

Attachment C

CSAPR ALLOWANCE PURCHASE AGREEMENT

This CSAPR ALLOWANCE PURCHASE AGREEMENT ("Agreement"), dated as of the **xx** day of xxxx, is by and between **New York State Energy Research and Development Authority** ("Seller") and xxxx ("Buyer"). Buyer and Seller can be individually referred to as a "Party" or collectively as "Parties."

WHEREAS, Seller wishes to sell certain CSAPR NO_x Annual and CSAPR SO₂ Annual Allowances (herein the "Allowances") and Buyer wishes to purchase such Allowances;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree as follows:

ARTICLE 1: DEFINITIONS

In addition to the other terms defined herein, the following terms shall have the meanings set forth below:

- 1.1 **"Administrator"** means the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative.
- 1.2 **"Allowance"** means CSAPR NO_x Annual allowances and SO₂ Annual allowances which means a limited authorization issued and allocated or auctioned by the Administrator, or by a State or Permitting Authority under a SIP revision approved by the Administrator under 40 C.F.R. § 52.38 and § 52.39.
- 1.3 **"Allowance Management System"** means the system by which the Administrator records allocations, deductions, and transfers of Allowances.
- 1.4 **"Applicable Law"** means CSAPR or any international, federal, state, municipal or foreign law, treaty, convention, rule, regulation, ruling, directive, interpretation, requirement, determination, order or decision of any Governmental Entity, including any international, federal, or state regulatory program concerning, creating or limiting Allowances.
- 1.5 **"Business Day"** means any day on which Federal Reserve member banks in New York, New York are open for business, and a Business Day begins at 8:00 a.m. and close at 5:00 p.m. Eastern Prevailing Time.
- 1.6 **"Confidential Information"** means all oral and written information exchanged between Seller and Buyer with respect to the payments to be made and the Allowances to be exchanged under this Agreement. The following exceptions, however, do not constitute Confidential Information for purposes of this Agreement: (a) information that is or becomes generally available to the public other than as a result of a disclosure by either Party in violation of this Agreement; (b) information that was already known by either Party on a non-confidential basis prior to this Agreement; (c) information that becomes available to either Party on a non-confidential basis from a source other than the other

Party if such source was not subject to any prohibition against disclosing the information to such Party; and (d) information a Party is required to disclose in connection with any administrative or regulatory approval or filing process in connection with the conduct of its business.

- 1.7 **“Cross-State Air Pollution Rule” or “CSAPR”** means that certain final rule to reduce NO_x, SO₂, and fine particulate emissions promulgated by the EPA on August 8, 2011, in Volume 76, Federal Register pages 48207 to 48712, codified at 40 CFR Parts 51, 52, 72, et al., as amended from time to time.
- 1.8 **“Delivery”** means Seller’s electronic delivery of the contracted number of Allowances of the specified Vintage Year and receipt by Buyer in Buyer’s account in the Allowance Management System.
- 1.9 **“Effective Date”** means the date as of which this Agreement has been fully executed by both Parties.
- 1.10 **“EPA”** means the United States Environmental Protection Agency or any successor agency with similar jurisdiction.
- 1.11 **“Government Action”** means the adoption of, or change in, Applicable Law that affects or otherwise relates in any manner to the CSAPR, , including the definition, applicability to Buyer or Seller, transferability, allocation, recordation, retirement or use of the Allowances.
- 1.12 **“Governmental Entity”** means, but is not limited to, any international, federal, state, municipal or foreign body, nation, government, state, commonwealth, province, territory, county, municipality, district, jurisdiction, authority, division, subdivision, department, agency, bureau, branch, office, commission, council, board, instrumentality, officer, official, representative, organization, unit, body, court or tribunal, including the EPA and the Permitting Authority issuing the Allowances.
- 1.13 **“NO_x”** means nitrogen oxides.
- 1.14 **“Permitting Authority”** means the Administrator, in the case of EPA-implemented programs, a delegate agency authorized by the Administrator to carry out a Federal permit program, or the State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program.
- 1.15 **“State”** means one of the States that is subject to the CSAPR.
- 1.16 **“SIP”** means state implementation plan.
- 1.17 **“SO₂”** means sulfur dioxides
- 1.18 **“Vintage Year”** means the first calendar year during which the Allowance may be utilized.

ARTICLE 2: PURCHASE AND SALE OF ALLOWANCES

- 2.1 **Amount and Purchase Price.** Buyer hereby agrees to purchase from Seller and Seller agrees to sell to Buyer a total **xxx** tons of NO_x Annual Allowances of **20xx** Vintage Year at a unit price of **\$x.xx**

per NOx Annual Allowance and a total of xxx tons of SO₂ Allowances of 20xx Vintage Year at a unit price of \$x.xx per SO₂ Allowance, and a total of xxx tons of SO₂ Allowances of 20xx Vintage Year at a unit price of \$x.xx for a total purchase price of \$xxx.xx.

- 2.2 **Payment, Transfer and Title.** Buyer shall pay for the Allowances within three (3) Business Days of execution of this Agreement and receipt of Seller's Invoice. Upon receipt of payment, but in no event later than two (2) Business Days after receipt of Buyer's payment, Seller shall electronically transfer the NOx Annual and SO₂ Allowances from Seller's account in the Allowance Management System to Buyer's account. This Article 2.2 shall survive expiration or termination of this Agreement.

The NOx Allowances shall be transferred and recorded in the following account in the Allowance Management System:

EPA account: xxx
account #: xxx
account rep: xxx

- 2.3 **Funds.** All funds to be paid directly to Seller under this Agreement shall be rendered in the form of immediately available funds (United States dollars) by wire transfer or by such other method of payment as reasonably requested by Seller.

Account Name: xxx
ABA # xxx
Account # xxx
Type of Account: Checking

- 2.4 **Taxes.** Each Party shall be responsible for any taxes or other fees associated with its respective purchase or sale of the Allowances hereunder.

- 2.5 **Recordation by EPA.** Upon notification by the EPA that any transfer contemplated by this Agreement will not be recorded, the Parties shall promptly confer and shall cooperate in taking all reasonable actions necessary to cure any defects in the proposed transfer so that the transfer can be recorded.

ARTICLE 3: REPRESENTATIONS AND WARRANTIES

- 3.1 **Seller Representations and Warranties.** Seller hereby represents and warrants to Buyer as follows:

- (a) Seller has, and at all times during the term of this Agreement will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.
- (b) The execution, delivery and performance of this Agreement by Seller have been duly authorized by all necessary action and do not violate any of the terms or conditions of Seller's governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to Seller.

- (c) There is no pending or, to Seller's knowledge, any threatened litigation, arbitration or administrative proceeding that materially adversely affects Seller's ability to perform this Agreement.
- (d) At the time of Delivery of the Allowances by Seller hereunder, Seller shall convey title to the Allowances to Buyer free and clear of any liens or other encumbrances or title defects.
- (e) Seller hereby warrants that it shall convey Seller's Allowances to Buyer free from all liens, security interests, and defects of title. Seller represents and warrants to Buyer (i) that each Allowance transferred pursuant to this Agreement is, or will be at the time of transfer, validly issued and in force in accordance with the CSAPR and (ii) that Seller obtained and possessed, or will obtain and possess at the time of transfer, each Allowance lawfully. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, SELLER EXPRESSLY NEGATES ANY OTHER REPRESENTATIONS OR WARRANTIES, WHETHER WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO CONFORMITY TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SELLER MAKES NO REPRESENTATION OR WARRANTY HEREUNDER REGARDING ANY ACTION OR FAILURE TO ACT, OR APPROVAL OR FAILURE TO APPROVE, OF THE EPA, ANY PERMITTING AUTHORITY OR ANY OTHER AGENCY OR GOVERNMENTAL ENTITY.

3.2 **Buyer Representations and Warranties.** Buyer hereby represents and warrants to Seller as follows:

- (a) Buyer has, and at all times during the term of this Agreement will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.
- (b) The execution, delivery and performance of this Agreement by Buyer have been duly authorized by all necessary action and do not violate any of the terms or conditions of Buyer's governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to Buyer.
- (c) There is no pending or, to Buyer's knowledge, any threatened litigation or administrative proceeding that materially adversely affects Buyer's ability to perform this Agreement.

3.3 **Survival.** This Article 3 shall survive expiration or termination of this Agreement.

ARTICLE 4: LIMITATION OF LIABILITY

4.1 **Limitation of Liability.** FOR BREACH OF ANY PROVISION OF THIS AGREEMENT, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, AND SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY HEREUNDER, AND ALL OTHER REMEDIES OR DAMAGES ARE WAIVED. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES, IN TORT, CONTRACT, OR OTHERWISE.

4.2 **Survival.** This Article 4 shall survive expiration or termination of this Agreement.

ARTICLE 5: EVENTS OF DEFAULT; REMEDIES

5.1 **Events of Default.** An “Event of Default” shall mean, with respect to a Party (the “Affected Party”):

- (a) except as provided in Section 9.2 of this Agreement, the failure by the Affected Party to make, when due, any payment, required under this Agreement if such failure is not remedied within three (3) Business Days after written notice of such failure is given to the Affected Party; or
- (b) the failure to provide Performance Assurance as provided for in Section 9.2; or
- (c) any representation or warranty made by the Affected Party in this Agreement shall prove to have been false or misleading in any material respect when made; or
- (d) the failure by the Affected Party to perform any covenant or obligation set forth in this Agreement (other than its obligations to make any payment or obligations which are otherwise specifically covered in this Article as a separate Event of Default), and such failure is not remedied within three (3) Business Days after written notice of such failure is given to the Affected Party; or
- (e) the Affected Party shall:
 - (i) make an assignment or any general arrangement for the benefit of creditors; or
 - (ii) file a petition or otherwise commence, authorize or acquiesce in the commencement of a proceeding or cause under any bankruptcy or similar law for the protection of creditors, or have such petition filed or proceeding commenced against it; or
 - (iii) otherwise become bankrupt or insolvent (however evidenced); or
 - (iv) be unable to pay its debts as they fall due; or
- (f) the failure of a Party’s guarantor, if any, to perform any covenant set forth in its guaranty, or such guaranty shall expire or be terminated or shall cease to guarantee the obligations of such Party hereunder, or such guarantor shall become subject to any of the events specified in 5.1(e) above.

5.2 **Remedies.** If an Event of Default occurs with respect to either Party at any time during the term of this Agreement, the other Party (the “Notifying Party”) may (a) terminate this Agreement, (b) withhold any payments due in respect of this Agreement to the extent of its actual damages pursuant to Article 4, and (c) exercise such other remedies as may be available at law or in equity or as otherwise provided in this Agreement.

5.3 **Buyer's Liability.** In the event Buyer causes an Event of Default specified in Section 5.1 above and Seller elects to terminate this Agreement, Seller shall calculate the termination payment, in an expeditious manner, as the sum of (a) the price for any Allowance delivered to Buyer for which Seller has not been paid; plus (b) the positive difference, if any, between (i) the aggregate price set forth in this Agreement for all remaining Allowances to be delivered under this Agreement minus (ii) the aggregate market price for equivalent Allowances (equivalent with respect to amount, Vintage Year and delivery dates) as of the date such Allowances were to be delivered by Seller to Buyer, to be determined based on the average Allowance prices quoted by two leading dealers, brokers or any

other industry participant, with each Party selecting one; plus (c) any other amounts owed to Seller by Buyer arising under this Agreement; less (d) any amounts owed to Buyer by Seller arising under this Agreement; plus (e) interest at the Interest Rate from the due date or the termination date, whichever is earlier, until paid and all reasonable collection costs, including, without limitation, reasonable attorneys' and broker fees.

- 5.4 **Seller's Liability.** In the event Seller causes an Event of Default specified in Section 5.1 above and Buyer elects to terminate this Agreement, Buyer shall calculate the termination payment, in an expeditious manner, as the sum of (a) the positive difference, if any, between (i) the aggregate market price for equivalent Allowances (equivalent with respect to amount, Vintage Year, and delivery dates) as of the date such Allowances were to be delivered by Seller to Buyer, to be determined based on the average Allowance prices quoted by two leading dealers, brokers or any other industry participant, with each Party selecting one; minus (ii) the aggregate price set forth in this Agreement for all remaining Allowances to be delivered under this Agreement; plus (b) any other amounts owed to Buyer by Seller arising under this Agreement; less (c) the price for any Allowances delivered to Buyer for which Seller has not been paid; less (d) any other amounts owed to Seller by Buyer arising under this Agreement; plus (e) interest at the Interest Rate from the due date or the termination date, whichever is earlier, until paid and all reasonable collection costs, including, without limitation, reasonable attorneys' and broker fees.
- 5.5 **Past Due Amounts.** All overdue payments shall bear interest from and including the due date to, but excluding, the date of payment at a rate equal to the lower of (i) the then-effective prime rate of interest published under "Money Rates" by The Wall Street Journal plus two percent (2%) per annum (the "Interest Rate"); or (ii) the maximum interest rate permitted by law.
- 5.6 **Exclusive Remedy.** THE REMEDIES SET FORTH IN THIS ARTICLE 5 ARE THE SOLE AND EXCLUSIVE REMEDIES IN THE EVENT OF A DEFAULT, AND A PARTY'S LIABILITY SHALL BE LIMITED AS SET FORTH IN THIS SECTION. ALL OTHER REMEDIES OR DAMAGES AT LAW ARE HEREBY WAIVED.

ARTICLE 6: NOTICES AND FORMAL COMMUNICATION

- 6.1 **Notices.** All notices, payments and other formal communication which either Party may give to the other under or in connection with this Agreement shall be in writing and shall be sent by any of the following methods: hand delivery; reputable overnight courier; certified mail, return receipt requested; or, with respect to communications other than payments, by facsimile transmission, if the original communication is delivered by reputable overnight courier. The communications shall be sent to the following addresses, and shall be effective when received:

If to Buyer: Notices **XXX**

If to Seller: NYSERDA
17 Columbia Circle
Albany, NY 12203

Mark.Decker@nyserda.ny.gov
518-862-1090

NYSERDA
17 Columbia Circle
Albany, NY 12203
invoices@nyserda.ny.gov
518-862-1090

ARTICLE 7: CONFIDENTIALITY; NON-DISCLOSURE

- 7.1 **Confidentiality.** Except as provided in this Article 7, neither Party shall publish, disclose, or otherwise divulge Confidential Information to any person, at any time during or after the term of this Agreement, without the other Party's prior express written consent. Each Party shall permit knowledge of and access to the Confidential Information only to those of its corporate affiliates, attorneys, accountants, representatives, agents and employees who have a need to know for purposes of consummating the transaction(s) contemplated by this Agreement. In performing their obligations under this Agreement, the Parties shall employ procedures established to prevent unauthorized disclosure or use of the Confidential Information. Such procedures shall be no less restrictive than the procedures used by each Party to protect its own confidential data.
- 7.2 **Required Disclosure.** If required by any law, statute, ordinance, decision, order, or regulation passed, adopted, issued or promulgated by a court, any governmental agency or authority having jurisdiction over a Party, such Party may release the Confidential Information, or portion thereof, to such court, governmental agency or authority, as required by such applicable law, statute, ordinance, decision, order or regulation and a Party may disclose Confidential Information to accountants in connection with audits, provided that, if the accountants are not otherwise subject to an agreement protecting the confidentiality of the Confidential Information, such party has notified the other Party of the required disclosure such that the other Party, where legally permissible and at its own cost, may attempt to cause that court, governmental agency, authority or accountant to treat such information in a confidential manner and to prevent such information from being disclosed or otherwise becoming part of the public domain.
- 7.3 **Survival.** This Article 7 shall survive for a period of one (1) year following the expiration or termination of this Agreement.

ARTICLE 8: MISCELLANEOUS

- 8.1 **Assignment.** This Agreement is not assignable by either Party without the prior written approval of the non-assigning Party, which shall not be unreasonably withheld or delayed. Any assignment without the written approval of the non-assigning Party is voidable by the non-assigning Party.
- 8.2 **Amendment/Binding Effect.** This Agreement may not be amended, changed, modified, or altered unless such amendment, change, modification, or alteration is in writing and signed by both of the Parties to this Agreement or their successor in interest. This Agreement inures to the benefit of and is binding upon the Parties and their respective successors and permitted assigns.
- 8.3 **Severability.** If any article, section, phrase or portion of this Agreement is, for any reason, held or

adjudged to be invalid, illegal or unenforceable by any court of competent jurisdiction, such article, section, phrase, or portion so adjudged will be deemed separate, severable and independent and the remainder of this Agreement will be and remain in full force and effect and will not be invalidated or rendered illegal or unenforceable or otherwise affected by such adjudication, provided the basic purpose of this Agreement and the benefits to the Parties are not substantially impaired.

- 8.4 **Entire Agreement**. This Agreement completely and fully supersedes all other understandings or agreements, both written and oral, including any term sheet or confirmation, between the Parties relating to the subject matter hereof.
- 8.5 **Waiver**. No delay or omission by a Party in the exercise of any right under this Agreement shall be taken, construed, or considered as a waiver or relinquishment thereof, and any such right may be exercised from time to time and as often as may be deemed expedient. If any of the terms and conditions herein are breached and thereafter waived by a party, such waiver is limited to the particular breach so waived and is not deemed to waive any other breach hereunder.
- 8.6 **Governing Law**. This Agreement is governed by and shall be construed in accordance with the laws of the State of New York, without regard to principles of conflicts of law. The Parties agree that, to the maximum extent possible under applicable law, no provision of Article 2 of the Uniform Commercial Code, as in effect from time to time in the State of New York, that is inconsistent with any provision of this Agreement shall apply to this Agreement. The Parties agree that any transaction entered into pursuant to this Agreement is a “qualified financial contract” within the meaning of New York General Obligations Law § 5-701b.
- 8.7 **Counterparts**. This Agreement may be executed in several counterparts, each of which is an original and all of which constitute one and the same instrument.
- 8.8 **Headings**. The Article and section titles in this Agreement are only for purposes of convenience and do not form a part of this Agreement and will not be taken to qualify, explain or affect any provision thereof.
- 8.9 **Forward Contract**. The Parties agree that this transaction constitutes a “forward contract” and that the Parties shall constitute “forward contract merchants” within the meaning of the United States Bankruptcy Code.
- 8.10 **Government Action**. The Parties understand that Allowances may hereafter be affected by Government Action. Buyer will pay for, and shall not be entitled to any refund from Seller, nor shall Seller be liable for any other claims or damages, due to Government Action with respect to Allowances that have been delivered by Seller to Buyer and recorded in Buyer’s Allowance Management System account as of the date of such Government Action. If the CSAPR Program is affected by Government Action prior to the date that the Allowances have been delivered by Seller to Buyer and recorded in Buyer’s Allowance Management System account, such that it becomes unlawful for Seller to deliver or Buyer to receive or the EPA to record in Buyer’s or Seller’s Allowance Management System account the Allowances, then this Agreement may be terminated by the affected party without liability by written notice to the other Party. This Section 8.10 will survive the expiration or termination of this Agreement.

ARTICLE 9: FINANCIAL RESPONSIBILITY

- 9.1 **Financial Statements.** Either Party shall have the right, but not the obligation, to request from the other Party audited annual financial statements and quarterly unaudited financial statements.
- 9.2 **Performance Assurance.** In the event the creditworthiness or financial condition of either Party becomes unsatisfactory to the other at any time during which this Agreement is in effect, that Party (a "Demanding Party") may demand security or assurance of performance in a form and amount reasonably required by it ("Performance Assurance") before further deliveries or payments are made by it under this Agreement. In the event the other party (an "Demand Receiving Party") shall fail to give the required Performance Assurance within forty-eight (48) hours of the request by the Demanding Party, that failure shall be an Event of Default of the Demand Receiving Party as described in Section 5.1 of this Agreement.
- 9.3 **Netting/Setoff.** If Buyer and Seller are required to pay any amount on the same day or in the same month, then such amounts with respect to each Party may be aggregated and the Parties may discharge their obligations to pay through netting, in which case the Party, if any, owing the greater aggregate amount shall pay to the Party owed the difference between the amounts owed. Each Party reserves to itself all rights, setoffs, counterclaims, combination of accounts, liens and other remedies and defenses which such Party has or may be entitled to (whether by operation of law or otherwise). The obligations to make payments under this Agreement and/or any other Agreement between the Parties may be offset against each other, set off or recouped therefrom.

IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement, signed by their duly authorized officers or individuals, as of the Effective Date.

**NEW YORK STATE ENERGY RESEARCH
AND DEVELOPMENT AUTHORITY**

[BUYER NAME]

By: _____

By: _____

Name:

Name:

Title:

Title:

Date: _____

Date: _____