain the following statement in the acknowledgments:

“The work conducted by the U.S. Department of Energy Joint Genome Institute, a DOE Office of Science User Facility, is supported by the Office of Science of the U.S. Department of Energy under Contract No. DE-AC02-05CH11231.”

ARTICLE XIV. DISPUTES***

The Parties will attempt to jointly resolve all disputes arising under this Agreement. If the Parties are unable to jointly resolve a dispute within a reasonable period of time, either Party may contact the Laboratory's Technology Transfer Ombudsman (TTO) to provide assistance. The TTO may work directly to resolve the dispute or, upon mutual agreement of the Parties, contact a third party neutral mediator to assist the Parties in coming to a resolution. The costs of the mediator's services will be shared equally by the Parties. In the event that an agreement is not reached with the aid of the ombudsman or mediator, the Parties may agree to have the dispute addressed by neutral evaluation. The decision rendered by the neutral evaluator shall be nonbinding on the Parties, and any costs incurred there from shall be divided equally between the Parties. Upon mutual agreement, the Parties may request a final decision by the DOE Contracting Officer. Absent resolution, either Party may seek relief in a court of competent jurisdiction.

ARTICLE XV. CONFLICT OF TERMS***

This Agreement constitutes the primary document which governs the Work described in the attached Appendices. In the event of any conflict between the terms of this document and any other document issued by either Party, the terms of this document shall prevail.

ARTICLE XVI. TERMINATION***

Either Party may terminate this Agreement for any reason at any time by giving not less than thirty (30) days prior written notice to the other Party. Notice will be deemed made as of the day of receipt. The obligations of any clause of this Agreement, which by their nature extend beyond its termination, shall remain in full force and effect until fulfilled.

FOR USER

FOR CONTRACTOR

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____