

**MEMORANDUM OF UNDERSTANDING BETWEEN
AES HUNTINGTON BEACH, LLC,
THE HUNTINGTON BEACH WETLANDS CONSERVANCY, AND
THE CALIFORNIA ENERGY COMMISSION STAFF**

DOCKET 00-AFC-13C
DATE JAN 30 2007
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This MEMORANDUM OF UNDERSTANDING ("MOU"), is made and entered into this 10th day of January 2007 (herein "Effective Date") by and between AES HUNTINGTON BEACH, LLC, a Delaware Corporation doing business in California (hereafter "AES"), THE HUNTINGTON BEACH WETLANDS CONSERVANCY, a California nonprofit corporation (hereafter the "Conservancy"), and the CALIFORNIA ENERGY COMMISSION STAFF, also known as the California Energy Resources Conservation and Development Commission, a State body established by the Warren-Alquist State Energy Resources Conservation and Development Act (Cal. Pubic Resources Code § 25000 et seq.) (hereafter the "Commission"). Collectively, all three shall be referred to as the Parties.

RECITALS

WHEREAS, the Conservancy is a charitable organization organized under Section 501(c)(3) of the Internal Revenue Code, governed by an all-volunteer seven member Board of Directors, and established to enhance, protect, restore and preserve wetlands habitat along the coast within the City of Huntington Beach; and

WHEREAS, the Conservancy currently owns approximately 102 acres of wetlands between the Santa Ana River and Newland Street, which comprises some or all of the areas frequently referred to as Talbert Marsh, Brookhurst Marsh, and Magnolia Marsh (hereafter "HB Wetlands"); and

WHEREAS, the Conservancy is uniquely qualified to perform the habitat restoration intended to affect 66.8 acres of Huntington Beach Wetlands owned by the Conservancy and required to be restored and maintained in accordance with that certain pronouncement by the Commission known as Decision and Order on the Huntington Beach Retool Project (00-AFC-13C) dated September 27, 2006; and

WHEREAS, this MOU is intended to satisfy the Commission's Condition of Certification BIO-5 (hereinafter "BIO-5") of the Commission Decision and Order on the Huntington Beach Retool Project (00-AFC-13) dated May 10, 2001 (hereafter "Commission Decision") as well as the Decision and Order on the Huntington Beach Retool Project (00-AFC-13C) dated September 27, 2006; and

WHEREAS, BIO-5 reads in its entirety as follows:

"If the entrainment and impingement study determines that a significant impact to one or more species of coastal fish is

occurring, the project owner will provide mitigation/compensation funds for impacts to Southern California Bight fish populations. Upon consultation with the project owner, the mitigation/compensation funds should be used for such things as tidal wetlands restoration, creations of artificial reefs, or some other form of habitat compensation that is sufficient to fully address the species impacts identified in the final report required by Condition of Certification BIO-3. The CEC CPM, in consultation with the project owner and state, federal and local resource agencies, will determine the amount and final application of the compensation funds. When appropriate mitigation is determined, the project owner will prepare and sign a Memorandum of Understanding (MOU) with the entity that will receive the compensation funds. The MOU will clearly identify acceptable uses of the funds, including an accounting of how the funds will be spent.

Verification: The CPM will review the draft MOU to ensure the wording is clear, meets the terms of the mitigation, and that it is enforceable. The CPM will ensure the MOU is completed within 120 days of determination of the need for mitigation/compensation. The project owner will provide written verification to the CEC CPM that the mitigation/compensation funds have been paid within 30 days after signing the MOU for the disposition of required compensation funds.”

WHEREAS, the Huntington Beach Generating Station (HBGS) has been in operation since 1957, with the original plant consisting of five electric generation units (Units 1-5), offshore intake and discharge pipes for cooling water, and additional ancillary facilities; Units 1 & 2 (430 MW) have been in operation since 1957; Units 3 & 4 (450 MW) were retired in 1995 due to limited use; and Unit 5, a 133 MW simple-cycle peaking facility, ceased operation prior to December 2002; and

WHEREAS, in December 2000, AES Huntington Beach submitted an Application for Certification to the Commission to retool the retired Units 3 & 4 of the AES HBGS; and at the time of the application, California's energy supply situation was declared an emergency; and

WHEREAS, in 2001, the Commission granted an emergency certification for the AES Huntington Beach Retool Project to retool and restart Units 3 & 4 at the existing HBGS; the Commission instituted a highly expedited permitting process to allow AES to come on line within 90 days from date of licensing to help alleviate the energy crisis in California; due to unforeseen circumstances, Unit 3 restarted operations in January 2003 and Unit 4 restarted operations in August 2003; and

WHEREAS, the Commission's approval of the project included Conditions of Certification to identify and mitigate potentially significant impacts from impingement and entrainment (BIO-3 and BIO-5) that could not be effectively evaluated during the expedited emergency certification. A one-year study of the impacts of impingement and entrainment was conducted between September 2003 and August 2004. A final report was published in April 2005, and based on the report, the Commission staff concluded that the estimated loss of productivity of 66.8 acres of coastal habitat due to the cooling water usage from Units 3 & 4 was significant. Commission staff recommended the restoration of 66.8 acres at the Huntington Beach Wetlands to fully mitigate the impacts caused by Units 3 & 4; and

WHEREAS, on September 27, 2006, the Energy Commission held a hearing at a regularly scheduled business meeting and after hearing from all interested parties, ordered AES to provide \$4,987,288 to the Conservancy for the restoration of 66.8 acres of the Huntington Beach Wetlands and to provide \$523,712 (discounted at 6 percent for advance payment) for maintenance of those restored wetlands for a period of 10 years (total payment equals $\$4,987,288 + \$385,457 = \$5,372,745$); and

WHEREAS, the Conservancy will open a trust account for the purpose of controlling the funding of projects for restoration of wetland habitat within the Wetlands so that health and biological productivity of aquatic coastal habitat will be increased. The trust officer, pursuant to the terms of this MOU, shall deposit funds into interest bearing accounts and disburse funds as approved by the Commission Compliance Project Manager (CPM) based on one or more acceptable uses of those funds as identified in this MOU; and

WHEREAS, in keeping with Condition of Certification BIO-5, this MOU governs the process for the Conservancy to submit specific project proposals to the CPM for approval and authorization of the use of the mitigation funds; and

WHEREAS, this MOU clearly identifies acceptable uses of the mitigation funds, including an accounting of how the funds will be spent. Funds for mitigation/compensation for impacts to Southern California Bight fish populations should be used for tidal wetlands restoration. The proposed Wetlands Restoration Project is designed to enhance existing wetland habitats, and increase the biological productivity of the Wetlands. Specific proposed project elements include planning/permitting, excavation and dredging, levee improvement / installation, construction of tidal control structures, and operation and maintenance costs; and

WHEREAS, the CPM has reviewed the draft MOU to ensure the wording is clear, meets the terms of the mitigation as provided in the Conditions of Certification, and is enforceable; and

WHEREAS, this MOU requires the CPM to review and approve the proposed restoration project and approve the level of funding for the restoration project; and

WHEREAS, this MOU also provides for project maintenance and expenditure approval by the CPM. This MOU requires the Conservancy to provide progress and final reports for the project to AES and the CPM. The MOU provides that no funds may be released without written approval of the CPM and provides for fiscal reports and auditing; and

WHEREAS, the Conservancy will provide an annual report including a description of restoration projects implemented, a schedule and description of future restoration projects, and a summary of financial account activity; and

WHEREAS, to maximize benefits, the CPM will approve restoration projects for funding and implementation as soon as possible after funds are deposited in the trust account and the Plan is approved by the CPM; and

WHEREAS, over the course of approximately five years, the restoration projects funded by the mitigation money are expected to be complete except for any necessary maintenance activities that would occur over the course of the required 10 years.

NOW THEREFORE, the Conservancy, AES and Commission Agree as follows:

1. All parties agree that the above recitals are true and correct to the best of each party's knowledge, and shall be incorporated into this MOU as if terms fully set forth herein.

2. Trust Account

- a. Deposit. No later than 4:30 P.M. on December 27, 2006, funds in the amount of FIVE MILLION THREE HUNDRED SEVENTY TWO THOUSAND SEVEN HUNDRED FORTY FIVE AND NO CENTS (\$5,372,745.00) shall be transferred by AES into a newly created, separate, segregated account which shall be known as the Huntington Beach Wetlands Conservancy Trust Account (hereafter the "Trust Account") which will be the equivalent of 66.8 acres of restoration.
- b. Funds Administrator. The Trust Account shall be established by Ryan Kelly, Principal and CEO of Spectrum Asset Management, Inc., whose firm shall serve as the funds administrator at the onset of this MOU. The Trust Account shall be held in the custody of the Charles Schwab Company as an account thereof and shall be professionally managed by Spectrum Asset Management Inc., a S.E.C. Registered Investment Adviser (hereafter "Spectrum"), who shall be under contract with the Conservancy and shall provide full accounting on a periodic basis and as requested by the Conservancy or CPM. Spectrum

shall act as the agent of the Conservancy for the purpose of investing all funds (principal plus earnings) for the benefit of the Conservancy, except when Spectrum shall act as a dual agent of the Commission and the Conservancy when distributing funds pursuant to this MOU. In the event of any unforeseen circumstances where the Conservancy determines Mr. Kelly or Spectrum shall no longer serve as the funds administrator or that the Charles Schwab Company shall no longer serve as the custodian of the funds, the Conservancy may transfer funds to a comparable custodian and/or contract with another funds administrator, provided the Conservancy receives the prior approval of the CPM and provided the new custodian and/or funds administrator fulfills the obligations as described in this MOU.

3. Restoration Project Submission and Approval

The Conservancy will propose wetland restoration projects at the Wetlands to be funded by the trust account. The Conservancy shall provide written restoration project proposals to the CPM. The proposals shall describe the restoration project, including a time schedule for completion. If known, the proposal shall identify the contractor or organization that will be responsible for carrying out the restoration project and any cooperating entities (such as other non-profit organizations).

- a. The CPM shall review the proposal submitted by the Conservancy. Within 15 working days of receiving the proposal, the CPM, applying the requirements of this MOU and the Conditions of Certification, shall approve or disapprove a restoration project proposed by the Conservancy or approve conditionally, or submit to the Conservancy a request for additional information, if applicable. Within 15 working days after receiving any additional information requested, the CPM, applying the requirements of this MOU and the Conditions of Certification, shall approve, disapprove, or conditionally approve a restoration project proposed by the Conservancy. Conditions of approval shall establish final restoration project requirements, including maintenance activities, to assure funds are spent appropriately. Approval shall include a determination of the level of funding appropriate for the project.
- b. Once a restoration project is approved and the CPM has determined that the conditions are fulfilled, then the CPM will authorize release of funds from the trust account within 5 working days.

4. Transfer or Sale of Land

- a. The Conservancy agrees to notify and obtain written approval from the CPM, which approval shall not be unreasonably withheld, prior to any transfer or sale of properties originally subject to the terms of this MOU. CPM approval shall not apply to any property reversions to the California State Coastal Conservancy or similar transfers which are pre-existing limitations on the property owned by the Conservancy.

To qualify for such approval, the Conservancy shall present evidence that in the case of a transfer, the proposed transferee meets the criteria described in Paragraph 4.c and the proposed transferee will continue to manage the property consistent with the purpose of this MOU. In the event of transfer of (but not sale of) all or any part of the properties subject to this MOU, a pro rata share of the funds and accrued unspent income existing at the time of transfer, less any of the Conservancy's applicable outstanding reimbursable expenses, will be transferred with the property.

- b. Any appropriate State or Federal agency ("Government Agencies"), or any land trust organization or other qualifying non-profit organization ("Qualified Non-Profits") that agrees to maintain the property and which is otherwise acceptable to the CPM, shall be qualified to accept a transfer of such property proposed for transfer.
- c. Upon the dissolution or any reformation of the non-profit status of the Conservancy, property title, the associated endowment and such other funds dedicated to the property, and possession of all books and records, all equipment, and supplies, purchased pursuant to this MOU, and all rights and responsibilities contained herein shall be transferred at the direction of the CPM.

5. Periodic Reports

The Conservancy shall provide periodic reports every May 15, September 15, and January 15 to the CPM until such time the CPM determines they are no longer necessary. The Annual Report, described below, shall be due January 15. The content of the periodic reports shall be determined by the CPM. At a minimum, each periodic report shall include a brief description of progress on restoration projects already approved. Each periodic report shall also include a summary of invoices paid, progress payments, purchase payments, outstanding balances, outstanding invoices, any other payments from the trust account for each project already approved, and use of funds for maintenance activities. The periodic reports shall include written and photographic documentation of how well the restoration project(s) are succeeding and a discussion of the success of the restoration project.

6. Annual Reports

The Conservancy shall provide two copies of annual reports to the CPM. The content of the annual reports shall be determined by the CPM and at a minimum, comply with reporting requirements. The annual report shall also include a fiscal report regarding the status of the trust fund, including investments. The annual report shall summarize all the periodic reports and to the extent the annual report is a substitute for a periodic report, shall contain all the information required for that periodic report. The Conservancy shall coordinate with existing monitoring and research projects regarding biological productivity of the Huntington Beach Watershed and shall include in the annual report, a summary of information

obtained from these existing projects. All reporting and monitoring requirements imposed by the CPM shall be related to documenting the progress of the Conservancy toward completing the restoration projects. All parties agree that any reporting and monitoring required by the CPM, or any other costs required under this MOU, may be paid from the trust fund with prior CPM approval, so that Conservancy itself shall not be required to pay for such reporting/monitoring out of its own funds.

7. Audits and Access to Records

The Conservancy shall maintain standard financial accounts, documents and records relating to implementation of the Program funded under this MOU. The Conservancy may use any accounting system which follows the guidelines of "Generally Accepted Accounting Practices" published by the American Institute of Certified Public Accountants. The Conservancy will maintain all required records for three (3) years after final payment from the trust account and all pending matters are resolved.

- a. The Commission and state government auditors or their duly authorized representatives shall have access to any books and documents, including electronic files, papers, and records of the Conservancy which are relevant to this MOU for any purpose including, but not limited to making audits, examinations, excerpts and transcriptions.
- b. The Conservancy shall include in each of its subcontracts involving an expenditure of funds under this MOU in excess of ten thousand dollars (\$10,000) a provision that requires the subcontractor to make all records relevant to the subcontractor's work on Program project(s) available for examination and audit under the same terms as specified in subparagraph "a." of this section. The Conservancy shall also require subcontractor to maintain all required records for three (3) years after final payment from the dedicated fund and all pending matters are resolved.

8. Third Parties

Nothing in this MOU is intended to create in the public or any member of the public, rights as a third party beneficiary under this MOU.

9. Permits, Fees and Notices

The Conservancy shall procure all permits and licenses necessary to accomplish the work funded by the trust account, pay all project related charges and fees from the trust account and give all notices necessary and incident to the due and lawful performance of the work with the approval of the CPM.

10. Insurance and Bonds

- a. The Conservancy is solely responsible for maintaining insurance policies to cover insurance needs, which may be required by law in the jurisdiction where the project funded by the trust account is being implemented. All insurance policies obtained by the Conservancy in furtherance of the restoration of the Wetlands shall name the Commission as an also insured and provide proof of such policies to the CPM. Conservancy and its insurers shall indemnify and defend the Commission from any claim, liability or action arising from the restoration of the Wetlands.
- b. Upon request, the Conservancy shall furnish to the CPM copies of insurance certificates evidencing its present level of insurance coverage for: Worker's Compensation, Employer's Liability, Commercial Liability Insurance, (including Contractual Liability and Automobile Liability) and any other coverage the Conservancy has. The certificates shall specify the dates when such insurance expires and shall provide further that the CPM shall be given not less than thirty (30) days written notice before cancellation of, or any material change in such insurance. The Conservancy shall maintain such insurance coverage throughout the term of this MOU.
- c. Indemnity. In no event shall the Conservancy be liable for losses resulting from the negligence or intentional misconduct of AES or the California Energy Commission. Nothing in this MOU shall be construed as creating an obligation for California Energy Commission to indemnify the Conservancy.

11. Conservancy Acting Independently

The Conservancy, and the employees or agents of the Conservancy and its subcontractors, in the performance of this MOU, shall act in an independent capacity and not as officers, employees or agents of the Commission or the State of California.

12. Review and Comments

The Conservancy agrees the Commission has the right to review and comment on any and all activities paid for from the trust account. All services, materials and other consideration provided by the Conservancy shall be provided to the reasonable satisfaction of the CPM.

13. Use of Funds

The Conservancy is prohibited from using funds from the Trust Account for any purpose other than projects or phases approved by the CPM. The Conservancy Board of Directors agree to be personally liable for any intentionally wrongful acts, including gross mismanagement and/or misappropriation of funds, to the full extent he or she is individually responsible

for such gross mismanagement or misappropriation. Nothing herein shall affect any obligations of insurance obtained by the Conservancy.

14. No Waiver of Enforcement

The failure of the Commission to enforce, or the delay by the Commission to enforce, any of the terms and conditions of this MOU shall not be deemed a continuing waiver or a modification of this MOU unless the waiver or modification is expressly written and signed by the Commission.

15. Progress in Five Years

Restoration of the wetlands is expected to be completed within five years, not including post-restoration maintenance which is funded for 10 years. If restoration projects are not completed in a timely manner or if the Commission determines that the Conservancy has not made adequate progress toward completion of the restoration, the Commission, at its discretion, may terminate the Conservancy's management of the restoration project and the Conservancy will transfer any funds as directed by the CPM. Prior to any action affecting the Conservancy's management of any projects or phases using Trust Account funds, sixty (60) days advance notice shall be given to the Conservancy, which shall have the right to a public hearing before the Commission to address all charges. Delays in completing projects that are beyond the reasonable control of the Conservancy may be excused. If projects are complete and some funds remain, other than those set aside for maintenance activities, then the CPM shall have sole discretion to determine the disposition of remaining funds.

16. Term of MOU

This MOU terminates five years after final payment from the trust account and all pending matters are resolved. Any remaining funds shall be transferred as directed and approved by the CPM. Upon the Conservancy's receipt of a notice of termination, and except as otherwise directed in the notice, the Conservancy shall:

- a. Stop work on the date of receipt unless a different date for termination of work is specified in the notice.
- b. Place no further orders nor enter into any further contracts or subcontracts for materials, services or facilities except as necessary to complete work under the Contract through the effective date of termination, after written approval from the CPM.
- c. Terminate all orders, contracts and subcontracts.
- d. Promptly take all other reasonable steps to minimize any additional costs, losses, mitigable damages or expenditures associated with work terminated,

including, but not limited to reasonable settlement of all outstanding liabilities and claims arising out of termination of orders and subcontracts.

- e. Deliver or make available to the CPM all data, drawings, specifications, reports, estimates, summaries, and such other information and material as may have been accumulated by the Conservancy under this MOU, whether completed, partially completed, or in progress.

17. Notice

Any notice a party desires or is required to give including noticing a change of contact or address shall be in writing and shall be given via pre-paid, first class mail to the designated agent for each party as follows:

Huntington Beach Wetlands Conservancy

Attn: Gary Gorman, Project Manager
P.O. Box 5903
Huntington Beach, CA 92615
(714) 926-1945
gcgorman@verizon.net

AES Huntington Beach, LLC

Eric Pendergraft, General Manager
21730 Newland Street
Huntington Beach, CA 92646
Eric.Pendergraft@AES.com

California Energy Commission:

Attn: Donna Stone
Compliance Project Manager
1516 Ninth St., MS 2000
Sacramento, CA 95814
(916) 654-4745
Dstone@energy.state.ca.us

18. Conflict Resolution

In the event of any express conflict between this MOU and the prior decisions of the Commission, including the Commission Decision and Order on the Huntington Beach Retool Project (00-AFC-13) dated May 10, 2001, and the Commission Decision and Order on the Huntington Beach Retool Project (00-AFC-13C) dated September 27, 2006, the intent of the prior Commission decision shall be followed. Any decision of the CPM may be appealed by the Conservancy to the Commission, and if a conflict still exists, any party may give notice of mediation. Each party agrees to participate in non-binding mediation prior to the filing of any litigation.

19. Litigation

This MOU shall be interpreted and applied in accordance with California law. Any litigation concerning this MOU shall be brought in Sacramento County Superior Court.

20. Entire Agreement

This MOU sets forth the parties' entire understanding of the mitigation fees and their use pursuant to the Commission's decisions regarding Huntington Beach Generating Station and supersedes all prior agreements and representations on the matter, written and oral, and may be modified only by a written document signed by the Conservancy, AES Huntington Beach, LLC, and the Commission.

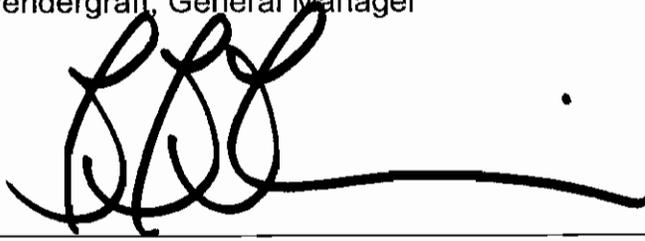
[SIGNATURE PAGE TO FOLLOW]


HUNTINGTON BEACH WETLANDS CONSERVANCY
Jack Kirlorn, Chairman

1-10-07
DATE


AES HUNTINGTON BEACH LLC
Eric Pendergraft, General Manager

1-30-07
DATE


CALIFORNIA ENERGY COMMISSION
B. B. Blevins, Executive Director

1.17.07
DATE