

SETTLEMENT AGREEMENT

THIS AGREEMENT (the "Agreement") is entered into as of this ___th day of January 2007 by and between **Golden Gate Audubon Society, Ohlone Audubon Society, Mount Diablo Audubon Society, Santa Clara Valley Audubon Society, and Marin Audubon Society** (collectively, "Audubon"), and **Californians for Renewable Energy ("CARE,"** and together with Audubon, "Audubon/CARE"), and **ESI Bay Area GP, Inc., ESI Altamont Acquisitions, Inc. on behalf of Green Ridge Power, LLC, and ESI Tehachapi Acquisitions on behalf of Altamont Power, LLC.** (collectively, "ESI"), **enXco, Inc., and SeaWest Power Resources, LLC** (collectively, along with ESI, the "Wind Power Companies"), and the **Alameda County Board of Supervisors, County of Alameda** (the "County"). Audubon, CARE, the Wind Power Companies and the County are referred to individually as a "Party" and collectively as the "Parties."

RECITALS

This Agreement is made with respect to the following recitals of fact:

1. On September 22, 2005, the Alameda County Board of Supervisors approved conditional use permits ("CUPs") for the operation of wind turbines by the Wind Power Companies, among other entities, at the Altamont Pass Wind Resources Area ("APWRA"). The Alameda County Board of Supervisors concluded that its decision to issue the CUPs was categorically exempt from the California Environmental Quality Act ("CEQA").
2. On or about October 31, 2005 and as amended on or about November 29, 2005, Audubon/CARE petitioned the Alameda County Superior Court for a writ of mandate (Case Nos. RG05239552 & RG05239790) to set aside the Alameda County Board of Supervisors' issuance of the CUPs on various grounds, including that such action violated the County's General Code and CEQA. The Audubon/CARE writ petitions are collectively referred to as the "Action." The Wind Power Companies are Real Parties in Interest in the Action.
3. Beginning in January, 2006, the parties to the Action engaged in a series of discussions in an attempt to resolve their disputes prior to the parties briefing the action on its merits. The discussions included the Parties, represented by legal counsel and their principals, and, after the proposed settlement agreement included consideration of a conservation planning component, representatives of the California Department of Fish and Game. After extensive discussion among and between the various parties, on or about November 6, 2006, Audubon/CARE and the Wind Power Companies agreed to a framework for settling the entire Action. That agreement is embodied in the November 6, 2006 Settlement Framework (the "Settlement Framework"), attached hereto as **Exhibit 1**.
4. The County wishes to enter into this Agreement with the Parties, based on the Settlement Framework, in order to resolve the Action and accordingly modify its existing conditional use permits for wind turbine operations at the APWRA, in order to continue producing wind energy while further reducing raptor mortality in the APWRA.
5. The Parties desire to enter into this Agreement in order to execute a final settlement of the Action. The terms and conditions of this Agreement are set forth below.

TERMS AND CONDITIONS

NOW THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement, the Parties agree as follows:

1. **County Approval Process.** This Agreement modifies the CUPs with regard to various measures to reduce raptor mortality at the APWRA, as reflected in the modified permit conditions approved by the County concurrently with the County's approval of this Agreement.

2. **Relationship to existing CUPs.**
 - (a) The Wind Power Companies hold CUPs with the County through various legal entities. Within each CUP, some turbines are owned beneficially only by Wind Power Companies and some are owned by a Wind Power Company and a non-settling party. Only the turbines owned beneficially solely by Wind Power Companies, with no non-settling party beneficial interest, are affected by this Agreement (the "Applicable Turbines"). The modification of the CUPs is intended to accomplish this objective.

3. **Reduction in raptor mortality.** The Wind Power Companies shall achieve a 50% reduction in raptor mortality within three (3) years of the effective date of this Agreement.
 - (a) The baseline for determining the percentage reduction in raptor mortality at the APWRA is thirteen hundred (1300).
 - (i) The raptor species that shall be evaluated to determine the percentage reduction in raptor mortality are Golden Eagle, Burrowing Owl, American Kestrel, and Red-Tailed Hawk.
 - (ii) The percentage reduction in raptor mortality shall be determined using field monitoring data collected in accordance with the CUPs and scaling factors for searcher efficiency and scavenging as approved by the Scientific Review Committee ("SRC").
 - (iii) In the event the above-referenced scaling factors exceed 2.5, the Wind Power Companies, Audubon, and the County, in consultation with the SRC, along with any other individuals or entities that both the Wind Power Companies, Audubon and the County agree to, shall meet and confer to re-determine a mutually acceptable baseline for determining raptor mortality and/or reduction percentage in raptor mortality that triggers adaptive management measures as specified in section 3(c) of this Agreement.

- (b) The Wind Power Companies, Audubon, and the County, in consultation with the SRC, shall meet and confer at least annually to determine if mutually acceptable mid-course corrections in measures to reduce raptor mortality are appropriate after the SRC evaluates the prior year's monitoring data. Agreed upon mid-course corrections for the Applicable Turbines shall be forwarded to the County for consideration pursuant to Condition 5 of the CUPs if the measures require permit modifications.
 - (c) Adaptive management measures will be implemented if a 50% reduction in raptor mortality is not achieved by November 1, 2009.
 - (i) The SRC will prioritize management measures, including an evaluation of management measures that have not reduced raptor mortality at the expense of energy production, after analyzing field monitoring data. The SRC shall use its best efforts to achieve its prioritization of management efforts by June 1, 2009.
 - (ii) By August 1, 2009, Wind Power Companies and Audubon will propose an adaptive management plan to the SRC/County for review pursuant to Condition 5 of the CUP if a 50% reduction in raptor mortality has not previously been achieved and is not projected to be achieved by November 1, 2009. The adaptive management plan will be designed to achieve a 50% reduction in raptor mortality with the least impact on energy production, and may include the elimination or reduction of seasonal shutdowns. The SRC shall act (pursuant to Condition 5 of the CUPs, as necessary) on the adaptive management plan for the Applicable Turbines by November 1, 2009.
 - (iii) Nothing in this Agreement shall preclude the Wind Power Companies from implementing other measures, such as rodent trapping, reasonably designed to reduce raptor fatalities and help achieve the objective of a 50% reduction in raptor mortality, provided the measures are consistent with the objectives of this Agreement and not outside the terms of the CUPs.
4. **Seasonal shutdown.** Wind Power Companies shall cease operations for approximately ½ of existing (non-repowered) operating Applicable Turbines between November 1, 2007 and December 31, 2007 and the remaining ½ of existing (non-repowered) operating Applicable Turbines between January 1, 2008 and February 28, 2008.
5. **Turbine removal or relocation.**
- (a) Wind Power Companies shall shut down Tiers 1 and 2 Applicable Turbines within 30 days of the effective date of this Agreement or, in the event an alternative list of Applicable Turbines is presented to the SRC, as specified in section 5(a)(ii), within 15 days of SRC approval of such list, whichever is later.

- (i) Tiers 1 and 2 Applicable Turbines means those turbines identified as Tiers 1 or 2 per Smallwood-Spiegel June 2005 report Group C ranking, confirmed by WEST July 2005 (currently 131 turbines unless the remaining 24 turbines are specifically identified by the SRC prior to the implementation date set forth in (a) above) and as therein allocated per each Wind Power Company and per each Wind Power Company's individual projects.
 - (ii) Any time after the execution of this Agreement, each Wind Power Company may submit to Audubon and the SRC a list and description of high risk Applicable Turbines already shut down and ask for credit against this Tier 1 and 2 shut down requirement. The SRC will grant credit for such Applicable Turbines reasonably determined on a scientific and technical basis to be high risk, provided such Applicable Turbines were shut down on or after May, 2002, and the fact that the Applicable Turbines were not listed as Tier 1 or 2 will not prejudice this evaluation.
- (b) Wind Power Companies shall shut down Tier 3 Applicable Turbines or Applicable Turbines identified pursuant to section 5(b)(ii) by October 31, 2008.
- (i) Tier 3 Applicable Turbines consist of no more than 152 turbines in total, and no more for each Wind Power Company and each Wind Power Company's individual project than the number allocated to each Wind Power Company and each Wind Power Company's individual project for Tier 3 turbines in the Smallwood-Spiegel June 2005 report, confirmed by WEST in July 2005.
 - (ii) By July 1, 2007, each Wind Power Company may present to the SRC an alternative list of Applicable Turbines for shutdown and ask for credit against this Tier 3 shutdown requirement. Applicable Turbines for consideration may include previously removed Applicable Turbines that were among those considered in the Smallwood-Spiegel June 2005 report provided such Applicable Turbines were non-derelict when removed. The SRC shall select for shutdown, on a scientific and technical basis, the highest risk Applicable Turbines of those presented to it by each Wind Power Company (Tier 3 list vs. proposed alternatives).
- (c) Wind Power Companies shall remove each Applicable Turbine that is subject to a shutdown requirement as specified in this Agreement unless the SRC, on a scientific and technical basis, approves of its continued existence (e.g., end-row turbine that serves as a flight diverter) or renewed operation (e.g., middle of a string with low risk). Any Applicable Turbine may be relocated to a non-Tier 1, 2, or 3 existing turbine site, provided it is relocated in accordance with the criteria specified in Exhibit A attached to the Settlement Framework (Exhibit 1).

6. **Blade painting study.** Wind Power Companies may participate in a SRC approved study to determine whether blade painting reduces raptor mortality. Up to 450

Applicable Turbines may be painted as part of this study, with a corresponding number of Applicable Turbines included as a control group. Turbines shall be painted by December 31, 2007, or as soon thereafter as reasonably possible, depending on the timing of SRC approval of the study design.

- (a) Wind Power Companies shall present a proposed before/after control/impact (“BACI”) design study to the SRC for review and approval to evaluate the effectiveness of the blade painting program in reducing raptor mortality. The SRC must also approve the blade painting design.
- (b) The SRC shall either approve the BACI design study within 30 days from submittal, or respond within 30 days from submittal with changes necessary for approval, so that the BACI design study can be incorporated into the ongoing monitoring program as soon as possible.
- (c) Painted blade turbines and control group turbines included in the approved BACI design study shall be exempted from all permanent and/or seasonal shutdown requirements for the period of the study.
- (d) Blade painting initial allocations subject to the further provisions of section 6(e) below are as follows:
 - (i) ESI – up to 285 Applicable Turbines (plus 285 control group Applicable Turbines);
 - (ii) enXco – up to 108 Applicable Turbines (plus 108 control group Applicable Turbines); and
 - (iii) SeaWest – up to 57 Applicable Turbines (plus 57 control group Applicable Turbines).
- (e) Nothing in subsection (d) shall prevent one Wind Power Company from assuming by mutual agreement all or part of another Wind Power Company’s initial allocation for blade-painting. The final allocations of Applicable Turbines beyond the allocations stated in subsection (d), and up to 450 painted Applicable Turbines, shall be by the agreement of the Wind Power Companies and subject to an SRC approved BACI design.

7. **Natural Communities Conservation Plan – Applicable to Activities of Wind Turbine Owners and Operators.**

- (a) It is the intent of the Parties to develop a Natural Communities Conservation Plan (“NCCP”) pursuant to section 2801 et seq. of the California Fish and Game Code or similar agreement approved by the California Department of Fish and Game (“CDFG”) to address the long-term operation of wind turbines at the APWRA and the conservation of impacted species of concern and their natural communities. The NCCP or similar agreement shall only apply to the operation, construction, maintenance and repowering of wind turbines and will not apply to land use

development or farming, ranching, or other agricultural activities except with the express consent of the applicable property owners.

- (b) The County will be the local sponsor of the NCCP or similar agreement. The Wind Power Companies shall be responsible for funding the County's expenses in serving as local sponsor for the NCCP or similar agreement, including, but not limited to, funding consultants and/or employees necessary to fill this role. This expense shall be divided among the Wind Power Companies as set forth in the CUPs.
 - (c) The NCCP or similar agreement may lead to modifications to the terms of the CUPs. The Parties acknowledge that future repowering of the Altamont, which plays a central role in the context of the current County CUPs, will also play an important role in the adoption of adaptive management measures as provided for in Section 3 of this agreement and/or in the development of the NCCP or similar agreement. The repowering and shutdown provisions (beginning September 2009, and thereafter) in the CUPs concerning Applicable Turbines have been amended to delete those provisions that are no longer effective for the Wind Power Companies because it is expected that the adaptive management plan and NCCP will supersede those provisions. Future repowering requirements will be governed by the adaptive management plan, the NCCP, or any similar agreement approved by both the County and CDFG. If no modifying documents are agreed to, the existing permit conditions in the CUPs, relating to repowering of Applicable Turbines, will not remain in effect, but the Parties agree that the County may amend the permits in light of then current conditions to address repowering obligations.
 - (d) The Parties have prepared and executed a draft Planning Agreement for the development of a NCCP, which is attached hereto as **Exhibit 2**. Notwithstanding the foregoing, the terms of this Agreement and the CUPs, as modified by this Agreement, shall remain in full force and effect if the Parties and/or CDFG do not agree to a NCCP or similar agreement.
8. **Release.** Audubon and CARE shall release the County, the Alameda County Board of Supervisors, the Alameda County Planning Department, the East County Board of Zoning Adjustments, and Wind Power Companies from the claims asserted in the Action. Notwithstanding the foregoing, Audubon and CARE shall have the right to enforce the terms of this Agreement. Audubon and CARE shall dismiss with prejudice the Action upon execution and adoption of this Agreement by the Parties.
9. **No admission of wrongdoing.** This Agreement is the result of a compromise with respect to the disputes between the Parties. In no event shall this Agreement be deemed an admission of wrongdoing or liability of any kind by any Party.
10. **Enforcement of agreement.** The Parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to mediation before any Party files a lawsuit. Any Party may commence mediation by providing to the

Parties a written request for mediation, setting forth the subject of the dispute and the relief requested. The Parties will cooperate with one another in selecting a mutually agreeable mediator, and in scheduling the mediation proceedings. The Parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. The provisions of this mediation clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered.

11. **Amendments.** Unless expressly permitted by this Agreement, no supplement, modification or amendment of any term, provision or condition of this Agreement (including this paragraph) shall be binding or enforceable unless evidenced in a writing executed by all of the Parties to this Agreement. Notwithstanding the foregoing, this provision does not restrict the role of the SRC pursuant to the terms of the CUPs.
12. **Applicable law.** This Agreement shall be governed exclusively by and construed and enforced exclusively in accordance with and subject to the law of the state of California without regard to its choice of law provisions, except in the event of bankruptcy by any Party, in which event the laws of the United States shall also apply, where appropriate.
13. **Authority to enter into Agreement.** The Parties here represent and warrant that they have reviewed this Agreement with their respective attorneys, and that they have authority to enter into and to sign this Agreement on their behalf.
14. **Counterparts.** The Agreement may be executed in counterparts, each of which shall be deemed an original, and each of which shall constitute together one and the same instrument. The counterparts will be binding on each of the Parties, even though the various Parties may have executed separate counterparts.
15. **Effective date.** The effective date of this Agreement shall be January __, 2007.

Dated: January __, 2007

GOLDEN GATE AUDUBON SOCIETY

Name: _____
Title: _____

Dated January __, 2007

OHLONE AUDUBON SOCIETY

Name: _____
Title: _____

Dated: January ____, 2007

MOUNT DIABLO AUDUBON SOCIETY

Name: _____
Title: _____

Dated: January ____, 2007

SANTA CLARA VALLEY AUDUBON SOCIETY

Name: _____
Title: _____

Dated: January ____, 2007

MARIN AUDUBON SOCIETY

Name: _____
Title: _____

Dated: January ____, 2007

CALIFORNIANS FOR RENEWABLE ENERGY

Name: _____
Title: _____

Dated: January ____, 2007

SEAWEST POWER RESOURCES, LLC

Name: _____
Title: _____

Dated: January ____, 2007

enXco, INC.

Name: _____
Title: _____

Dated: January ____, 2007

ESI Bay Area GP, Inc.

Name: _____
Title: _____

Dated: January ____, 2007

ESI Altamont Acquisitions, Inc. on behalf of Green Ridge Power LLC.

Name: _____
Title: _____

Dated: January ____, 2007

ESI Tehachapi Acquisitions, Inc. on behalf of Altamont Power, LLC

Name: _____
Title: _____

Dated: January ____, 2007

ALAMEDA COUNTY

Name: _____
Title: _____

Dated: January ____, 2007
Approved as to form:

LAW OFFICE OF J. WILLIAM YEATES

J. William Yeates
Attorney for Golden Gate Audubon Society, Ohlone Audubon Society, Mount Diablo Audubon Society, Santa Clara Valley Audubon Society, and Marin Audubon Society

Dated: January ____, 2007
Approved as to form:

LAW OFFICE OF JOHN C. GABRIELLI

John C. Gabrielli
Attorney for Californians for Renewable Energy

Dated: January ____, 2007
Approved as to form:

PAUL, HASTINGS, JANOFSKY & WALKER LLP

Peter H. Weiner
Attorney for ESI Bay Area GP, Inc., ESI Altamont
Acquisitions, Inc. on behalf of Green Ridge Power, LLC.,
and ESI Tehachapi Acquisitions, Inc., on behalf of
Altamont Power, LLC

Dated: January ____, 2007
Approved as to form:

KAYE SCHOLER LLP

George T. Caplan
Attorney for SeaWest Power Resources, LLC and enXco,
Inc.

Dated: January ____, 2007
Approved as to form:

ALAMEDA COUNTY
