

DETERMINATION OF EXCEPTIONAL CIRCUMSTANCES UNDER THE BAYH-DOLE ACT TO FURTHER PROMOTE DOMESTIC MANUFACTURE OF NNSA TECHNOLOGIES

I. DOE's Determination of Exceptional Circumstances for Science and Energy Technologies

On June 7, 2021, the U.S. Department of Energy (DOE) issued a Determination of Exceptional Circumstances Under the Bayh-Dole Act¹ to Further Promote Domestic Manufacture of DOE Science and Energy Technologies (S&E DEC). The S&E DEC authorizes other DOE program offices to approve the S&E DEC by signature including additional supporting information, with written notice to the Secretary and a copy to the Assistant General Counsel for Technology Transfer and Intellectual Property.² The S&E DEC is narrowly tailored such that, except for the addition of the U.S. Competitiveness Provision and its corresponding enforcement mechanism, the patent rights granted to certain funding recipients under Bayh-Dole remain the same.

II. Addition of the National Nuclear Security Administration to the S&E DEC

It is vital to America's security and prosperity that the National Nuclear Security Administration's (NNSA) multi-billion-dollar investments, that it makes through applicable funding agreements, cultivate new research and development ecosystems, manufacturing capabilities and industries, and supply chains within the United States. NNSA has a mission to "maintain the safety, security, and effectiveness of the U.S. nuclear weapons stockpile through application of unparalleled science, technology, engineering, and manufacturing; respond to nuclear and radiological emergencies in the U.S. and abroad; prevent nuclear weapons proliferation and reduce the threat of nuclear and radiological terrorism around the world; and provide the U.S. Navy with militarily effective nuclear propulsion plants and ensure their safe, reliable, and long-lived operation. As noted in the S&E DEC, U.S. manufacturing should be a starting point in return for DOE funding of these innovations, while providing flexibility for waivers, modifications, and alternative commitments to the U.S. The same principle applies to NNSA funded innovations to ensure NNSA's investment benefits U.S. manufacturing, industry, and labor.

Through this addendum, NNSA joins the S&E DEC, which will allow NNSA to require the incorporation of the U.S. Competitiveness Provision in Appendix A of the S&E DEC in funding agreements issued to contractors as designated in any NNSA FOA, solicitation, announcement, notice, or specific funding agreement, including but not limited to, financial assistance transactions, acquisition contracts, and laboratory or facility management and operating contracts (e.g. DOE/NNSA Acquisition Letters). Additionally, for funding

¹ 35 U.S.C. §§ 200-12

² See page 15 of the S&E DEC. Other DOE program offices may approve this DEC by signature of this approval page by the cognizant Under Secretary or Head of Departmental Element including additional supporting information, if any, with written notification to the Secretary and a copy to the Assistant General Counsel for Technology Transfer and Intellectual Property.

agreements in existence prior to approval of the S&E DEC, 37 CFR § 401.3(d) authorizes NNSA to negotiate the insertion of the U.S. Competitiveness provision described in Appendix A of the S&E DEC task-orders/modifications added to a funding agreement after the initial award, including, but not limited to, contracts for the management and operation of NNSA's National Laboratories and other facilities.

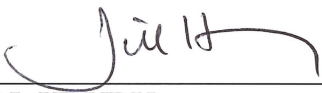
III. Waivers and Modification are Available Under the S&E DEC.

The S&E DEC recognizes the need for flexibility noting that applications from contractors will be accepted for a waiver or modification of the requirements under the U.S. Competitiveness Provision. All applications for a waiver or modification will be considered. Modifications to the U.S. Competitiveness Provision in certain situations, if needed, will be accomplished as outlined in the S&E DEC.

IV. Conclusion

Exceptional circumstances exist for NNSA technologies. Therefore, I hereby approve application of the S&E DEC to NNSA funding agreements as described above. The U.S. Competitiveness Provision described herein will better promote the objectives of Bayh-Dole by providing stronger support to U.S. economic and national security, commercialization of federally supported inventions, U.S. industry, and U.S. manufacturing. Moreover, the S&E DEC is not imposing additional restrictions, requirements, or modifications from the standard patent rights clause beyond what is necessary to address the exceptional circumstances.

Any Bayh-Dole entity affected by this determination of exceptional circumstances has the right to appeal it.³

Approved:  Date: 5/9/22
JILL HRUBY
UNDER SECRETARY FOR NUCLEAR SECURITY
ADMINISTRATOR, NNSA

³ See 35 U.S.C. § 202(b)(3); 37 C.F.R. § 401.4;
<https://www.energy.gov/sites/prod/files/2018/02/f48/Interim%20Administrative%20Appeal%20Process%20401-11%20%282018%29.pdf>.