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February 6, 2004

TO: County of Alameda  
East County Board of Zoning Adjustments  
224 West Winton Avenue, Room 111  
Hayward, CA 94544

Darryl Gray, Assistant Planning Director  
Alameda County Planning Department  
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**Re: Appeal of East County Board of Zoning Adjustments Approval of Conditional Use Permits Nos. C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8216, C-8224, C-8225, C-8231, C-8232, C-8240, C-8263**

## **I. INTRODUCTION**

The Center for Biological Diversity (“CBD”), Californians for Renewable Energy (“CARE”), and Golden Gate Audubon Society (“GGAS”) hereby appeal the January 29, 2004 approval by the East County Board of Zoning Adjustments for Conditional Use Permits Nos. C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8216, C-8224, C-8225, C-8231, C-8232, C-8240, C-8263 (hereinafter the “Permits” or the “Project”).

For your reference, the CBD is a nonprofit environmental organization with over 9,000 members, dedicated to the protection of native species and their habitats. The CBD works to protect and restore natural ecosystems and imperiled species through science, education, policy, and environmental law. The CBD has a strong interest in protecting imperiled raptor populations and other birds being killed in large numbers at the Altamont Pass Wind Resources Area (“APWRA”). The CBD formally petitioned in 2003 for state listing 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. CBD also filed suit in federal court in January 2003 against the operators of the majority of turbines at the APWRA, Florida Power and Light, Inc., for their illegal and ongoing killing of raptors and other protected birds at wind turbines in the APWRA. A copy of the complaint in this matter is attached to this appeal.

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CALifornians for Renewable Energy, Inc. is a non-profit corporation that works to educate and encourage the use of alternative forms of renewable energy to avoid dependence on declining supplies of fossil fuels, and the harmful air emissions their use entails.

The Golden Gate Audubon Society has been a leader in conserving Bay Area wildlife and habitats since 1917. The mission of GGAS is to protect and enjoy wildlife and their natural habitats. GGAS promotes these values through conservation, education and recreation, inspiring and empowering people to care for the Bay Area's unique environment.

All previous comments and attachments submitted by CBD and CARE, as well as all of the comment letters and all other matters of record received in connection with permits 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, including those of CBD, CARE, the United States Fish and Wildlife Service, the California Department of Fish and Game, the California Energy Commission, the East Bay Regional Park District, and BioResource Consultants are hereby incorporated by reference as if fully set forth herein. The comments of the United States Fish and Wildlife Service, the California Department of Fish and Game, the California Energy Commission, the East Bay Regional Park District, and BioResource Consultants are attached to this appeal. These documents are all part of the administrative record for the decision appealed in this letter, as the East County Board of Zoning Adjustments at the January 29, 2004 hearing granted CBD's request to incorporate these items into the record.

This Appeal is filed pursuant to Section 17.54.670 of the County of Alameda General Code.

## **II. THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS PREJUDICALLY ABUSED ITS DISCRETION AND VIOLATED THE LAW IN APPROVING THE PERMITS**

### **A. It Is Irrational Public Policy To Issue New 20-Year Permits Without Any Environmental Review, Without Any Mitigation Requirements, And Without Awaiting The Imminent Publication Of The California Energy Commission's Mitigation Recommendations**

The action of the East County Board of Zoning Adjustments in issuing new conditional use permits with 20-year terms for thousands of existing wind turbines without any meaningful mitigation or remediation requirements, and without any environmental analysis whatsoever, is a policy that is legally, scientifically, and ecologically bankrupt, and will embroil the County in litigation for years to come. Given the large body of new research on bird kills at Altamont Pass that has been published in the past six years, there is no reasonable explanation for the Board's refusal to follow the counsel of the United States Fish and Wildlife Service, the California Department of Fish

and Game, and the California Energy Commission and delay issuing new permits until the County has performed an adequate environmental analysis and has imposed necessary mitigation and remediation conditions.

Twenty years ago, Alameda County committed an error with grave and continuing environmental consequences by issuing permits for thousands of wind turbines at Altamont Pass without preparing an environmental impact report, contrary to its obligations under the California Environmental Quality Act (CEQA). It is undisputed that those wind turbines are killing more than 500 eagles, hawks, owls, and other raptors every year, as well as many hundreds of other protected birds. These massive bird kills violate California and federal wildlife laws, including criminal provisions of those laws. These violations include California Fish and Game Code sections 2000, 3503.5, 3511, 3513, 3800, 12000, California Code of Regulations sections 472, 509; title 16 United States Code section 668 (the Bald Eagle and Golden Eagle Protection Act); title 16 United States Code section 703 (the Migratory Bird Treaty Act); and title 50 Code of Federal Regulations sections 10.13, 21.11, 22.11.

It is also undisputed that during the past twenty years the wind power industry has implemented no effective mitigation measures to save a single bird from death, and no turbine has ever been shut down because of the bird deaths it has caused.

Alameda County is now poised to repeat its past mistakes by issuing new conditional use permits en masse for all existing wind turbines at Altamont Pass, again without performing the necessary environmental review mandated by CEQA and without requiring any effective mitigation or remediation measures. Nor has the County undertaken any case-by-case examination of the bird kills caused by each individual turbine it is permitting, notwithstanding evidence that bird kill rates vary dramatically among different turbines. Moreover, the County has approved the new permits for a 20-year term, which will cause the errors of the past to persist long into the future.

Perhaps most disturbing, however, is the County's unconscionable refusal to await the imminent publication of the results of the California Energy Commission's massive scientific study of bird kills by wind turbines in the Altamont Pass Wind Resource Area and the mitigation recommendations that the Commission will make as a result of that study. The County's insistence on approving these new permits before the publication of the California Energy Commission study and the formulation of the Commission's recommendations is baffling and irrational, and can have no other purpose than to shield the wind power industry from the necessary mitigation and remediation measures that the Commission will soon recommend. In doing so, Alameda County becomes an accomplice to the rampant illegal conduct of the wind power industry.

In addition, 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. Once expired, these permits cannot be lawfully "renewed." A request 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 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.

Pursuant to the Alameda County General Code Section 17.54.030 under Zoning, “[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.” (Emphasis supplied.) Since the original CUPs were 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 for the project over the last twenty years include species 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, 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). Because the Permits had expired or were otherwise invalid, they cannot be “renewed” or “extended” as the County purports to do here.

There is no justification for Alameda County’s disregard of its obligations under state and federal law and its haste to rush these permits through and allow the wind power industry to avoid any meaningful mitigation and remediation requirements. In addition to being bad public policy, the County’s action here is illegal and irresponsible for the additional reasons discussed below.

## **B. The Categorical Exemption Is Illegal Under CEQA**

As the California Supreme Court has held, “an activity that may have a significant effect on the environment cannot be categorically exempt.” *Mountain Lion Foundation v. Fish & Game Comm’n*, 16 Cal. 4th 105, 124 (1997). 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.” *Id.* at 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. 4<sup>th</sup> 1165, 1191. The official CEQA Guidelines reinforce this rule: “Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment . . .” Title 14 Cal. Code Reg. §15300.2, subd. (c) (CEQA Guidelines).

In this instance, this standard has been far surpassed. The record contains information indicating 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. There is no doubt that if these permits are granted the wind turbines of the Altamont Pass Wind Resource Area will cause significant environmental effects, as the numerous scientific studies referenced above demonstrate. Killing over 500 raptors a year is a significant environmental effect under any definition of that term. Avian mortality is also caused via electrocution on the powerlines at Altamont Pass. This is an additional impact that must be disclosed, avoided, minimized, and mitigated through the approval process. Feasible retrofitting and protection measures are currently available and must be instituted immediately before the Permits can be lawfully approved.

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

Nor can the County rely on any categorical exemption for these permits, given its illegal failure to prepare an EIR at the time these wind turbines were first issued permits. The premise of the categorical exemption for existing facilities is that the environmental consequences of the facilities were thoroughly and properly examined at the time they were first constructed, a premise that is false in this case. The wind turbines that are the subject of these conditional use permits have *never* been subject to the EIR process.

In addition, because the original permits were for a fixed duration, upon their expiration the right to operate the wind turbines ceases. The turbines thereupon revert to their original unpermitted state. For CEQA purposes, the baseline condition, i.e., the “no-project alternative” or status quo against which the County’s proposed issuance of new permits must be measured, is turbines without any existing right to operate. Any issuance of new permits for future operation of the wind turbines will cause significant environmental effects.

Moreover, the cumulative impacts of the series of permits for wind power that Alameda County proposes to issue at this time are significant, and also disqualify the permits from any categorical exemption. “Cumulative Impact. All [categorical] exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.” Title 14 Cal. Code Reg. § 15300.2, subd. (c) (CEQA Guidelines).

Nor is the 1998 EIR “Repowering A Portion of the Altamont Pass Wind Resource Area” any substitute for the environmental analysis required by CEQA that the County has failed to perform here. The 1998 EIR was limited to examining the effects and alternatives of three specific repowering projects. The EIR did not perform the necessary examination that CEQA requires of the effects and alternatives to the issuance of the new permits for existing turbines at issue here. And, in any event, as the studies noted above

demonstrated, the 1998 EIR is woefully out of date regarding scientific knowledge. Moreover, it failed to require any meaningful mitigation or remediation measures.

Neither Section 15301 nor Section 15302 of the CEQA Guidelines, on which the County purports to rely, is applicable to the current situation. Even if Sections 15301 or 15302 were applicable, which they are not, in this case both special circumstances and significant cumulative impacts prevent the reliance on categorical exemptions. 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 Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1992) 52 Cal. App. 4<sup>th</sup> 1165, 1200 (internal citation omitted).

### **C. The Most Lethal 1% Of Existing Turbines Should Not Have Their Permits Renewed But Should Be Shut Down**

It has long been known that a handful of wind turbines at the APWRA kill raptors out of all proportion to their numbers. It is believed that this is an effect of where those hyperlethal turbines are sited in the landscape.

Six years ago, in 1998, two scientists who have done extensive consulting work in the employ of the wind power industry, Curry and Kerlinger, called on the industry to “take immediate action to reduce the number of avian fatalities” at Altamont. Curry & Kerlinger, *Avian Mitigation Plan: Kenetech Model Wind Turbines* (1998) at p. 18, available at [http://www.nationalwind.org/pubs/avian98/04-Curry\\_Kerlinger-Altamont.pdf](http://www.nationalwind.org/pubs/avian98/04-Curry_Kerlinger-Altamont.pdf). They identified “16 turbines . . . [that] account for 19.2% of all known eagle fatalities” and “27 turbines [that] have killed . . . one sixth (16.6%) of all Red-tailed Hawks.” Shutting down the 43 killer turbines in 1998 identified by Curry and Kerlinger could have had a dramatic impact on subsequent mortality over the past six years. A copy of the Curry and Kerlinger study is attached to this appeal.

The recent Thelander study sponsored by the National Renewable Energy Laboratory and the California Energy Commission has confirmed that a small number of turbines are hyperlethal to birds and kill a hugely disproportionate number of raptors.

Despite this long-standing knowledge that a handful of hyperlethal turbines are responsible for a significant proportion of all bird deaths, no action has ever been taken to eliminate the hazard posed by those hyperlethal turbines. Instead, the Board has approved new permits for these hyperlethal turbines to continue operating.

By refusing to renew the permits of the hyperlethal 1% of turbines, Alameda County could at minimal cost achieve an immediate and dramatic reduction in raptor mortality at Altamont Pass. There is no excuse for not doing so, and the Board’s action in issuing new permits to these hyperlethal turbines is defective for this reason as well.

#### **D. There Is No Excuse For Not Requiring Implementation Of Accepted Technologies For Preventing Bird Deaths By Electrocutation**

A significant number of bird deaths at Altamont continue to be caused not by turbine blades striking birds but by electrocution by the electric power lines that convey power from the turbines to P. G. & E.'s electric grid. Technologies for retrofitting power poles and power lines to prevent bird deaths by electrocution are well known and well accepted within the electric power industry. Retrofitting all electrical distribution systems within the APWRA to prevent bird deaths by electrocution should be a condition of any new permits issued.

#### **E. The 20 Year Duration of The New Permits Is Indefensible**

Because the previous permits were for a fixed term of years, they created no vested rights and preserved the County's power to refuse to renew the permits at the end of their term or to require additional mitigation or other conditions as the price of renewal. In its rush to immunize the wind power industry from any meaningful mitigation and remediation requirements in the future, however, the County proposed to make the permits permanent and of unlimited duration. Following objections from the CBD, the County modified the permits at the eleventh hour to include a 20-year term, rather than unlimited duration.

It is nothing short of irrational to reward an industry with a 20-year history of wildlife law violations with such a long-term permit to continue their illegal practices. Any new permits, in addition to imposing meaningful mitigation and remediation, should be issued for a very short period of time, and certainly no more than three years, so that as the state of the art of mitigation evolves, new mitigation measures can be incorporated in those permit conditions. The proposed five-year review procedure is an inadequate mechanism that gives the County little leverage, and little motivation, to impose new mitigation and remediation conditions.

#### **F. 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 no way certain to reduce impacts. 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.

### III. CONCLUSION

The raptors and other birds that are being killed by the wind turbines that are the subject of these permit applications do not belong to Alameda County, but to the people of California as a whole (Cal. Fish & Game Code, § 1600). The evidence in the record shows that the wind turbines permitted by Alameda County are depleting raptor populations not just locally but regionally, as well as injuring other bird species. Alameda County must now assume responsibility for the unlawful bird killings and resulting environmental damage it has permitted to continue unabated for the past twenty years, and must comply with CEQA and not issue any new wind turbine permits until it has performed a comprehensive analysis of the environmental effects and alternatives, and until it has developed and imposed meaningful mitigation and remediation requirements.

Further, we request that Alameda County require that the most lethal turbines in Altamont Pass immediately cease operation, and that power pole and power line retrofiting be required to prevent bird deaths by electrocution.

Thank you for your consideration of this appeal.

Respectfully submitted,

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