# **ATTACHMENT 9**

**Third-Party Beneficiary Language**

**for Contract Between Project Owner and Delegate Chief Building Official (DCBO)**

All of the following provisions must be included in the Agreement between the Project Owner and the DCBO:

1. Parties
2. [Name of Applicant] (herein after referred to as “Project Owner”) is the Project Owner of [Name of Project] (“Project”), Docket Log [#], which is under review by the California Energy Commission (“Energy Commission”). Review by the Energy Commission is evidenced by the Presiding Member’s Proposed Decision (“Proposed Decision”), which includes draft conditions of certification providing the requirements for project construction, operation and closure. Approval of the Project by the Energy Commission is evidenced by the Presiding Member’s Final Decision (“Final Decision”), which includes conditions of certification providing the requirements for project construction, operation and closure. The DCBO and Project Owner must construct the Project according to the requirements in the Final Decision.
3. Project Owner is a party to [Name of Agreement between Project Owner and DCBO].
4. The Energy Commission has authority to approve the Project pursuant to Public Resources Code Section 25500 *et. seq*. Under the California Building Code Standards (CBCS), while monitoring project construction and operation, staff of the Energy Commission acts as, and has the authority of, the Chief Building Official.
5. [Name of DCBO Firm] was selected by the Energy Commission as its Delegated Chief Building Official (“DCBO”) in accordance with the California Building Standards Code (California Code of Regulations, Title 24, Parts 1 through 12) to verify compliance with all applicable conditions of certification in the Final Decision, and facilitate compliance with the design, plan review, construction inspection and monitoring for the Project facility’s compliance plan in accordance with all appropriate building codes; laws, ordinances, regulations and standards (“LORS”); and Energy Commission requirements. [Name of DCBO Firm] (hereinafter referred to as “DBCO”) is a party to [Name of Agreement between Project Owner and DCBO].
6. Express Third-Party Beneficiary
7. To ensure proper enforcement of the Energy Commission’s Final Decision and the success of the Project, in the event that the Energy Commission approves the Project, the Energy Commission is the express and intended creditor third-party beneficiary in [Name of Agreement between Project Owner and DCBO] between Project Owner and DCBO.
8. The Energy Commission does not guarantee the approval of the Project by being named the creditor third-party beneficiary in [Name of Agreement between Project Owner and DCBO].
9. DCBO entered into [Name of Agreement between Project Owner and DCBO] for the express benefit of the Energy Commission as the creditor third-party beneficiary. It is recognized that DCBO’s performance under [Name of Agreement between Project Owner and DCBO] is tied to and related to Project Owner’s obligations under the Energy Commission’s conditions of certification in its Final Decision. DCBO acknowledges that its performance under [Name of Agreement between Project Owner and DCBO] is the benefit contemplated by Project Owner and is a motivating cause of making [Name of Agreement between Project Owner and DCBO]. Naming the Energy Commission as the creditor third-party beneficiary is a material condition of [Name of Agreement between Project Owner and DCBO].
10. In the event the Energy Commission approves the Project, the Energy Commission must ensure that the Project is designed, constructed, and operated in conformity with the Final Decision; the California Building Standards Code (CBSC); the local building codes adopted by the [County or City] of [*Enter name of County or City*]; and LORS. If the Project Owner anticipates site mobilization immediately following issuance of the Final Decision, the Project Owner may be permitted to file compliance submittals prior to the issuance of the Final Decision. Compliance verifications may be submitted in advance of the Final Decision, but the Project Owner submits the compliance verifications at its own risk. Additionally, any work undertaken by DCBO prior to the issuance of the Final Decision shall be performed at the sole risk of DCBO. Any compliance approvals by Energy Commission staff prior to the issuance of the Final Decision are subject to change, and staff compliance approvals provided before the issuance of the Final Decision does not imply that the Energy Commission will approve the Project for actual construction and operation.
11. DCBO, as the delegate of the Energy Commission, shall be compensated by Project Owner to certify Project Owner’s obligations for compliance with the conditions of certification in the Final Decision. [Name of DCBO Firm] shall charge Project Owner, and Project Owner shall compensate [name of DCBO firm], **Option A:** for work satisfactorily completed in advance, in arrears, or from a credit account established with the DCBO Firm by the Project Owner **OR** **Option B:** for services based on the rates in the attached rate schedule (Appendix [X]) negotiated between the Energy Commission and DCBO. **(to be determined)**
12. Duties of Project Owner and DCBO
13. The Final Decision will require that [Name of Project Owner], or current Project Owner, submit engineering plans, calculations, specifications, and other project-related facility design, construction, and operational compliance information (as required by sections 105.3 and 106.1 in Appendix Chapter 1 of the California Building Standards Code) to DCBO prior to and during construction of the Project, for review and oversight by the Energy Commission pursuant to the terms and conditions of its Final Decision as specified in California Public Resources Code section 25500 *et seq*.
14. The design review, construction inspections, and necessary approvals prior to and during construction will be provided by DCBO, a fully qualified chief building official contractor experienced in providing industrial building official services, acting as the Energy Commission’s delegate to ensure independent review of the Project.
15. Although DCBO will function as the Energy Commission’s delegate, the Energy Commission has the final authority and responsibility to ensure that the Project is built in accordance with the applicable engineering LORS, the Decision, and subsequent amendments.
16. DCBO shall carry out these duties with all the rights and immunities afforded the Chief Building Official by applicable LORS and building codes.
17. DCBO is authorized to take any action allowed by the California Code of Regulations and the CBSC to ensure that the Energy Commission’s interests are properly addressed and protected. If DCBO has issued, or is considering issuing, a stop-work order to ensure compliance, to ensure that the Energy Commission’s interests are protected, or for any other reason, DCBO shall seek the cooperation and assistance of the Energy Commission’s Compliance Project Manager (“CPM”).
18. Project Owner shall maintain its books, records, documents, and other evidence sufficient to properly reflect all payments made to DCBO under [Name of Agreement between Project Owner and DCBO] for a period of three (3) years after final payment to DCBO. Project Owner shall permit the Energy Commission, another state agency, and/or a public accounting firm designated by the Energy Commission to audit Project Owner’s accounting records associated with [Name of Agreement between Project Owner and DCBO] at all reasonable times, with prior notice by the Energy Commission.
19. Project Owner shall provide the Energy Commission with two (2) copies of the executed [Name of Agreement between Project Owner and DCBO].
20. Enforcement
21. [Name of Agreement between Project Owner and DCBO] is made expressly for the benefit of the Energy Commission as the creditor third-party beneficiary and may be enforced by the Energy Commission at any time.
22. The Energy Commission has a right of enforcement and may elect to take enforcement action against Project Owner or DCBO, and may join them in one action, for failure to perform under [Name of Agreement between Project Owner and DCBO].
23. Nothing in [Name of Agreement between Project Owner and DCBO] will limit or impede the Energy Commission’s legal authority to enforce the terms and conditions of its Decision as specified in Public Resources Code sections 25534 and 25900. The Energy Commission may amend or revoke a project certification and may impose a civil penalty for any significant failure to comply with the terms or conditions of the Decision.
24. Satisfactory Performance

Project Owner and DCBO agree that DBCO’s work under [Name of Agreement between Project Owner and DCBO] must be performed to the satisfaction of the Energy Commission and that the Energy Commission shall decide all questions as to the adequacy of DCBO’s performance. However, lack of objection by the Energy Commission shall not constitute a waiver or estoppel of the Energy Commission’s rights and remedies. Failure of DCBO to comply with the roles, responsibilities, and tasks expected of an DCBO service provider may be a basis for its termination as the delegate of the Energy Commission.

1. Amendment, Assignment and Termination

Project Owner and DCBO agree that [Name of Agreement between Project Owner and DCBO] confers rights and remedies upon the Energy Commission as the creditor third-party beneficiary. No person, other than Project Owner, DCBO, and the Energy Commission, has any rights or remedies under [Name of Agreement between Project Owner and DCBO]. Project Owner and DCBO further agree:

1. No Right to Amend without Consent of the Energy Commission

Neither Project Owner nor DCBO shall amend [Reference to Section] of [Name of Agreement between Project Owner and DCBO] expressly naming the Energy Commission as the creditor third-party beneficiary to the Agreement, without the prior written consent of the Energy Commission.

1. No Right to Assign and Delegate without Consent of the Energy Commission

Neither Project Owner nor DCBO shall assign or delegate the duties and responsibilities of Project Owner or DCBO, without the prior written consent of the Energy Commission.

1. No Right to Terminate without Consent of the Energy Commission

Neither Project Owner nor DCBO shall terminate [Name of Agreement between Project Owner and DCBO] or terminate payments to DCBO under [Name of Agreement between Project Owner and DCBO] without the prior written consent of the Energy Commission.

1. No Liability

Project Owner and DCBO agree that the Energy Commission, as intended creditor third-party beneficiary, is not liable for any events or occurrences that result in harm to persons or property during the course of construction or operation of the Project. The Energy Commission assumes no liability for errors and omissions on the design elements of the Project. If Project Owner or DCBO fail to perform their obligations under [Name of Agreement between Project Owner and DCBO], the Energy Commission shall in no way have any liability to any parties that may be harmed as a result of failure of Project Owner or DCBO to perform their obligations. Further, the Energy Commission is in no way liable for payment to DCBO for its services in the event Project Owner fails to make timely payment.

1. Flow-Down Rights in Subcontracts
2. DCBO may retain the services of one or more independent qualified subcontractor(s) to supplement its employees in the environmental monitoring, design review, plan check, and construction inspection of the project. The subcontractor(s) shall answer directly to, and be responsible to, DCBO. DCBO shall retain responsibility for the construction inspections required by Appendix Chapter 1, section 109 of the CBSC and for monitoring special inspections required by Chapter 17, section 1704 and 1707 of the CBSC.

1. It is expressly recognized that DCBO’s performance under [Name of Agreement between Project Owner and DCBO] is tied to and related to the performance of its subcontractor(s). The Energy Commission shall be expressly recognized and acknowledged as an intended creditor third-party beneficiary in all contracts between DCBO and its subcontractor(s). DCBO shall reserve for the Energy Commission, as an intended creditor third-party beneficiary, the right to proceed directly against its subcontractor(s) in the event subcontractor(s) breaches or fails to perform in whole or in part as required in its contract(s) with DCBO. The Energy Commission’s right to proceed against subcontractor(s) shall be made independent of DCBO's rights.
2. DCBO shall provide the Energy Commission two (2) copies of all executed contracts it enters into with subcontractor(s) in order to substantiate compliance with the requirements of [Name of Agreement between Project Owner and DCBO].