

COUNTY OF ALAMEDA
East County Board of Zoning Adjustments

In the Matter of:) Conditional Use Permit Nos.
Conditional Use Permits (CUPs) for the maintenance and operations of existing windturbines in the Altamont Pass Wind Resources Area (APWRA)) C-8161, C-8182, C-8191, C-8201, C-8203, C-7853, C-7854, C-8216, C-8232, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239 C-8240, C-8241, C-8242, & C-8244

Appeal of East County Board of Zoning Adjustments Approval of Conditional Use Permits (CUPs) for the maintenance and operations of existing windturbines in the Altamont Pass Wind Resources Area (APWRA)

In a single Action¹ on November 13, 2003 the East County Board of Zoning Adjustments approved several Conditional Use Permits (CUPs) at one time for the maintenance and operations of existing windturbines in the Altamont Pass Wind Resources Area (APWRA) without preparing an environmental review as required under the California Environmental Quality Act (CEQA) which is necessitated for the project because of the significant adverse environmental impacts from the project on migratory bird species, including birds protected against illegal “taking” that are species protected under the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668, or the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544; 50 CFR Parts 17, 401–424, 450–453, and all which are covered under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712. This Appeal is being brought in behalf of Californians for Renewable Energy, Inc. (CARE), and the Center for Biological Diversity, both organizations which have members and contributors who reside within Alameda County. This is an Appeal filed pursuant to Section 17.54.670 of the County of Alameda General Code.

An appeal may be taken to the board of supervisors within ten days after the date of any order made by the planning commission, the planning director or the board of zoning adjustments pursuant to Sections 17.18.130, 17.54.030, 17.54.060, 17.54.070, 17.54.100, 17.54.140, or 17.54.400. The appeal may be taken by any property owner or other person aggrieved or by an officer, department, board or

¹ CARE and the Center have paid a single \$100 Appeal Application fee to cover the cost of Appealing this single discretionary Action by the East County Board of Zoning Adjustments in approving several of the above captioned CUPs. To the degree that the County of Alameda requires a \$100 appeal filing fee for each of the CUPs listed above we hereby file (except the \$100 we pay initially) this as an application for a fee waiver (or reduction) due to the real economic hardship this imposes on both Appellant organizations, who are non-profit corporations, whose purposes solely serve the public benefit and other charitable purposes. We respectfully request you grant such request.

commission affected by the order within said ten-day period, by filing with the clerk of the board of supervisors of a notice of appeal specifying the grounds for such appeal. Filing such notice shall stay all proceedings in furtherance of the order appealed from. (Ord. 2002-60 (part): Prior gen. code § 8-102.0)

**Objections to the East County Board of Zoning Adjustments
Prejudicially abuse of discretion in approving project**

I. We object to the approval of the project as it currently stands. The East County Board of Zoning Adjustments prejudicially abused its discretion in ways that include but are not limited to the following:

1. Pursuant to the Alameda County General Code Section 17.54.030 under Zoning, approval of all Permits are revocable in the case “[w]henver zoning approval is found to have been obtained by fraud or to have been issued illegally or in error, it shall be revoked.” Since the original CUPs where issued without an adequate review of reasonably foreseeable impacts of the project on Migratory bird species, as required under CEQA, and since the identified bird kills (now part of your administrative records²) for the project over the last twenty years are species which includes those that are protected under the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668, or the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544; 50 CFR Parts 17, 401–424, 450–453, and all which are covered under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712, therefore as such, the original CUP’s are illegal, and must be revoked. Clearly it was not the County of Alameda’s intention in issuing the original CUPs to allow the illegal “taking” of federally protected bird species as a lawful “use” of the properties involved in the project. Additionally the California Fish and Game Codes, which are being violated, are, §3503.5 (unlawful to take birds of prey), §3511 (unlawful to take fully protected birds), §3513 (unlawful to take migratory none game birds), and § 3800 (unlawful to take none game birds).

2. An environmental review, preferably an Environmental Impact Report (EIR), must be prepared by the County of Alameda, as the lead agency under

the California Environmental Quality Act (CEQA) in approving the proposed re-issuance of conditional use permits (CUPs) for the maintenance and operations of existing wind turbines in the Altamont Pass Wind Resources Area (APWRA). County Staff has proposed and the East County Board of Zoning Adjustments has approved that the County issue categorical exemptions for the projects under CEQA. CEQA Guidelines sections 15301 to 15329 covers categorical exemptions from CEQA review. According to the Guidelines, “all classes of categorical exemptions are inapplicable where significant cumulative impacts will result over time from successive projects of the same type in the same place.” Also, “categorical exemptions shall not be used for any activity for which there exists a reasonable possibility that significant environmental impacts will result due to unusual circumstances.” Then, the Guidelines state, “When relying on any categorical exemption, the approving agency should be careful to create an administrative record showing that the agency fully considered whether the project might cause significant impacts.” Each of these statements is followed by citations of case law. Just look up Categorical Exclusions in the table of contents of your CEQA Guidelines.

3. There are ongoing and increasingly substantial cumulative impacts on migratory bird species, the unusual circumstance of the Altamont Pass being a migratory bird route, and the administrative record appears to be missing from the County’s proposed action. Environmental review is required under CEQA because there was no way for the County to predict the substantial level of these impacts would occur twenty years ago when the original CUPs were first issued for wind turbines in the area as these CUPs were issued prior to construction of such turbines.

4. The County improperly determined that the project(s) is categorically exempt and specifically failed to properly determine whether any exceptions to categorical exemptions apply.

² Pursuant to County of Alameda General Code Section 17.54.680 we request transmittal of the administrative records from the November 13, 2003 meeting of the East County Board of Zoning Adjustments to the Alameda County Board of Supervisors, and that these submissions be incorporated fully herein.

5. There isn't enough or adequate evidence in the record to support your decision that categorical exemptions apply, and that no exceptions apply.
6. In making your exemption decision you completely ignored good evidence submitted by ourselves and others showing that a proper CEQA review must be conducted before the project(s) can be approved legally.
7. As a threshold matter, the project has been improperly styled as Conditional Use Permit ("CUP") "renewals" while in fact many of prior permits have already expired or are otherwise invalid. CUPs C-8235, C-8234, C-8237, C-8241, C-8244, C-8238, C-8203, and C-8023 are all composed entirely or partially of former permits that have already expired. Once expired, these permits cannot be lawfully "renewed." Requests for an "extension" of a CUP processed after the CUP has expired must be treated as a new application. Because some or all of the underlying CUPs have for these applications have expired, the wind farms, if they are currently operating, are operating illegally. We request immediate enforcement action, and if action is not taken, may pursue other appropriate relief pursuant to applicable law.
8. We reserve the right to add to or modify this list as further information is obtained until the complete administrative record(s) is available.

II. Issuing and/or Renewing the Conditional Use Permits Violated CEQA

A. Issuing and/or Renewing the Conditional Use Permits Is a Discretionary Action Subject to CEQA

There cannot be any serious dispute that the issuance of a CUP is a discretionary action, and a "project" subject to CEQA. The County must conduct CEQA review unless the issuance of the CUPs is otherwise exempt from CEQA. As discussed below, no exemptions apply to this situation.

B. Issuing and/or Renewing the Conditional Use Permits is Not Categorically Exempt from CEQA

In considering whether the issuance of the CUPs could be categorically exempt from CEQA, the County must follow established legal principles including the fact that CEQA must be interpreted "to afford the fullest possible protection to the environment

within the reasonable scope of the statutory language.” *Mountain Lion Fdn. v. Fish and Game Com.* (1997) 16 Cal. 4th 105, 112 (quoting *Friends of Mammoth v. County of Supervisors* (1972) 8 Cal. 3d 247, 259). Consistent with this principal, categorical exemptions are simply not available when there is any reasonable possibility that a project may have a significant effect on the environment. *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1992) 52 Cal. App. 4th 1165, 1191.

In this instance, this standard has been far surpassed. The County has acknowledged this in admitting that the answer to the question “does a categorical exemption apply to this project?” is only “arguably yes.” Attachment C to Pre-Hearing Analysis, November 13, 2003 –R-E Altamont Pass Wind Resource Area Conditional Use Permit Renewals (“Attachment C”) at 1. The record contains information that any action taken with regard to the subject CUPs, including issuing new CUPs, “renewing” existing CUPs, or “extending” existing CUPS, will certainly have a significant effect on the environment, especially with regard to the migratory bird flyway in the project area and the number of avian species deaths that will result directly from the action.

In addition, the project cannot be categorically exempt because it will adversely affect scenic highway 580.

1. Section 15301 is Inapplicable

Section 15301 of the CEQA Guidelines, on which the County attempts to rely, is by its own terms inapplicable to the current situation. Section 15301 applies only when the permitting of an existing facility involves “negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.” For the CUPs, which have expired, there is no use currently authorized, and therefore the project cannot be considered the continued permitting of an existing facility. Many, if not all, of the CUPs, which have not otherwise expired, have been operated in violation of their conditions of approval and are therefore also invalid. For example, rodent control programs with significant adverse environmental impacts have been implemented for these CUPs, in the absence of the required environmental review.

Even if the existing CUPs were otherwise valid, which they are not, the proposed project represents a significant increase over the existing impact because the currently proposed CUPs have no time limit, but would continue indefinitely. This is clearly a significant increase in the environmental impact over the previous 20-year term. Over

the previous 20 year term, scientists estimate that a minimum of 22,000 to 44,000 birds have been killed by these turbines. By authorizing an unlimited term, the County is authorizing unlimited bird death, which is clearly an enormous increase in the impact.

2. Section 15302 is Inapplicable

The project approvals seem to be issuing a blanket exemption under Section 15302 for any replacement or repair of facilities that will need to be accomplished during the proposed indefinite term of the CUPs. This is not appropriate or lawful. Each specific repair, replacement, or other activity must be analyzed separately to determine if it qualifies for this exemption. It is not possible to pre-determine whether a given action will have a significant impact on the environment, and authorization for unspecified activities cannot be granted in this manner.

3. Even if Otherwise Applicable, These Categorical Exemptions are Not Available Due to Special Circumstances and Significant Cumulative Impacts

In this instance, there are both special circumstances and significant cumulative impacts that prevent the reliance on categorical exemptions, even if they were otherwise available, which they are not. The special circumstances and significant cumulative impacts, in particular with regard to the migratory bird flyway and avian death, are detailed in Dr. Smallwood and Mr. Thelander comments.

Moreover, whenever there is evidence in the record that the project, prior to mitigation, may have a significant impact on the environment, the project cannot be categorically exempt. In other words, an agency cannot “cannot escape the law by taking a minor step in mitigation and then find [itself] exempt from the exception to the exemption.” *Azusa*, 52 Cal. App. 4th at 1200 (internal citation omitted). Yet this is precisely what the County has attempted to do. By acknowledging both (1) that the wind farms unquestionably have a significant impact on birds (see, e.g. Attachment C at 4); and (2) that additional mitigation is required in the form of new permit conditions in order to address these impacts (see, e.g., new permit conditions #8, 13), the County has itself made the case that the project approvals cannot be categorically exempt.

III. Issuing and/or Renewing the Conditional Use Permits Violated the Planning and Zoning Law

The project is inconsistent with portions of the Alameda County General Plan including, but not limited to, Policy 157, Policy 159, and Policy 160. It is inconsistent with these provisions because the County is aware of severe impacts to the

environment in the form of the placement of the wind farms in a major migratory bird flyway and thousands of avian deaths each year. Despite abundant evidence in the record that the wind farms need to be evaluated for environmental impacts and that the impacts need to be minimized and mitigated, the County refuses to do so. The County has refused to adopt specific mitigation measures that would reduce impacts, and has instead relied upon vague and ineffective mitigation measures that are in now way certain to reduce impacts. See, e.g. new permit condition #8. For these reasons and others, the project is inconsistent with the Alameda County General Plan and violates CEQA. We also object on any other grounds raised by ourselves or anyone else during these administrative proceedings.

CARE as one of the state of California's leading opponents to large fossil fuel power plant construction, like FP&L Energy's³ proposed 1100 MW Tesla Power Plant before the CEC⁴ under docket 01-AFC-21 proposed adjacent to these wind farms. We provide a copy of recent litigation filed by CARE in the state Supreme Court over the East Altamont Energy Center (01-AFC-4), also located in Alameda County. We are concerned that as advocates for renewable energy the County's proposed "Action" will illegally give "Wind Power" a **black eye**, nationwide by not dealing with the real cumulative impacts of wind energy on migratory birds, especially raptor species. This will do much to support advocates of fossil fuel energy like FP&L Energy's Tesla Power Plant.

The Center for Biological Diversity is a nonprofit environmental organization dedicated to the protection of native species and their habitats throughout California, the United States, northern Mexico, Alaska and beyond. The Center works to protect and restore natural ecosystems and imperiled species through science, education, policy, and environmental law. The Center has worked to protect imperiled species in the San Francisco Bay Area since 1999 and has an ongoing interest in protecting raptor species in the Altamont area. The Center formally petitioned in 2003 for state listing

³ Florida Power and Light, or FP&L Energy, the owner of the wind farms in question here, are one of those energy companies named by the Federal Energy Regulatory Commission (FERC) [under Docket No. EL03-155-000] to have "appear[ed] to have participated in activities (Gaming Practices), that constitute gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs during the period January 1, 2000 to June 20, 2001[i.e., the California Energy Crises], that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies." Which begs the question, why is Alameda County helping these thieves in high places? See attached FERC Order to CARE's November 13, 2003 filings.

⁴ California Energy Commission

under the California Endangered Species Act of the western burrowing owl, a species that is subject to high mortality at wind turbines in the Altamont Pass.

Bird fatalities in the Altamont Pass Wind Resource Area (APWRA) have plagued the wind industry and clouded the public's perceptions of whether the wind can be developed as an environmentally safe, renewable energy resource. The total number of birds killed in the APWRA is unknown, but estimates of 10,000 - 20,000 birds during the past two decades are supportable (Orloff and Flannery 1992, 1996; Thelander et. al 2002). Because of the County's proposed ministerial action in approving the CUPs, however, these significant adverse impacts will be ignored and no protection measures or management programs are in place that will reduce these fatalities, despite years of research and widespread acknowledgement of the problem. How could this happen?

Identified bird kills are species which includes those that are protected under the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668, or the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544; 50 CFR Parts 17, 401–424, 450–453, and all which are covered under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712. If CARE and the Center are forced to bring a private enforcement action in the courts against the County of Alameda and the federal US Fish and Wildlife Service, to enforce these federal statutes, it could result in millions of dollars in fines being assessed against the County for allowing this illegal taking of migratory bird species, while guaranteeing the end to these wind farms continued operations producing clean air pollution free renewable energy.

CARE and the Center do not wish to give a **black eye**, nationwide to "Wind Power". For these reasons, and to prepare your administrative records for litigation purposes [in case we have to sue], we have retained the services of BioResource Consultants (BRC) to prepare an expert comment letter on the proposed re-issuance of conditional use permits (CUPs) for the maintenance and operations of existing wind turbines in the Altamont Pass Wind Resources Area (APWRA) which is attached, and we beg you to carefully review it and take action on it. The qualifications of Dr. Smallwood and Mr. Thelander for commenting on the proposed re-issuance of CUPs are summarized in their short biographies and Curriculum Vitae, which are also attached.

For all the foregoing reasons we respectfully request that this appeal be granted, that the existing CUPs be revoked, and that a full CEQA review be conducted, which entails preparation of an EIR, even if the EIR only focuses on the issues we have raised.

Respectfully submitted,



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VERIFICATION

I am an officer of the commenting corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2003, at Soquel, California



CALifornians for Renewable Energy, Inc. (CARE)