



## **Exclusive Right to Negotiate Agreement**

This AGREEMENT is made and entered into on the date of last signature of this agreement ("Effective Date") by and between RealEnergy, LLC (DEVELOPER), and Napa Sanitation District (NSD).

### **RECITALS**

NSD owns land ("Site A") located in the County of Napa and depicted in the Site Map attached hereto as Exhibit "A." The Site is contiguous to the Waste Water Treatment Plant with existing anaerobic digesters and engine generation.

The DEVELOPER is a private company specializing in the development of on-site and renewable energy power plants and has submitted to NSD a preliminary proposal for the development of a High Performance Mixed Waste Processing Facility (HP-MWPF) (the "Project").

The Project is a biogas development using anaerobic digestion of organic materials derived from municipal solid waste (MSW) sourced from the Napa-Vallejo Waste Management Authority and from Recology in San Francisco to capture methane to generate renewable electricity, compressed natural gas (CNG) and to sequester excess nutrients to be sold as fertilizer. This project will be known as the Napa Biogas Plant.

The Project is intended to meet the requirements for energy conservation contracts contained in Chapter 3.2 of Division 5 of Title 1 of the California Government Code (commencing with Section 4217.10).

Successful completion of the project is expected to require that the Parties enter into various agreements, including, but not limited to, a site lease relating to Site A (the "Site Lease"), as well as an Agreement for the Purchase and Sale of Recycled Water (the "Recycled Water Agreement") an Agreement for the Purchase and Sale of Electricity (the "Power Purchase Agreement") and an Industrial User Waste Water Discharge Permit (the "Discharge Permit"). The Site Lease will include an option and first right of refusal for NSD to operate the HP-MWPF and an option and first right of refusal for NSD to purchase the HP-MWPF at some point after tax credit investors have fully realized the tax benefits.

The Parties agree to negotiate exclusively and in good faith to enter into Site Lease for Site A, the Recycled Water Agreement and the Power Purchase Agreement upon the following terms and conditions:



## **1. Agreement to Negotiate Exclusively: Good Faith Negotiations.**

A. NSD agrees that, during the Negotiation Period (as defined in Section 2 below) and provided that DEVELOPER is not in default of its obligations under this Agreement, NSD shall negotiate exclusively and in good faith with DEVELOPER with respect to the Site Lease and Power Purchase Agreement to be entered into between NSD and DEVELOPER. During the negotiation period, NSD shall not solicit or entertain offers or proposals from other parties concerning similar biogas energy generation projects at Site A. However, in no way does this agreement limit NSD in the research or pursuit of its own solar power generation facility, either developed by NSD or subject to a power purchase agreement.

B. The Parties agree, in consideration of this Agreement, to negotiate in good faith with each other with respect to the proposed Site Lease, Power Purchase Agreement and Recycled Water Agreement, and necessary government approvals and to cooperate in the preparation thereof. The Parties shall provide each other with any information regarding the Site or Project that may be reasonably requested by the other Party that exists at the time of the request.

## **2. Period of Negotiation.**

A. The Parties agree to negotiate in good faith for a period of one (1) year from the Effective Date ("Negotiation Period"). If the Parties have not executed the Site Lease, Power Purchase Agreement and Recycled Water Agreement, and obtained necessary government approvals by the end of the Negotiation Period, then this Agreement shall automatically terminate, provided, however, that the Parties may, at their sole discretion, mutually agree to extend the term of this Agreement for an additional period of up to one (1) year, subject to approval by the NSD Board of Directors.

B. DEVELOPER agrees to make meaningful progress toward determining the feasibility of the project during the Negotiation Period. Meaningful progress shall include the following:

1. DEVELOPER shall form Napa Biogas LLC and secure a Resolution of Intent to Include Expenditures for Bond Issue within the first 90 days of the Negotiation Period, and
2. DEVELOPER shall obtain Organic Transfer Station Operation and Maintenance Agreements with Recology (or comparable organization) and with the Napa-Vallejo Waste Management Authority within the first 180 days of the Negotiation Period, and
3. DEVELOPER shall request a "Will Serve" letter from NSD for the use of recycled water, identifying the location for use, purposes of use, and estimated monthly quantities required, within the first 180 days of the Negotiation Period, and

4. DEVELOPER shall develop grant applications, equity financing and/or market financing packages sufficient to show project feasibility within the first 180 days of the Negotiation Period.

C. Should DEVELOPER fail to take the actions described in Section 2 (B) above, NSD may, at its sole discretion, terminate this Agreement. This Agreement may also be terminated if the Parties agree in writing that a successful consummation of the negotiations is impossible.

D. Upon termination of this Agreement, any interest that DEVELOPER may have hereunder shall cease.

### **3. Compensation for NSD Expenses**

A. The agreements contemplated herein are outside the normal scope of operations for NSD, and as such require professional assistance to negotiate an agreement that protects the interests of NSD ratepayers. DEVELOPER agrees to reimburse NSD for any and all third party financial advice or legal expenses incurred during the Negotiation Period that are related to the negotiation and analysis of the Ground Leases or Project Agreement, provided that said reimbursement shall not exceed twenty thousand dollars (\$20,000). Said twenty thousand dollar reimbursement limit shall not apply to DEVELOPER's obligations pursuant to Section 3.B of this Agreement. The reimbursement shall be made by DEVELOPER to NSD upon termination of this Agreement, and DEVELOPER's reimbursement obligation shall survive termination of this agreement. In the event that the parties enter into a Site Lease, the Parties agree that the Site Lease will specify that the reimbursement may be credited against the first revenue payment due to NSD by DEVELOPER.

B. DEVELOPER shall bear all costs to be incurred as a result of compliance with the California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA), including, but not limited to, preparation of an environmental impact report, if required, or any other required studies or documents. All NSD staff time and other costs, including attorneys fees, associated with compliance with CEQA and NEPA, including required review and comment on documents prepared in association with the Project, shall be reimbursed by DEVELOPER. DEVELOPER shall also indemnify NSD and bear all costs, expenses, and attorney's fees associated with responding to or defending against claims that may be filed against itself, or NSD in connection with defending such environmental studies or documents from challenge by third parties.

### **4. Test and Surveys.**

A. During the Negotiation Period, DEVELOPER may conduct such tests, surveys, and other analyses as the DEVELOPER reasonably deems necessary to determine the feasibility of designing, constructing, leasing, and financing the Project and shall complete such tests, surveys, and other analyses as promptly as possible within the Negotiation Period.

B. For the purpose of conducting these tests and surveys, NSD shall provide to DEVELOPER, its agents, and representatives, the right to enter onto the Sites and to conduct such tests, surveys, and other procedures desired by DEVELOPER ("Tests"), provided the DEVELOPER requests access at least two (2) business days prior to entry, the entry and tests do not unduly infringe on the operational needs of the wastewater treatment plant, and that the entry is conducted during normally staffed operating hours of the plant. Any such tests or surveys that involve earth disturbance shall first be approved in writing by NSD, and NSD shall comply with any requirements under CEQA that may apply to such tests or surveys. In the event that additional steps are required to be taken to comply with CEQA, it is understood that NSD may require more than two (2) days' notice. Upon the conclusion of all such tests, surveys, and other analyses DEVELOPER shall return the Site to its condition prior to such tests or surveys.

C. DEVELOPER shall provide copies of all studies, test results and surveys to NSD once completed.

## **5. Site Lease Negotiations.**

The Site Lease shall include, without limitation, all of the following DEVELOPER obligations and restrictions:

(a) (1) Design of the Project, which shall be subject to approval of NSD and compliance with all requirements and regulations of other public agencies having jurisdiction; (2) Scope of Development; (3) Schedules of Performance; and (4) Other documents regulating the progress and development of the Project. If negotiations result in a Site Lease, that Site Lease becomes final only upon approval by the NSD Board of Directors.

(b) Supervision of all improvements comprising the Project, the completion of which shall be: (1) overseen by DEVELOPER upon terms mutually agreeable to the Parties, and (2) free of mechanics' liens and liens other than those respecting the financing of the Project and agreed to by NSD.

(c) Operation and maintenance of the Project, including the option and right of first refusal for NSD to operate and maintain the Project under separate contract with Napa Biogas LLC on such terms as the parties may agree.

(d) Operation and maintenance of a Combined Heat and Power system incorporated into the Project, including the right of NSD and its member jurisdictions to purchase the power generated on such terms as the parties may agree.

(e) Certain performance requirements by DEVELOPER, including that the HP-MWPF may receive MSW from outside of Napa County at a ratio no greater than three times the amount of MSW received that originates inside Napa County, and that MSW generated inside Napa County shall have priority in acceptance at the HP-MWPF over MSW generated outside Napa County.

(f) Reasonable restrictions on transfer or assignment of (1) the Project, (2) DEVELOPER's interest in the Site Lease and (3) change in controlling ownership of DEVELOPER.

(g) Provisions in the Site Lease addressing the (1) term, (2) lease area description, (3) amount and schedule of rents or equivalent payments by DEVELOPER to NSD, and (4) all other essential terms of a Site Lease.

(h) Reasonable security to assure DEVELOPER's performance under the Site Lease.

The Parties shall also attempt to negotiate a provision of the Site Lease that gives the District's right to purchase the Project at a specified time for a specified or to-be-determined price.

## **6. Development Goals of NSD.**

In negotiating the Site Lease, NSD has the following development goals:

(a) Continued use of the Site consistent with its current uses and all applicable Zoning and General Plan requirements.

(b) Reduction of NSD's carbon footprint.

(c) Generation of electrical power used by NSD from clean energy sources.

(d) Generation of new revenues and cost savings for NSD, and avoidance of financial and other risk to its ratepayers.

(e) Beneficial disposal of byproducts of the sewage treatment process (algae and/or biosolids).

## **7. Topics for Negotiation.**

The topics for negotiation shall include, among other things: (i) DEVELOPER's right to lease the site; (ii) method of calculating and paying Site Lease rents or equivalent payments; (iii) the terms of the proposed Site Lease including necessary covenants, conditions and restrictions affecting the Site; (iv) air rights use; (v) management of the Project; (vi) the schedule of performance; (vii) availability of the Site to the DEVELOPER; (viii) proposed land uses; (ix) Site layout; (x) preliminary design and architectural concepts and plans; (xi) aesthetic considerations; (xii) the quality and type of construction; (xiii) environmental responsibilities; (xiv) the DEVELOPER's responsibility to obtain environmental clearances, licenses and other entitlements, and project financing; (xv) any other considerations necessary to fully implement the proposed Project in a timely fashion; and (xvi) the District's right to purchase the Project at a specified period of time for a specified or to-be-determined price.

## **8. Broker's Fees.**

The Parties represent and warrant to each other that no broker or finder has been engaged or is in anyway connected with the transactions contemplated by this Agreement. In the event any claim for broker's or finder's fees is made in connection with the transactions contemplated by this Agreement, the Party upon whose statement, representation or agreement the claim is made shall indemnify, save harmless and defend the other Party from and against such claims.

## **9. Assignment.**

A. DEVELOPER shall not assign any interest in this Agreement without the express written consent of NSD, which consent shall not be unreasonably withheld. As a condition to any proposed assignment of this Agreement, DEVELOPER shall be required to make full disclosure to NSD of the proposed assignee's principals, officers, stockholders, partners, etc., and all other pertinent information concerning the assignee and its associates. NSD shall not assess a fee for its approval of any assignment.

B. Nothing contained herein shall prohibit or in any way limit DEVELOPER's unfettered choice in the selection and replacement of such consultants and other third parties as DEVELOPER shall designate from time to time to perform services relating to the Project.

## **10. NSD Obligations.**

A. During the Term of this Agreement, NSD shall deliver, at DEVELOPER's expense, within 30 days of receipt of written request thereof, any existing NSD-owned information, studies, reports, site and construction plans or other documents which DEVELOPER may reasonably request to facilitate the Project design. The Parties shall cooperate to ensure timely review and revision of any DEVELOPER documents or plans. NSD shall provide a community support letter sufficient to achieve a final resolution in DEVELOPER's effort to achieve financing through the State of California for bond authority for project financing. In addition, NSD shall provide to DEVELOPER reasonable access to NSD's design staff personnel familiar with the Site, plant operations staff familiar with dewatering and codigestion processes, and NSD's third party consultants and engineers for the purpose of aiding DEVELOPER in understanding the physical aspects of the Site, for carbon baselining and/or for discussing integration of NSD processes or waste materials into the Project. DEVELOPER shall bear all costs that may arise associated with making NSD's third party consultants and engineers available to DEVELOPER. Any studies, plans, or other documents made available to DEVELOPER by NSD shall be held in confidence by DEVELOPER, shall not be disclosed to third parties without the consent of NSD, and shall be returned to NSD upon expiration or termination of this agreement.

B. This Agreement is an agreement to enter into a period of exclusive negotiations according to the terms hereof. NSD and DEVELOPER each expressly reserves the right to decline to enter into a Site Lease, Power Purchase Agreement and/or Recycled Water Agreement in the event the Parties fail to negotiate an agreement to the mutual satisfaction of NSD and DEVELOPER. Except as expressly provided in this



Agreement, NSD and DEVELOPER shall have no obligations or duties hereunder and shall have no liability whatsoever in the event the Parties fail to timely execute a Site Lease, Power Purchase Agreement and / or Recycled Water Agreement, except as expressly identified herein. NSD agrees to cooperate with DEVELOPER in securing the necessary approvals for the Project from governmental agencies having jurisdiction over the Project.

C. DEVELOPER acknowledges and agrees that NSD has not agreed to fund, subsidize or otherwise financially contribute in any manner toward the development of the Project.

D. By its execution of this Agreement, NSD is not committing to or agreeing to undertake: (i) disposition of land to DEVELOPER; or (ii) any other acts or activities requiring the subsequent independent exercise of discretion by NSD. The Parties recognize that one or more of the conditions to DEVELOPER's proposal set forth herein may fail to be met as a result of subsequent studies, reviews and proceedings invoking / the exercise of discretion by NSD or any public agency having regulatory jurisdiction.

#### **11. Non-Liability of NSD Officials and Employees.**

Without limiting the provisions set forth herein, no member, official, representative, director, attorney, or employee of NSD shall be personally liable to DEVELOPER or any successor in interest, in the event of any default or breach by NSD of any obligations under the terms of this Agreement, or of any amount which may become due to DEVELOPER or to its successor under the terms of this Agreement.

#### **12. Plans, Reports, Studies and Investigation.**

Upon request by NSD, DEVELOPER shall provide NSD, without cost or expense to NSD, copies of all plans, reports, studies, or investigations (collectively, "Plans") prepared by or on behalf of DEVELOPER which the DEVELOPER owns or has the copyrights to with respect to the Site and the Project. All Plans shall be prepared at DEVELOPER's sole cost and expense, and DEVELOPER agrees to indemnify, defend and hold harmless NSD and their representatives, employees, officials, directors, attorneys, successors and assigns (collectively, "Representatives") from any losses, liability, claims, causes of action, injury or expense, including without limitation, reasonable attorneys' fees and costs (collectively, "Loss and Liabilities") arising from or in any way related solely to the cost of preparation of such Plans. Nothing contained herein shall be deemed a representation or warranty by DEVELOPER of the accuracy of any information contained in such Plans.

#### **13. DEVELOPER's Responsibilities.**

Without limiting any other provision of this Agreement, during the period of negotiations hereunder, DEVELOPER, at its sole cost and expense, shall prepare and submit the following documents and perform the following acts all in furtherance of the negotiation process:

(a) All documents and other materials that NSD and all agencies having regulatory jurisdiction will require for planning and design approval for the Project. DEVELOPER shall meet with representatives of NSD to review and reach a clear understanding of the planning and design criteria required by these and other agencies.

(b) DEVELOPER shall, no later than 90 days before termination of the Negotiation Period, provide NSD with all documents reasonably necessary to determine the feasibility and details of the project.

#### **14. Entire Agreement: Attorneys' fees.**

This Agreement represents the entire agreement of the Parties with respect to the matters set forth herein. This Agreement may not be amended except in writing signed by all of the Parties hereunder. If any Party brings an action or files a proceeding in connection with the enforcement of its respective rights or as a consequence of any breach by another Party of its obligations hereunder, then the prevailing Party in such action or proceeding shall be entitled to have its reasonable attorney's fees and costs paid by the losing Party.

#### **15. Notices.**

All notices required or permitted hereunder shall be delivered in person, by overnight courier, or by registered or certified mail, postage prepaid, return receipt requested to such Party at its address shown below, or to any other place designated in writing by such Party.

##### **NSD (in person):**

Napa Sanitation District  
Mr. Jeff Tucker  
CFO  
1515 Soscol Ferry Road  
Napa, California 94558

##### **NSD (by US Mail):**

Napa Sanitation District  
Mr. Jeff Tucker  
CFO  
P.O. Box 2480  
Napa, CA 94558

##### **DEVELOPER:**

RealEnergy, LLC  
Mr. Kevin Best  
CEO  
1190 Airport Road, Suite 2100  
Napa, California 94558

Any such notice shall be deemed received upon delivery, if delivered personally, the next business day after delivery by a courier, if delivered by courier, and three (3) days after deposit into the United States Mail, if delivered by registered or certified mail.

IN WITNESS WHEREOF, NSD and DEVELOPER have signed this Agreement as of the dates set forth below.



**NAPA SANITATION DISTRICT**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**APPROVED AS TO FORM:**

By:  \_\_\_\_\_

Attorney for NSD

Date: 8/21/2013 \_\_\_\_\_

**DEVELOPER:**

**RealEnergy, LLC**

By: \_\_\_\_\_

Date: \_\_\_\_\_

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## Exhibit A

### Site "A" Map

