

MEMORANDUM OF UNDERSTANDING

Between the California Ocean Protection Council, the State Water Resources Control Board, and the California State Coastal Conservancy Regarding Acceptance and Use of Interim Mitigation Funds for the Once-Through Cooling Policy

The California Ocean Protection Council ("OPC"), the State Water Resources Control Board ("State Water Board"), and the State Coastal Conservancy (Conservancy) (collectively referred to as the Parties) enter into this memorandum of Agreement ("Agreement") with respect to the State Water Board's desire that the OPC and the Conservancy accept and use certain interim mitigation funds required by the statewide "Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" (Policy) for continued operation of facilities that utilize coastal and estuarine waters for once-through cooling (OTC), and are not yet in full compliance with the Policy. This Agreement and its terms may be retroactive, and becomes effective immediately.

WHEREAS, the State Water Board is responsible for adopting state policy for water quality control as it relates to the marine environment pursuant to Chapter 3, Division 7 of the California Water Code; and is designated as the state water pollution control agency for purposes of the federal Clean Water Act (33 U.S.C. §1251 et seq.), including thermal intake structures regulated under § 316(b) of the Act (33 U.S.C. § 1326(b)); and

WHEREAS, on May 4, 2010, the State Water Board adopted the Policy under Resolution No. 2010-0020. The Policy establishes uniform, technology-based requirements to implement the federal Clean Water Act § 316(b) (33 U.S.C. § 1326(b)) through the State Water Board's National Pollutant Discharge Elimination System (NPDES) permit program pursuant to Clean Water Act § 402 (33 U.S.C. § 1342); and

WHEREAS, section 2.C.(3) of the Policy requires the owner or operator of an existing power plant to implement measures to mitigate the interim impingement and entrainment impacts resulting from their OTC intake structure(s), commencing October 1, 2015, and continuing up to and until the owner or operator achieves final compliance. An owner or operator may comply with this requirement by demonstrating to the State Water Board's satisfaction that the interim impingement and entrainment impacts are compensated for by the owner or operator providing funding to the OPC or the Conservancy, consistent with this Agreement, to fund an appropriate mitigation project.

WHEREAS, on August 18, 2015, by Resolution 2015- 0057, the State Water Board delegated to the Executive Director of the State Water Board authority to approve measures that owners or operators of existing OTC facilities must undertake to comply with interim mitigation

requirements on a case-by-case basis. Through a method developed by the State Water Board, determining the mitigation fee for each facility requires calculating the entrainment fee, impingement fee, and management and monitoring fee. The sum of these three fees constitutes the interim mitigation fee in units of cost per million gallons. Since the calculations for the fees require input values from each OTC facility, the interim mitigation fee will vary by facility and will be set by the State Water Board; and

WHEREAS, OPC is responsible for improving the protection, conservation, restoration, and management of California's coastal ocean ecosystems through enhanced scientific understanding, and can assist the State Water Board in implementing its legal directives by accepting, holding and disbursing funds consistent with the OPC's authority (see Public Resources Code 35500 *et seq.*, and Fish and Game Code 2850.5); and

WHEREAS, the OPC is authorized under § 35625 *et seq.* of the Public Resources Code, and a Section 28 letter approved by the Department of Finance, to accept such funds, and is further authorized to award grants to public agencies, tribes and nonprofit organizations to restoration projects that improve or protect coastal and marine habitat, water quality, sediment management and living marine resources; and

WHEREAS, the Ocean Trust Fund was established in the State Treasury pursuant to § 35650 *et seq.*, of the Public Resources Code to receive and disburse funds paid to the OPC in trust, subject to the right of recovery to fulfill the purposes of the trust; and such funds include those paid to the OPC in trust for purposes of mitigation or other regulatory entitlements; and

WHEREAS, OPC's Executive Director has authority to accept funds for agency support and project work, make required representations, negotiate and enter into agreements to obtain the funds consistent with Council approval; and

WHEREAS, the funds acquired from OTC facilities per this Agreement are for interim mitigation measures those OTC facilities are obligated to pay for, and are not intended to offset general fund obligations that are, or will foreseeably, be achieved with those existing general fund allotments already allocated to the OPC.

WHEREAS, the State Coastal Conservancy, a state agency established under Division 21 of the Public Resources Code (Public Resources Code §§ 31000 *et seq.*), is responsible for implementing a program of marine resource enhancement and protection along the coast of California and throughout the San Francisco Bay Area, and can assist the State Water Board in implementing its legal directives by accepting, holding and disbursing Funds consistent with the Conservancy's authority; and

WHEREAS, the Conservancy is authorized under § 31104 of the Public Resources Code to accept funds from public and private sources, and is further authorized under Chapter 5.5 of

Division 21 of the Public Resource Code to award grants to public agencies, tribes and nonprofit organizations to undertake restoration projects that improve or protect coastal and marine habitat, water quality, sediment management and living marine resources; and

WHEREAS, the Coastal Trust Fund was established in the State Treasury pursuant to § 31012 of the Public Resources Code to receive and disburse funds paid to the Conservancy in trust, subject to the right of recovery to fulfill the purposes of the trust; and such funds include those paid to the Conservancy in trust for purposes of mitigation or other regulatory entitlements; and

WHEREAS, Section 31012 of the Public Resources Code provides that funds deposited in the Coastal Trust Fund bear interest and are continuously appropriated, without regard to fiscal year, to the Conservancy to fulfill the trust purposes for which the payment of funds were made; and

WHEREAS, on September 25, 2001 the Conservancy delegated to its Executive Officer authority to accept funds for agency support and project work, make required representations, negotiate and enter into agreements to obtain the funds, and meet agreed conditions; and

NOW, THEREFORE, the Parties agree as follows:

1. OPC and Conservancy Acceptance of the Policy's interim mitigation Funds.

OPC, the Water Board, and the Conservancy agree that, exclusive of pre-existing legal obligations, each year 5.4 million dollars (\$5,400,000) of the Funds shall be provided to the OPC for mitigation of impacts to the State Marine Protected Areas. The Conservancy shall accept all remaining OTC Funds, to the extent any such Funds remain, to be used for wetland restoration. To the extent the Funds consist of less than 5.4 million, OPC shall receive the full amount of Funds available.

Notwithstanding the foregoing, a settlement to litigation challenging the original Policy between the State Water Board and NRG California South, LP allows NRG to seek to apply interim mitigation Funds to a specific project otherwise consistent with Policy.

2. Where an owner or operator of an existing OTC facility elects to pay interim mitigation Funds in order to comply with the Policy, and where the State Water Board has calculated the amount of the Funds, the following actions will occur:

a. The Executive Director of the State Water Board will send a letter to the OPC and, to the extent Funds are accrued from OTC operators above 5.4 million, to the Conservancy indicating any conditions or terms which direct the use of Funds at least thirty days prior to the date by which the Funds will be transferred. The permittee will provide the OPC or the Conservancy with any documentation necessary, including information needed to effectuate transfer of the Funds, unless the permittee receives a waiver of this requirement in writing from the OPC or the Conservancy, whichever is necessary.

- b. The Executive Director of the OPC or the Executive Officer of the Conservancy will authorize in writing acceptance of the Funds for use in accordance with this Agreement and any relevant conditions placed on the expenditure of the Funds.
- c. The OPC or the Conservancy shall consult with the State Water Board about proposed use of the Funds for specific mitigation projects.
- d. The Funds may be cumulated with other small amounts of Funds accepted under this Agreement, and disbursed to other projects, or additional mitigation and monitoring of existing projects, after appropriate consultation.
- e. Nothing in this Agreement shall preclude the OPC or Conservancy from accepting Funds required by State Water Board for compliance with the Policy's requirements for interim mitigation, if the Parties so agree.

3. Deposit of Permit Funds. The OPC and the Conservancy shall deposit all Funds accepted pursuant to this Agreement in one or more accounts within their respective Trusts, the Ocean Protection Trust Fund and the Coastal Trust Fund. Each entity will apply its internal accounting practices, subject to any necessary approvals from the Department of Finance. All accounts shall, to the extent possible, bear interest.

4. State Water Board Project Approval. The State Water Board shall indicate approval of selected mitigation projects through letters from the State Water Board's Executive Director or designee to the OPC's Executive Director or Conservancy's Executive Officer.

5. Disbursements.

- a. Upon and subject to the authorization of the OPC's governing board, or the Conservancy's governing board, the OPC or the Conservancy shall disburse funds to a designated recipient or other appropriate entity to implement the mitigation project(s) consistent with the terms of this Agreement and the letter from the Executive Director of the State Water Board.
- b. Disbursement of any Funds shall be made in accordance with the requirements of the OPC governing board's authorization and in compliance with Division 26.5 of the Public Resources Code and other applicable provisions of law, or the Conservancy's governing Board's authorization and compliance with Division 21 of the Public Resources Code.
- c. The OPC and the Conservancy may each retain ten percent of the Funds they receive to cover the administrative costs associated with project selection, grant oversight, and administration the funds.

d. The total amount of Funds which the OPC and Conservancy are obligated to disburse to mitigation projects in furtherance of this agreement shall in no event exceed the corresponding amount of Funds accepted, plus any interest attributed to those Funds.

6. Alternative Projects. If the OPC's Executive Director or Conservancy's Executive Officer determine at any time that any mitigation project(s) is/are infeasible or cannot be completed with the amount of Funds accepted by the OPC or the Conservancy, the OPC or the Conservancy may use the Funds for an alternative mitigation project, subject to the review and approval of the Executive Director of the State Water Board. Where small amounts of Funds can be cumulated and usefully applied to appropriate projects within the State's marine protected areas in the geographic region of the facility, or other areas as agreed upon by the parties, the OPC or Conservancy will implement such a project.

7. Remaining Funds. If an authorized mitigation project is completed for less than the amount of Funds available, any remaining money may be used to either (a) fund other projects approved by both the Executive Director of the State Water Board and the Executive Director of OPC and/or the Executive Officer of the Conservancy, or (b) increase the amount of funds used toward maintaining and monitoring the project.

8. Annual Reports. The OPC and the Conservancy will separately each produce an annual report to the State Water Board identifying each completed mitigation project and the monitoring and maintenance activities that have occurred on each project which requires continued monitoring and maintenance.

9. Term. This Agreement shall start on the effective date and shall run through June 30, 2034 ("the termination date") unless otherwise terminated or amended as provided in this Agreement.

10. Termination.

a. Either OPC or the State Water Board may terminate this Agreement for any reason by providing the other party with thirty days' notice in writing. However, the obligations of the OPC and the State Water Board shall continue with respect to any Funds that the OPC has agreed to accept, and has received prior to the termination date, except as the parties may otherwise agree.

b. Either the Conservancy or the State Water Board may terminate this Agreement for any reason by providing the other party with thirty days' notice in writing. However, the obligations of the Conservancy and the State Water Board shall continue with respect to any Funds that the Conservancy has agreed to accept, and has received prior to the termination date, except as the parties may otherwise agree.

11. Amendment. Any modification, waiver, or amendment of any provision of this Agreement shall be effective only if in writing and signed by all parties.
12. Designees. The Executive Officer of the OPC, the Executive Officer of the Conservancy, and the Executive Director of the State Water Board may each designate in writing a staff person who shall have authority to act on behalf of each agency.
13. Authority. Each of the parties represents and warrants that it has the full power and authority to execute, deliver and perform under this Agreement.
14. Counterparts. This Agreement may be executed by the parties hereto simultaneously in separate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

STATE WATER RESOURCES CONTROL BOARD

By: _____
THOMAS HOWARD
Executive Director

Date: _____

OCEAN PROTECTION COUNCIL

By: _____
DEBORAH HALBERSTADT
Executive Director

Date: _____

COASTAL CONSERVANCY

By: 
SAM SCHUCHAT
Executive Officer

Date: 10/18/16

11. Amendment. Any modification, waiver, or amendment of any provision of this Agreement shall be effective only if in writing and signed by all parties.

12. Designees. The Executive Officer of the OPC, the Executive Officer of the Conservancy, and the Executive Director of the State Water Board may each designate in writing a staff person who shall have authority to act on behalf of each agency.

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STATE WATER RESOURCES CONTROL BOARD

By: Thomas Howard
THOMAS HOWARD
Executive Director

Date: 10/20/16

OCEAN PROTECTION COUNCIL

By: _____
DEBORAH HALBERSTADT
Executive Director

Date: _____

COASTAL CONSERVANCY

By: _____
SAM SCHUCHAT
Executive Officer

Date: _____

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STATE WATER RESOURCES CONTROL BOARD

By: _____
THOMAS HOWARD
Executive Director

Date: _____

OCEAN PROTECTION COUNCIL

By:  _____
DEBORAH HALBERSTADT
Executive Director

Date: 11/3/2016

COASTAL CONSERVANCY

By: _____
SAM SCHUCHAT
Executive Officer

Date: _____