

Agreement to Terminate Mediation

This agreement to terminate mediation (“Agreement”) is entered into as of this ___th day of October, 2008, by and between **Golden Gate Audubon Society**, (“Audubon”), 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.**, (“enXco”), and **SeaWest Power Resources, LLC.**, (“SeaWest”), (ESI, enXco and SeaWest collectively the “Wind Power Companies”), and the **Alameda County Board of Supervisors, County of Alameda** (the “County”), all of whom 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:

- A.** On January 2007, the Parties entered into a settlement agreement (the “Settlement Agreement”) resolving litigation challenging the issuance by the County of conditional use permits (“CUPs”) to the Wind Power Companies for wind turbine operation at the Altamont Pass Wind Resources Area (“APWRA”).
- B.** On January 11, 2007, the County modified the CUPs for the Wind Power Companies consistent with the terms of the Settlement Agreement.
- C.** On or about October 29, 2007, Audubon requested mediation, pursuant to section 10 of the Settlement Agreement, alleging the Wind Power Companies had not complied with, and the County had not enforced, the requirement to timely remove High Risk Turbines and derelict and non-operating turbines. The Wind Power Companies deny that they have not complied with, and the County denies that it has not enforced, the terms of the Settlement Agreement.
- D.** Beginning in January 2008, the Parties engaged in a series of mediation sessions in an attempt to resolve their disputes (the “Mediation Dispute”).
- E.** The Parties desire to enter into this Agreement in order to execute a final settlement of the Mediation Dispute. The terms and conditions of this Agreement are set forth below.

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

TERMS AND CONDITIONS

1. Compliance Monitor

- (a) The County shall hire an independent consultant (“Compliance Monitor”) whose sole purpose shall be to ensure compliance with the terms of the CUPs, including but not limited to the timely removal (and, as applicable, relocation) of high risk and unproductive turbines and towers and the execution of seasonal shutdowns requirements specified in this Agreement and the Settlement Agreement.

- (b) The Wind Power Companies shall fund the Compliance Monitor position as follows:
 - (i) \$20,000 per year in years 2009-2011.
 - (ii) \$15,000 per year in years 2012-2018.
- (c) The Wind Power Companies shall fund the Compliance Monitor on a pro rata basis as follows:
 - (i) ESI – 62.57%
 - (ii) enXco – 28.08%
 - (iii) SeaWest – 9.35%
- (d) The Compliance Monitor shall physically confirm and document by digital photograph the timely removal of high risk and unproductive turbines and towers and performance of seasonal shutdown as specified in this Agreement. Within 14 days of any of the Compliance Monitor deadlines in this Agreement, the Compliance Monitor shall notify the applicable Wind Company, the County and Audubon of any purported noncompliance (the “Notice”). The Compliance Monitor shall schedule a meet and confer with the applicable Wind Company, County and Audubon concerning any potential noncompliance within 14 days of the Notice.
- (e) The services performed by the Compliance Monitor are not encompassed within the existing tasks performed by the County pursuant to the terms of the CUPs and the funding for the costs of the Compliance Monitor’s services is not in lieu of and does not duplicate the County’s other CUP related costs including, but not limited to, costs expended for scientific monitoring or implementation of the Avian Wildlife Protection Program pursuant to paragraphs 6 and 7 of Resolution 2005-235.

2. **Confirmation of identification of High Risk Turbines.**

- (a) High Risk Turbines shall be defined as: a) turbines and towers rated 8 - 10 by the Scientific Review Committee (SRC) during its December 2007 site visit; or b) turbine sites grouped within Tiers 1, 2 or 3 per Smallwood-Spiegel June 2005 report, Group C ranking. High Risk Turbines do not include turbines located on the Santa Clara site.
- (b) To confirm the status of High Risk Turbines as of the effective date of this agreement:
 - (i) Each Wind Company shall, within 7 working days of the effective date of this Agreement, submit a list of High Risk Turbines attributable to it to the County for confirmation (SeaWest will also include turbines rated 7.5 by

the SRC during its December 2007 site visit). The list shall include all High Risk Turbines that are or were subject to a removal or relocation requirement per the terms of the Settlement Agreement and this Agreement.

- (ii) The County, after consultation with the SRC, shall confirm the status of High Risk Turbines within 30 days of receipt of each Wind Companies' list (pursuant to subsection (i) immediately above). The County shall distribute the confirmed list of High Risk Turbines to the Compliance Monitor, Audubon and the Wind Companies.
- (c) Each Wind Company shall, within 14 days of receiving its confirmed list of High Risk Turbines, submit to Audubon, the County and Compliance Monitor a detailed map identifying the location and site #s for the confirmed High Risk Turbines attributed to it.

3. **Removal and Relocation of High-Risk turbines and towers.**

- (a) By February 28, 2009, each Wind Company shall remove turbines and towers rated by the SRC during its December 2007 site visit as follows:
 - (i) SeaWest shall remove its High Risk Turbines rated 7.5 – 10.
 - (ii) enXco shall remove its High Risk Turbines rated 8 – 10.
 - (iii) ESI shall remove its High Risk Turbines rated 8.5 – 10; provided, however, that ESI may continue to operate three (3) KVS-33 (400 kW capacity) turbines, which are owned by Green Ridge Power, LLC, in exchange for removing six (6) 56-100 turbines and towers rated 8.
- (b) High Risk Turbines subject to a removal requirement above may be relocated as follows:
 - (i) ESI and enXco shall not relocate turbines to sites rated 8 – 10; SeaWest shall not relocate turbines to sites rated 7.5 – 10. In addition, the Wind Companies shall not relocate turbines to turbine sites grouped within Tiers 1, 2 or 3 per Smallwood-Spiegel June 2005 report, Group C ranking.
 - (ii) Wind Companies shall make best efforts to relocate turbines consistent with Section 3 of the SRC Relocation Guidelines, document P70 (1-30-2008). If any wind company has any question about a relocation site, the company is encouraged to consult with the SRC before relocating or re-siting a removed turbine.
 - (iii) If the SRC rates additional High Risk Turbines, the Wind Companies shall not relocate turbines to sites rated 8 - 10 after such additional ratings are made.

4. **Unproductive Turbines and Towers**

- (a) Each Wind Company shall receive an allotment of Unproductive Turbines and Towers sites that can be used as relocation sites for turbines that are subject to a removal requirement.
- (b) Unproductive Turbines and Towers are: (a) turbines that have remained non-operational for 12 consecutive months and (b) turbine sites with towers only. Unproductive Turbines and Towers do not include turbines or towers located on the Santa Clara site.
- (c) The initial allotment of allowable Unproductive Turbine and Tower sites for each individual Wind Company is as follows:
 - (i) ESI – 150 turbines.
 - (ii) enXco – 21 turbines.
 - (iii) SeaWest – 18 turbines
- (d) On February 21, 2009, and annually thereafter, each Wind Company shall submit to Audubon, the County and Compliance Monitor a detailed map that identifies the location and site #s of Unproductive Turbines and Towers held in reserve as part of each company's annual allotment of Unproductive Turbines and Towers.
- (e) Each Wind Company shall remove by February 28, 2009, and February 28 of each year thereafter, Unproductive Turbines and Towers in excess of its annual allotment.
- (f) If no further high risk turbines (other than the High Risk Turbine removals required pursuant to section 3 of this Agreement) are required to be removed pursuant to a future agreement between the Parties, or pursuant to an approved adaptive management plan, then each Wind Company's final allotment on February 28, 2010 shall be:
 - (i) ESI – 48 turbines
 - (ii) enXco – 21 turbines
 - (iii) SeaWest – 12 turbines

5. **Confirmation of timely removal/relocation of High Risk Turbines and Unproductive Turbines and Towers.**

- (a) By February 28, 2009, and any years thereafter as applicable, each Wind Company shall submit a map detailing the locations to which High Risk Turbines have been relocated (to the extent they have been relocated).
- (b) The Compliance Monitor shall physically confirm and document by digital photograph the timely removal of High Risk Turbines as specified in this Agreement.
- (c) Between February 28 and March 6, 2009, the Compliance Monitor shall confirm the removal of High Risk Turbines pursuant to section 3(a).
- (d) Between February 28 and March 25, 2009, the Compliance Monitor shall randomly inspect between five (5) and ten (10) relocation areas (i.e., groupings of turbines) to confirm that relocated turbines were relocated consistent with Section 3 of the SRC Relocation Guidelines, document P70 (1-30-2008).
- (e) Between February 28 and March 6 of each year beginning in 2009, the Compliance Monitor shall physically confirm and document by digital photograph the timely removal of any Unproductive Turbines and Towers that may be required to be removed pursuant to Section 4 above by randomly inspecting at least eight (8) groups of approximately fifty (50) turbines.

6. **Seasonal shutdown.**

- (a) The Wind Companies shall shut down turbines in accordance with the CUPs; provided, however, that the Wind Companies shall shut down their turbines on a one-time universal basis per season commencing on November 1 (i.e., the Wind Companies will not shut down half the turbines in the staggered cross-over design required under the CUPs).
- (b) Within 14 days after the requirement to initiate or complete a seasonal shutdown as specified in this Agreement, (a) ESI shall submit operational data maintained in the normal course of operations to the Compliance Monitor demonstrating operating time per day for each turbine for the duration of the seasonal shutdown since its commencement; and (b) SeaWest and enXco shall submit meter readings maintained in the normal course demonstrating power generation for all turbines under their control for the duration of the seasonal shutdown since its commencement.

7. **Future SRC Actions** The Parties will encourage the SRC to rate additional High Risk Turbines consistent with the "Qualitative Description of the Hazardous Ratings" section of SRC document 69 (Final 2-1-08).

8. **Attorneys Fees.**

- (a) The Wind Companies shall pay Audubon's reasonable attorney's fees incurred in connection with the Mediation Dispute in the amount of \$46,637.50.

- (b) The Wind Power Companies shall pay Audubon's reasonable attorney's fees on a pro rata basis as follows:
 - (i) ESI – 62.57%
 - (ii) enXco – 28.08%
 - (iii) SeaWest – 9.35%

- 9. **Release.** Audubon shall release the County and Wind Power Companies, and each of their attorneys, agents, employees, representatives, officers, directors, assigns and/or successors in interest from any and all claims asserted in the Mediation Dispute. Notwithstanding the foregoing, the Parties shall have the right to enforce the terms of this Agreement.

- 10. **No Admission of Wrongdoing.** This Agreement is the result of a compromise with respect to the Mediation Dispute between the Parties. In no event shall this Agreement be deemed an admission of wrongdoing or liability of any kind by any Party.

- 11. **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.

- 12. **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.

- 13. **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.

- 14. **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.

- 15. **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.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officers as of the date first set forth above.

Golden Gate Audubon Society

By: 

Title: Executive Director

ESI Bay Area GP, Inc.

By: _____

Title: _____

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

By: _____

Title: _____

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

By: _____

Title: _____

SeaWest Power Resources, LLC

By: _____

Title: _____

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Golden Gate Audubon Society

By: _____

Title: _____

ESI Bay Area GP, Inc.

By:  _____

Title: Ben Gilbert
Vice President

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

By:  _____

Title: Ben Gilbert
Vice President

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

By:  _____

Title: Ben Gilbert
Vice President

SeaWest Power Resources, LLC

By: _____

Title: _____

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By: _____

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By: _____

Title: _____

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on behalf of Green Ridge Power, LLC

By: _____

Title: _____

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

By: _____

Title: _____

SeaWest Power Resources, LLC

By: William J. Barnes

Title: Vice President

enXco, Inc.

By: MR [Signature]
Title: VP Asset Mgmt 3/16/13

County of Alameda

By: [Signature]
Title: PRESIDENT, BOARD of SUPERVISORS

enXco, Inc.

By: _____

Title: _____

County of Alameda

By: _____

Scott Aggerty

Title: PRESIDENT, BOARD OF SUPERVISORS